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AND SOUTH CAROLINA, AND THE SUPREME
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OF GEORGIA

WITH KEY-NUMBER ANNOTATIONS

DECEMBER 10, 1921 — JANUARY 21, 1922

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1922

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THE SOUTHEASTERN REPORTER

VOLUME 109

(182 N. C. 838)

STATE v. PANNIL et al. (No. 346.)

(Supreme Court of North Carolina. Nov. 2, 1921.)

1. Larceny \S 55—Evidence sustaining verdict of guilty.

In a prosecution for the larceny of a quantity of oats, evidence held sufficient to sustain a verdict of guilty.

2. Criminal law \S 1152(1)—Severance of trials within discretion of court.

In a prosecution of three defendants for larceny, the question of separate trials is within the discretion of the court, and not subject to review except for abuse.

3. Criminal law \S 370, 371(2)—Evidence of theft of other property held admissible as to knowledge and intent.

In a prosecution for larceny of a quantity of oats, evidence of the finding in defendants' possession of sweet feed and sweet feed bags belonging to the owner of the oats held admissible to show knowledge and intent.

4. Criminal law \S 922(7)—Judge's misrecital of testimony no ground for new trial.

That the judge in summing up to the jury misrecited the testimony held no ground for a new trial, counsel failing to call the court's attention thereto, and the instructions requiring the case to be tried on the evidence.

5. Criminal law \S 1059(2)—General exception to charge will not be considered on appeal.

The Supreme Court will not consider a general or "broadside" exception to the charge given in a criminal case.

Appeal from Superior Court, Rockingham County; Webb, Judge.

William Reid Pannil, Garland Watt, and Chas. W. Currie were convicted of larceny, and they appeal. No error.

The defendants were convicted of larceny of a large quantity of oats, the property of Nello Teer, and from the judgment upon such conviction appealed to this court.

Exceptions 7 and 9 were directed to the judge's refusal to give judgment as of non-

suit at the conclusion of the state's evidence, and again at the conclusion of all the evidence.

The prosecuting witness, Nello Teer, was a contractor working upon the public roads of Rockingham county, and owning a number of mules and horses used in this work. He kept a warehouse in the town of Reidsville, in which he stored a large quantity of oats and sweet feed for his stock, and had missed oats for some time, about 300 bushels. Besides the ordinary fastenings, he nailed up the windows to the warehouse and put a bar across the door. On the night of December 11, 1920, the warehouse was broken into, and 14 5-bushel bags of oats were taken out. About 7 o'clock next morning, he discovered the loss, and secured two policemen of the town to accompany him with a search warrant in his attempt to follow the trail of the thief, or thieves. A one-horse wagon had been backed up to the platform, and though it had rained the night of the theft, they followed the track of this wagon along a devious course, and first to the barn of the defendant Currie. There they found a box of oats, and certain sweet feed bags which had Teer's name on them. The box of oats contained 10 or 15 bushels, and empty bags were hanging up on a wire across the corner of the feed room. There were a dozen or more sweet feed bags with Teer's name upon them, and 8 or more oat bags with his stock number on them. His stock number was z-72, the 72 indicating the grade of the oats and the z, it is contended, the point to which they were shipped. The wagon track was then followed from Currie's barn to the barn in which the other two defendants kept their horses. All of the defendants ran drays in the town of Reidsville. He found in Garland Watt's feed room three full bags and one half full of oats. The bags had the stock number z-72 on them. In another department in the barn, there was a box that had 10 bushels or more of oats in it. Several empty bags were found on that box, which contained also the stock number. He saw Garland Watt's horse after Garland was arrested, observed the horse's track, and

it was very much like the track made by the horse attached to the wagon, "So much like it, that I thought it was the same track made by the shoe."

The defendant Pannil occupied one of the departments of a barn, in which Garland Watt had another. There were 10 or 12 bushels of these oats in Will Pannil's department. Will's father, Tom Pannil, and another man had horses in this barn also. None of the defendants had worked for Teer, and he had sold no oats or sweet feed to any of them. When his oat bags were emptied, he bundled them up and shipped them to T. A. Jennings & Sons, Lynchburg, Va.

The defendants claimed that they had bought these oats from one Will, or Brer, Garland. The defendant Currie testified that Will Garland sold him 2 bags of sweet feed at \$2.50 a bag. He did not see Will Garland any more, but when he went in the barn the morning of the search the barn was filled with the oats, and the sacks were hanging where he had other sacks hung. He knew that the price of sweet feed on the market was from \$3.40 to \$3.60. He did not pay Will Garland for oats or sweet feed. Garland Watt claims that he bought 2 bags of sweet feed and 1 bag of oats from Will Garland on the same day that Currie claimed to have bought his. For the 3 bags he was to pay Will Garland \$7.50. The oats were put in his barn that night, without his knowledge. Will Pannil also claimed to have bought 2 bags of oats, at \$2.50 a bag, from Will Garland, and found them in the barn the next morning, the morning of the search, when he went to feed. He did not pay Will Garland for them. It seems from the testimony that Will Garland had disappeared. Defendants appealed from the judgment upon the verdict of guilty.

J. M. Sharp and J. R. Joyce, both of Reidsville, for appellants.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

WALKER, J. (after stating the facts as above). [1] If we follow the rule that only the state's testimony, with so much of the defendant's sustaining it, is to be considered, on a motion for judgment as of nonsuit, we are of the opinion that the evidence is amply sufficient to sustain the verdict, and the motion for a nonsuit was properly overruled.

[2] Exception 1 was directed to the judge's refusal to sever the trials of the three defendants. This, however, was in the sound discretion of the court. *State v. Southland*, 178 N. C. 676, 100 S. E. 187, where it was said to have been frequently held that a motion for a separate trial of defendants charged in the same bill of indictment is a matter that must necessarily be left to the sound discretion of the trial judge. To undertake to review such rulings is impractica-

ble, and would result in great delay in the disposition of criminal actions. It is only when there appears to have been an abuse of such discretion that this court will entertain such exceptions and review the rulings of the trial judge. Nothing of that nature appears in this record, citing *State v. Dixon*, 78 N. C. 558; *State v. Parish*, 104 N. C. 689, 10 S. E. 457; *State v. Hastings*, 86 N. C. 597; *State v. Haney*, 19 N. C. 390; *State v. Murphy*, 84 N. C. 742. See, also, *State v. Finley*, 118 N. C. 1161, 24 S. E. 495; *State v. Oxendine*, 107 N. C. 783, 12 S. E. 573; *State v. Gooch*, 94 N. C. 997. There was manifestly no abuse of discretion by the judge.

[3] Exceptions 2, 3, 4, 5, and 8, were directed to the testimony as to the sweet feed lost and the sweet feed bags with Teer's name or number on them in the barns of defendants. This evidence, however, tended to show knowledge and intent upon both the counts in the bill of indictment. The court has recently discussed this question very fully in *State v. Simons*, 178 N. C. 679, 100 S. E. 239, and in *State v. Stancill*, 178 N. C. 683, 100 S. E. 241, citing all the cases. It was held in *State v. Adams*, 138 N. C. 698, 50 S. E. 767:

"True it is that evidence as to one offense is not admissible against a defendant to prove that he is also guilty of another and distinct crime, the two having no relation to or connection with each other. But there are well-defined exceptions to this rule. Proof of another offense is competent to show identity, intent or scienter, and for other purposes"—citing *State v. Murphy*, 84 N. C. 742; *State v. Parish*, 104 N. C. 692, 10 S. E. 457; *State v. Weaver*, 104 N. C. 761, 10 S. E. 486; *State v. Walton*, 114 N. C. 783, 18 S. E. 945 and *State v. Graham*, 121 N. C. 623, 28 S. E. 409.

So in *State v. Stancill*, 178 N. C. 686, 100 S. E. 241, where there is a full discussion of the subject, with citation of the authorities, it is said there, at least substantially, that the testimony as to the theft of the Wilkinson tobacco, was offered merely to show the felonious intent with which the defendants stole this tobacco, and not to prove the accusation substantively. It was sufficiently connected with the main charge to render it competent for this purpose. It was all taken to Raymond Stancill's, the common storehouse for the loot of these defendants. It was but a part of a series of transactions carried out in pursuance of the original design, and it was contemplated by them in the beginning, that they should plunder the tobacco barns in the neighborhood, and this was one of them. The jury might well have inferred this common purpose from the evidence. Robbing Wilkinson was a part of the common design, and done in furtherance of it. Proof of the commission of other like offenses to show the scienter, intent, or motive is generally competent when the crimes are so connected or associated that this evidence will throw light

upon that question. So it is with the oats and sweet feed in this instance, the two cases being alike.

The one inference to be drawn from the evidence is that defendants stole the oats and sweet feed in the nighttime under the cover of darkness, as the theft was discovered early in the morning, and the warehouse was locked and bolted the night before. The jury did not believe the story about the defendants buying the goods at a greatly reduced price from Will Garland, for, if they had believed it, they would have convicted the defendants upon the second count in the indictment for receiving the goods knowing them to have been stolen, there being ample evidence to warrant it, because, the dealing with Garland being necessarily in the nighttime, and the price asked being considerably below the market quotation, cast grave suspicion on the whole transaction. It was an incredible story at the best, and the jurors were not in credulous mood. But they concluded that Garland was a mythical man, and their story about him a pure fabrication, and consequently convicted them of the principal felony, which verdict is abundantly supported by the testimony.

[4] Exceptions 10, 11, 12, 13, 14, 15, 16, and 17 were addressed to the judge's recital of the evidence. If there was any error or shortcomings in it, his attention should have been called to it at the time. A misrecital of the testimony by a judge in his summing up to the jury is no ground of new trial; such summing up being an appeal to their recollection. It is the right of counsel, in a proper manner and at a proper time, to correct such mistake by calling the attention of the judge to it, in the presence of the jury, before the cause is finally committed to them; and a failure then to make the correction is a waiver of all right to make it thereafter. *Wheeler v. Schroeder*, 4 R. I. 383.

Exception 18 relates to the following clause in the judge's charge:

"And they admit, that is Currie and Pannil, that they purchased some oats from Garland the afternoon before."

As a matter of fact, Pannil and Watt admitted that they purchased oats from Garland the afternoon before. Currie denied that he bought any oats, but claimed to have bought two bags of sweet feed from Garland. This, however, was a lapse of the tongue, and an error in the recital of the testimony which should have been brought immediately to the attention of the court. The judge told the jury expressly that, "You will try this case solely upon the evidence," and the judge himself, in the very next sentence, corrects his error in regard to Currie. After reciting the contentions of the state and of the defendants, he said to the jury:

"When you go out to consider your verdict, you will discard everything except the evidence in this case."

This exception is covered fully by what has been said above, in regard to exception 4, and including 2 to 5 and 8, and the authorities there cited are applicable here.

Exceptions 19 and 20 were directed to the recital of the state's contentions, while 21 and 22 relate to the recital of the defendants' contentions. In the state of the record these cannot be assigned as errors here, and what we have said above as to exceptions 10 to 17, and the authorities there cited, apply equally in this instance.

Exception 23 has been sufficiently considered in our discussion of exceptions 7 and 9.

Exception 24 was directed to what was a clear and accurate statement by the judge of the reasons why the evidence, in regard to sweet feed and the bags, was admissible, and at the same time a warning to the jury that defendants were not indicted for stealing bags of sweet feed but bags of oats. The evidence was admitted simply as a circumstance to be considered by the jury when weighing the evidence as to whether or not the defendants were guilty of the larceny of oats or guilty of receiving them, knowing at the time that they were stolen.

[5] Exception 25 was a general, or "broad-side," exception to the charge, and as such will not be considered by this court.

This was a bold robbery, done with deliberation, but the defendants were so hurried in its commission, or for some other reason, they failed to conceal, or remove, the marks of identification on the bags, and it makes little difference whether they were oats bags or sweet feed bags. Those that were marked were found with other bags of a kind taken from the warehouse. They were there the night of the robbery, and they were not there the next morning, when it was first discovered that the house had been entered and rifled of a part of its contents. The marked bags identified those unmarked, because (*noscitur a sociis*) they are known by their companions as a man is said to be known by the company he keeps. What difference does it make whether the mark on the bags was the prosecutor's name or his stock number, so that it identified the bags as the property which had been stolen from him. The numbers were as sufficient for the purpose as his name, but defendants, if they saw them on the bags, did not appreciate their significance and were thus entrapped by their own ignorance, which not infrequently happens in such cases.

The substantial and pivotal objection to the trial of the case below is based upon a misapprehension concerning the competency and relevancy of the testimony as to marks on the sweet feed sacks, which we have shown was clearly admissible. That is sharp-

ly made the focus of criticism, and all possible emphasis laid upon it, as not only important, but as being prejudicial to the defendants. We have met this objection sufficiently, and no more comment is required.

The other exceptions, including those to the instructions, are without any real merit. The charge was full and fair to both sides, and is not subject to the objections which are made to it. When the judge correctly ruled upon the evidence, the issue became very largely one of fact, and there was an abundance of evidence to support the verdict.

We can find no error in the case or record. No error.

(182 N. C. 319)

HUNEYCUTT v. BOARD OF ROAD COM'RS OF STANLY COUNTY. (No. 409.)

(Supreme Court of North Carolina. Nov. 2, 1921.)

1. Statutes \Rightarrow 97(2)—Act vesting in commissioners control of county's roads and bridges held not within prohibition of local or private legislation.

Since the purpose of acts 1921, § 3, vesting entire control and management of the public roads and bridges of Stanly county in the board of road commissioners created by such act, and declaring it their duty to take charge of working, repairing, maintaining, altering, and constructing roads and bridges maintained and thereafter built by such county, was not to authorize the laying out, opening, altering, or discontinuing of any road or highway but to provide means by which the general roadwork of the entire county might be carried on and maintained, such act is not within the constitutional prohibition (Const. art. 2, § 29) of local or private legislation.

2. Highways \Rightarrow 95(1) — Acts incorporating boards of road commissioners to construct and maintain, highways, held valid, though county commissioners levy and collect taxes.

Acts incorporating boards of road commissioners, distinct from the county commissioners, and giving them full control and authority over the construction, maintenance, laying out, altering, and discontinuing of public roads and highways, are valid, though the issuing of bonds and the control and ordering of road work are given to the local authorities, while the county commissioners levy and collect taxes.

3. Counties \Rightarrow 174—County road commissioners held authorized to issue county road improvement bonds.

Under Acts 1921, § 6, authorizing the road commissioners of Stanly county to borrow money to pay debt incurred by the former boards of highway commissioners for constructing roads and bridges in the county, to meet outstanding contracts for roadwork, etc., and providing that all notes or other evidences of debt given for such loan shall be executed by and in the name of "road commissioners of Stanly

county," section 2, vesting the commissioners with all other powers necessary to carry out the provisions of the act, and section 4, providing that all such moneys spent and obligations incurred shall be deemed to be for the necessary public expense and good of the county, the commissioners had power to issue road improvement bonds in their name for a period not to exceed 40 years, as provided by C. S. § 3768, the governing authorities of a county having authority, when the power to incur a debt for a necessary expense exists, to make provision for payment thereof by issuing bonds, if desirable and proper.

Appeal from Superior Court, Stanly County; Finley, Judge.

Action by E. E. Huneycutt against the Board of Road Commissioners of Stanly County. Judgment for defendant, and plaintiff appeals. Modified and affirmed.

Civil action to enjoin the defendant, board of road commissioners of Stanly county, from issuing certain bonds, to the amount of \$200,000, in order to carry out the purposes of an act of the 1921 General Assembly (not yet published in book form) entitled, "an act to provide road commissioners and for road improvement in Stanly county." From a judgment dissolving the temporary restraining order, and holding that said bonds might be sold as valid and binding obligations, the plaintiff appealed.

G. D. B. Reynolds, of Albemarle, and Stack, Parker & Craig, of Monroe, for appellant.

Cansler & Cansler, of Charlotte, and Brown, Sikes & Brown, J. R. Price, and R. L. Smith & Son, all of Albemarle, for appellee.

STACY, J. The plaintiff assails the validity of the bonds in question upon the grounds: First, that the act of 1921, creating the board of road commissioners of Stanly county, and giving to them the entire control and management of the public roads and bridges in said county, is void under article 2, § 29, of the Constitution; and, second, that, even if said act be valid, it does not authorize the defendants to issue bonds in the name of the road commissioners of Stanly county.

Considering the objections in the order named, we may observe that the section of the Constitution, against which it is contended the present enactment of the Legislature offends, in part provides:

"The General Assembly shall not pass any local, private, or special act or resolution * * * authorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets, or alleys. * * * Any local, private or special act or resolution passed in violation of the provisions of this section shall be void. The General Assembly shall have power to pass general laws regulating matters set out in this section."

The act under consideration, among other things, provides as follows:

"Sec. 3. The road commissioners herein created shall have entire control and management of the public roads and bridges of Stanly county. That it shall be the duty of said board to take charge of working, repairing, maintaining, altering, and constructing all roads and bridges of Stanly county now maintained by the county as public roads and bridges and such as may be hereafter built."

[1] Thus it will be seen that the purpose of the act in question was not to authorize the laying out, opening, altering or discontinuing of any given road or highway, but to provide ways and means by which the general road work of the entire county might be successfully carried on and maintained. The two highway commissions hitherto existing in the county were to be abolished and one new central system established. It has been held with us, in a number of cases, that acts of this character do not fall within the constitutional prohibition against local, or private legislation. *Brown v. Com'rs*, 173 N. C. 598, 92 S. E. 502, and cases there cited; *Mills v. Com'rs*, 175 N. C. 215, 95 S. E. 481; *Martin County v. Trust Co.*, 178 N. C. 27, 100 S. E. 134; *Com'rs v. Pruden*, 178 N. C. 394, 100 S. E. 695; *Com'rs v. Bank*, 181 N. C. 347, 107 S. E. 245, and cases there cited. The subject has been so thoroughly and fully discussed in these recent decisions that we deem it unnecessary to reiterate here the reasons upon which they are based.

[2] We have also repeatedly upheld acts of this character incorporating boards of road commissioners and giving them full control and authority over the construction, maintenance, laying out, altering, and discontinuing of the public roads and highways. *Com'rs v. Road Com'rs*, 185 N. C. 632, 81 S. E. 1001, and cases there cited. In *Highway Commission v. Webb*, 152 N. C. 710, 68 S. E. 211, the court decided that the Legislature, in its discretion, might create a board of road commissioners and vest them with such authority over the roads as the county commissioners had theretofore possessed.

"It is no objection to this legislation that the issuing of the bonds and the control and ordering of the roadwork are given to the local authorities, while the county commissioners are directed to levy and collect the taxes." *Trustees v. Webb*, 155 N. C. 383, 71 S. E. 520.

Again, in *Hargrave v. Com'rs*, 168 N. C. 626, 84 S. E. 1044:

"The questions presented in this case are almost identical with those considered in *Com'rs v. Com'rs*, 185 N. C. 632, in which a similar act was upheld. In that case, and also in *Trustees v. Webb*, 155 N. C. 379; *Pritchard v. Com'rs*, 159 N. C. 636, affirmed on rehearing, 160 N. C. 476; *Tate v. Com'rs*, 122 N. C. 812; *Herring v. Dixon*, Id. 420, and in

other cases, this court has held that the construction and maintenance of public roads are a necessary public expense, and that the General Assembly may provide for the construction and working the same and may create a board to do this, distinct from the county commissioners, and fix and authorize the levy of taxes for that purpose, as in this act, without a vote of the people. We know of no reason to question the correctness of those decisions."

[3] Coming then to the second objection made by the plaintiff, to wit, that the defendants are without authority to issue bonds, we find the following provision in the act now before us:

"Sec. 6. The said road commissioners of Stanly county are hereby authorized and empowered to borrow money to an amount not exceeding two hundred thousand dollars at a rate of interest not exceeding six per cent. to pay the current indebtedness now due by the two old boards of highway commissioners in Stanly county incurred for constructing roads and bridges in said county, for which the notes or bonds of the county have not been heretofore issued, and to meet the contracts now outstanding for road work and for further constructing, altering and repairing the roads and bridges of said county. All notes or other evidences of debt given for any loan under this act shall be executed by and in the name of 'road commissioners of Stanly county' by its chairman and attested by its secretary and sealed with the seal of the board."

It is also provided in section 2 that the commission shall have "such other powers as are necessary to carry out any and all the provisions of this act." And further, in section 4:

"All moneys spent and all obligations incurred by said board in constructing, altering, repairing and maintaining the roads and bridges of said county shall be deemed to be for the necessary public expense and good of said county."

In addition to the specific provisions of the present act, it is the generally accepted position that the costs incurred in building bridges and constructing public roads constitute a part of the necessary expenses of a county. *Tate v. Com'rs*, 122 N. C. 812, 30 S. E. 352; *Herring v. Dixon*, 122 N. C. 420, 29 S. E. 368; *McKethan v. Com'rs*, 92 N. C. 243; *Evans v. Com'rs*, 89 N. C. 154. And whatever difference of opinion may be found in the decisions elsewhere, it has been held with us, in a number of cases, that—

"When the power to incur a debt for a necessary expense exists, there would seem to be no good reason of law to prevent the governing authorities of a town [or county] from making provision for the present or ultimate payment of such a debt by issuing bonds for the purpose, if good business prudence and existing conditions are such as to render this course desirable and proper." *Com'rs v.*

Webb, 148 N. C. 122, 61 S. E. 671; Jones v. Com'rs, 137 N. C. 579, 50 S. E. 291.

This was approved in *Bennett v. Com'rs*, 173 N. C. 625, 92 S. E. 603, where Hoke, J., writing the opinion, took occasion to say:

"True, we have held in this jurisdiction that when county commissioners have power to contract a debt or to provide for valid debts already contracted, they may, in the exercise of good business prudence, issue county bonds in evidence of the obligation, the right of taxation therefor being restricted to the constitutional limitations as to debts incurred since the same was adopted"—citing *Com'rs v. Webb*, 148 N. C. 120, 61 S. E. 670; *McCless v. Meekins*, 117 N. C. 34, 23 S. E. 99; *French v. Com'rs*, 74 N. C. 692; *Johnston v. Com'rs*, 67 N. C. 103.

In *Johnston v. Com'rs*, 67 N. C. 103, Pearson, C. J., speaking to this question, said:

"When the defendants, 'the board of commissioners,' succeeded to the office and duties of the justices of the peace in this regard, and found a very large amount of interest in arrear, was it the duty of the board of commissioners to levy and collect a tax in one year, sufficient to pay off the accumulated interest for some fifteen years? or did they have a discretion to endeavor to break the force of this burden upon the taxpayers of the county, by issuing county bonds to raise a part of the amount called for, and levying a tax for the residue? We think the board of commissioners had this discretion, and it seems to have been exercised in a discreet manner."

Upon the foregoing authorities, we think the objections made and now insisted on by the plaintiff must be resolved in favor of the validity of the bonds. But we are of opinion that the term of said bonds should not exceed a period of 40 years, as provided by section 3768 of the Consolidated Statutes. It was stated on the argument that this limitation would be observed. As thus modified, the judgment will be affirmed.

Modified and affirmed.

(182 N. C. 298)

TRUSTEES OF ELON COLLEGE V. ELON BANKING & TRUST CO. (No. 333.)

(Supreme Court of North Carolina. Oct. 26, 1921.)

1. Banks and banking §90—Part of a bank's business is acting as agent for customers.

An important part of the business of banks consists in acting as agent or bailee for its customers.

2. Banks and banking §153—Bank, holding itself out to receive and care for articles of unusual value, is not an accommodation bailee.

Banking institutions receiving articles of unusual value, and holding themselves out as

having special facilities for their transmission and safe-keeping, are not accommodation bailees; the compensation being indirect benefits.

3. Banks and banking §153—Banks soliciting valuables for safe-keeping owe duty of care of prudent banker for his own property of like value.

Where banks have solicited and taken Liberty Bonds and other valuables for safe-keeping, they owe a duty of the care that a prudent and diligent banker would give his own property of like value and importance.

4. Bailment §33—By failure to return property prima facie case is made sufficient to go to jury.

When it is shown that the property in question has been delivered to the bailee and is not or cannot be returned, there is a prima facie case made for the bailor which is sufficient to go to the jury and authorize a verdict.

5. Negligence §136(2)—Question of fact and law.

Whether there has been negligence in the performance of any legal duty is generally a composite question of fact and law.

6. Banks and banking §154(9)—Negligence as bailee of bonds held jury question.

Negligence of a bank as bailee of bonds stolen by burglars held a question for the jury. Clark, C. J., dissenting.

Appeal from Superior Court, Alamance County; Devin, Judge.

Action by the Trustees of Elon College against the Elon Banking & Trust Company. Case heard on facts agreed. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

This action was brought to recover the value of certain bonds of the United States, known as Liberty Bonds, which were deposited with the defendant for the purpose of being exchanged for the new bonds to be issued in their stead under the act of the Congress. The exchange was effected by the defendant and the bonds received by it and deposited in its bank, which will hereinafter more fully appear. They were stolen by burglars. Hence this action for their loss. A more detailed account of the facts and incidents of the case seems to be required.

The following is a substantial statement of the facts, as they appear in the record:

Plaintiffs are the Trustees of Elon College, and the defendant is a corporation of Elon College, N. C., engaged in the business of banking and writing, as agent, contracts of insurance. On March 15, 1920, defendant received from plaintiffs \$5,850 in United States Liberty Bonds (of which only \$4,400 is here involved) belonging to plaintiffs, to be transmitted by defendant through the Federal Reserve Bank at Richmond, to the United States Treasury Department at

Washington, and converted into bonds of the permanent issue and returned to plaintiffs. Plaintiffs offered to pay any expenses incident to the service, but the bank agreed to handle the transaction, as it was its custom, as a matter of accommodation, and further agreed to notify plaintiffs' agent, T. C. Amick, treasurer of the college, upon the return of said bonds. Plaintiffs requested that the shipment be protected by insurance, and the defendant procured such insurance upon the transmission of the bonds from Elon College to Richmond. Of the bonds \$4,400 were duly returned, arriving at the post office at Elon College on March 24, 1920, and on that date were receipted for by defendant's cashier, and taken into defendant's safe, where they remained until stolen, as hereinafter set out. On the night of April 19, 1920, defendant's safe was blown open by persons unknown to the parties, and said \$4,400 in bonds as well as other property, were stolen and have not been recovered. It had been the custom of plaintiffs to keep their bonds and other valuables in a safe in the main building of the college, and not in defendant's safe. At the time of the burglary the college bonds were deposited in the defendant's safe, where the bank kept its own government bonds (which were also stolen), but not in the part thereof where the bank kept its cash and currency. That by the terms of certain insurance policies carried by the defendant, the bank could recover 100 per cent. of any loss from the money chest (or burglar-proof compartment), but could recover only 10 per cent. of any loss from other portions of the vault.

T. C. Amick, treasurer of the college, resides at Elon College, and is a teacher therein, and was at all times a director, vice president, and local auditor of defendant bank; that on April 2, 1920, he checked up the books of the bank and found \$5,800 in Liberty Bonds in there, but the books seen by him did not show that any of the bonds belonged to plaintiffs. A certificate or affidavit made by Amick, as auditor of the bank, showing that the bank had \$5,800 Liberty Bonds in the vault on April 2, 1920, was later used by the bank to induce the insurance companies to include the \$4,400 of college bonds in the total appraisal of loss sustained by the burglary, a copy of which affidavit is set out in the record. At the time of the burglary, the defendant carried two policies of burglary insurance; and in proof of the claim for loss under said policies the converted bonds belonging to plaintiffs, amounting to \$4,400, were listed by the defendant as property, or money for which the defendant was liable and defendant has received and now has 10 per cent. of the said sum, or \$440, which it thus received from the insurance companies. If said bonds had been in the burglar-proof

compartment where defendant kept its money, the bonds would not have been stolen, or, if stolen, the defendant would have received the full value of the same, or \$4,400.

The defendant has tendered the sum of \$440 to plaintiffs in full of plaintiffs' claim against it, but the offer has been declined. Defendant still tenders and offers to pay plaintiffs said sum of \$440.

The case was heard on facts agreed submitting the controversy without action to the judgment of the court.

The court gave judgment for the defendant, and plaintiff appealed.

D. R. Fonville, of Burlington, and Brooks, Hines & Smith, of Greensboro, for appellant.

E. S. W. Dameron, of Burlington, for appellee.

WALKER, J. (after stating the facts as above). The plaintiffs' counsel contended that, in the consideration of the questions presented herein, certain material facts, which they contend have been admitted, should be kept in mind and control our decision. We will state, as briefly as possible, the grounds upon which these contentions are laid, in discussing the prominent features of the case.

The bank solicited the business, and by reason of the bank's offer the plaintiffs did forego other safe and convenient methods of transmitting the bonds. The bank held itself out as having safe means of preserving the bonds, plaintiffs asked for insurance that would protect them, offered to pay any expense incident thereto, and defendant is an insurance agent. The bank, being in the insurance business, was in a position to know just how fully it was protected, and but for its negligence in acquainting itself with the terms of its own insurance policies might have been, and doubtless would have been, fully protected, instead of being protected only to the extent of 10 per cent. The bank agreed to notify plaintiffs upon return of the bonds. It negligently failed for 26 days to do so. If it had done so, the plaintiffs would have taken them from the bank and placed them in the safe of the college, "where it was the custom for the college to keep its bonds." The college safe was not robbed. The bank did not keep these bonds where it kept its money, and if it had, they would not have been stolen, or, if they had been stolen the bank would have recovered from the insurance company 100 per cent. of such loss. The bank at the time of the loss, acknowledged its liability, and recovered \$440 insurance money by solemnly declaring its liability. It still has this money. It has never offered to return the money to the insurance company, but instead offers it to plaintiffs, and avers that it is liable only to this extent. These are some of plaintiffs' contentions:

[1] It is thus well said, in an interesting note by the late Judge Freeman, to be found in 38 Am. St. Rep. 773:

"A very important part of the business of every bank, whether private or incorporated, consists of acting as an agent or bailee for its customers."

It was at one time held by some courts that such services were outside the scope of authority of banking institutions, but all doubt about their propriety has been removed by such well-considered opinions as *First National Bank of Carlisle v. Graham*, 100 U. S. 699, 25 L. Ed. 750, and *Third National Bank v. Boyd*, 44 Md. 47, 22 Am. Rep. 35.

[2] While it is a general rule that an accommodation bailee is liable only for gross negligence, the courts in nearly all recent cases have held that a stricter degree of care is required of banking institutions receiving articles of more than usual value, and holding themselves out as having special facilities for their transmission and safe-keeping. In fact, they are not accommodation bailees, for while a bank "may not receive any direct compensation for its service, it obtains advantages therefrom in attracting and retaining clients." Note, *Isham v. Post*, 38 Am. St. Rep. 781. In the case of *Levy v. Pike*, 25 La. Ann. 630, the court, discussing a case somewhat similar to this, substantially said:

"Their object was doubtless to increase their deposits, and, of course, enhance their profits; and to accomplish it they held themselves out to the business community as prepared to take care of their valuable boxes. The taking care * * * of these boxes was a part of the business of the bank, by which they doubtless induced cash deposits and made considerable profits. We, therefore, do not regard the deposit in question as only a gratuitous one. Something more than no gross negligence or fraud was expected from the defendants. * * * They were bound to exercise such diligence as prudent bankers would exercise in taking care and preserving a thing of that character deposited with them."

[3] Since banks hold themselves out as having unusually safe and convenient means of transmitting and keeping Liberty Bonds and other valuable securities as well as money, and since such institutions at such small cost can obtain indemnity that will absolutely protect them, the courts have come to apply to them a measure of liability which has been invited by them, to wit, the rule of the ordinary prudent man in like circumstances; or, to be more specific, the care that a prudent and diligent banker would give his own property or securities of like value and importance. As has been said, the assertion that banks are liable for gross negligence only is well calculated, if generally accepted as such, to thwart the only purpose for which such a deposit is

ever made. Banks are instituted, and their buildings constructed, for the delivery in, and safe-keeping of, money and money securities; and these bonds were deposited in defendant's bank for greater security of the bonds, that is, for safe-keeping. *Whitney v. National Bank*, 55 Vt. 155, 45 Am. Rep. 598; *Isham v. Post*, 141 N. Y. 100, 35 N. E. 1084, 23 L. R. A. 90, 38 Am. St. Rep. 780, and note. Schouler, in his recent work on Bailments and Carriers (section 35), after stating that a gratuitous bailee is liable only for slight care and diligence, according to the circumstances, and cannot be held for loss or injury, unless grossly negligent, says:

"This statement of the rule, though strongly buttressed upon authority, fails at this day of universal approval in our jurisprudence."

The same author says that what is negligence or gross negligence depends largely upon the value of the property, and upon business usage, and the attendant facts. This court, in *Hanes v. Shapiro*, 168 N. C. 24, 84 S. E. 33, treating of this question, brings our state into line with the majority of jurisdictions, by saying:

"But, in the last analysis, the care required by law is that of the man of ordinary prudence. This is the safest and best rule, and rids us of the technical and useless distinctions in regard to the subject."

And this case is quoted with approval in *Perry v. Railroad*, 171 N. C. 158, 88 S. E. 156, L. R. A. 1916E, 478. It is evident that the so-called distinctions between slight, ordinary, and gross negligence over which courts have perhaps somewhat quibbled for a hundred years can furnish no assistance. *Mad-dock v. Riggs*, 106 Kan. 808, 190 Pac. 12, 12 A. L. R. 221. The care must be "commensurate care," having regard to the value of the property bailed and the particular circumstances of the case. *Hanes v. Shapiro*, supra.

The Supreme Court of the United States, in the case of *Preston v. Prather*, 137 U. S. 604, 11 Sup. Ct. 162, 34 L. Ed. 788, held that banks, acting as bailees, without reward, in the care of special deposits are bound to exercise such reasonable care as men of common prudence bestow upon the protection of their own property of a similar character. The theory that the bailee's care of his own property is a satisfactory test of his duty to a bailor has also been rejected. It is now the law that the bailee must take such care of his property as prudent and careful business men generally take of property of like value and importance. Any other rule would put a premium upon negligence and carelessness. The modern rule is well stated in *Mad-dock v. Riggs*, 106 Kan. 808, 190 Pac. 12, 12 A. L. R. 219, and is, in substance, this: That while many respectable authorities may be found which regard such a showing as the

(109 S.E.)

true test in determining whether there has been gross negligence, the better rule is that taking such care of the property, or thing, as of one's own, repels a presumption of gross negligence; but this may be overcome and liability fastened upon the bailee, nevertheless, by showing the failure to exercise the care that under all the circumstances was required of him, because, manifestly, one may take risks with his own property that he has no right to take with another's, and because it is not a question of the care exercised by him as an individual merely, but as one of a class. In 3 R. C. L. at page 102, it is well said that a gratuitous bailee will not be permitted to absolve himself from all responsibility for the care of an article bailed, merely by proving that he has been likewise grossly negligent with his own goods. See, also, 6 C. J. 1119, §§ 57 and 59.

In *Boyden v. Bank*, 65 N. C. at page 19, is found an expression which is relied on by defendant, that a bank "is bound only to keep a [special] deposit with the same care that it keeps its own property of a like description." Of course, the court did not mean to make the bald statement, that a bank can be negligent with its own property, and be excused from responsibility for that of another, because the latter was held by it as bailee and dealt with in the same manner as was its owner. In the old case of *Doorman v. Jenkins* (1834) 2 Ad. & El. 256, 111 Eng. Reprint, 99, 4 Nev. & M. 179, 4 L. J. K. B. N. S. 29, the plaintiff proved the delivery of the money to the defendant for the purpose of taking up a bill. The defendant was the proprietor of a coffee house, and the account he gave of the loss was that he unfortunately placed the money in a cash box which was kept in the taproom, and that the cash box with the plaintiff's money in it, and also a larger sum belonging to the defendant, was stolen from its place of deposit on a Sunday. Lord Chief Justice Denman, a very eminent and learned jurist, said in his charge it did not follow, from the defendant's having lost his own money, at the same time as the plaintiff's, that he had taken such care of the plaintiff's money as a reasonable and prudent man would ordinarily take of his own. The case is reported in 2 Ad. & El. 256 (111 Eng. Reprint, 99), where the action of the court in leaving the question, whether there had been culpable negligence, to the jury, was approved. See, also, *Coggs v. Bernard*, 2 Ld. Raym. 909 (92 Eng. Reprint, 107), 1 Smith, Lead. Cas. 199.

We dealt with this question in *Marks v. Cotton Mills*, 135 N. C. 287, 47 S. E. 432, and *Hanes v. Shapiro*, supra. In the *Marks* Case, we held that an employer in respect to machinery and appliances was not exonerated from liability for an injury received by his employee, while using a machine or appliance, simply because he exercised that degree of care which he would have used if he had

been supplying them for his own use, but that he must have been as careful of his employee as a man of ordinary prudence would have been if he was himself exposed to injury, and having regard for his own safety. The principle as to negligence is practically the same in both of the classes.

Reverting to the agreed facts in the case at bar, plaintiffs contend that the defendant has admitted five important things:

(1) It received the bonds as bailee, and is unable to return them.

(2) It was directed to insure the bonds, but carried only 10 per cent. insurance on them.

(3) It failed for a period of 26 days, contrary to express agreement, to notify plaintiffs that the bonds had been returned.

(4) It failed to keep the bonds in the burglar-proof compartment of its safe, where there was 100 per cent. safety—and 100 per cent. insurance.

(5) It virtually admitted to its insurance company that it was liable for the loss and has received as insurance money, and retains, 10 per cent. of the amount of the loss.

[4] As to the first proposition, it seems to be well-settled law in this jurisdiction, and generally, that when it is shown that the property in question has been delivered to the bailee, and is not returned, or cannot be returned, there is a prima facie case made for the bailor which is sufficient to carry the case to the jury and to authorize a verdict for him. 3 R. C. L. pp. 150, 151; *Hanes v. Shapiro*, supra; *Sprinkle v. Brimm*, 144 N. C. 401, 57 S. E. 148, 12 L. R. A. (N. S.) 679.

There is some reference in the briefs, and also in the argument before us, to the question of insurance, that is, as to the duty of the defendant to have kept the bonds insured to their full value in compliance with a request to that effect made by the plaintiffs, but we need not enter at large upon the consideration of this question, as we will briefly refer to it later in our conclusion as to the present disposition of the case; and in the same category must be placed the reference to the notice by defendant to plaintiffs of the arrival of the new bonds, it being contended as to that feature of this case that the doctrine of *Martin v. Outhbertson*, 64 N. C. 328, applies, where it is held by the court:

"Where * * * there is any material departure from the terms of the bailment, the bailee becomes a wrongdoer, and is liable for any injury which results from the departure, without regard to the question of negligence."

And, in this connection, they also rely on 6 Corpus Juris, 1110 and 1111, as stating the rule of the most recent authorities, viz.: Where there is an express and valid contract, the terms thereof control, since both bailor and the bailee are entitled to impose on each other any terms they respectively may choose, and their express agreement will prevail against general principles of law ap-

plicable in the absence of such an agreement. The bailee is liable for loss resulting from breach of his contract to keep the property in a particular manner, or to return it at a particular time, or other special stipulation in regard to the property, without regard to whether he has been otherwise negligent. They refer also to *Caril v. Goldberg*, 59 Misc. Rep. 172, 110 N. Y. Supp. 318; *Cochran v. Walker* (Tex. Civ. App.) 49 S. W. 403; *Sprinkle v. Brimm*, 144 N. C. 401, 57 S. E. 148, 12 L. R. A. (N. S.) 679.

Plaintiffs contend further that the defendant kept the bonds in the wrong place, an unsafe place, while it kept its own money in the "money chest," which proved to be a safe place for it; but this matter also may be deferred for additional treatment in our conclusion, and also the contention that defendant has virtually admitted its liability, by collecting the \$440 from the insurance company upon its representation, expressed or implied, that it was, at least to that extent, liable to the plaintiffs.

We come now to the conclusion of the law upon all these matters, and variety of contentions.

[5, 6] The concise question necessarily involved in this case is whether the defendant, as bailee of the bonds, has exercised that care which the law requires of it, in the custody and preservation of them, and whether it gave the notice of their arrival at its banking house, and in other respects complied with the contract of bailment. We find ourselves unable to determine these questions and to decide fairly and correctly as to the rights of the one party, or the liability of the other, upon the case agreed as we find it to be in the record. Whether there has been negligence in the performance of any legal duty is generally a composite question of fact and law, and is in this case, as in nearly all others, one for the jury to decide under proper instructions from the court. The admissions of the parties, as stated in this case, are not so conclusive in their character, and not so comprehensive, as to present the naked question of law whether the defendant has broken the contract of bailment and the plaintiffs have been thereby proximately injured. We can well conceive of other elements, or facts and circumstances additional to those stated in the case, which may well enter into the proper solution of this central and controlling question. The defendant does not, expressly or impliedly, admit its negligence, but denies it strenuously, and, conversely, the plaintiffs do not, expressly or impliedly, admit that there was no negligence. Neither could safely make such an admission. It would end the case against it (the bank or college) should either be so indiscreet as to make the admission. Negligence is pre-eminently a question for a jury, with proper advice from the court as to the law, to pass upon; as the existence or non-

existence of it in the particular case depends upon the special facts and circumstances—and all of them.

We do not assert that the facts and circumstances cannot be so stated as to determine the rights and liabilities of the respective parties, but they are not apt to be, as it might require too grave and serious an admission, if not a fatal one, on the part of one or the other of the litigants. Sufficient it is to state that such a case is not presented here. The parties have selected the wrong method of presenting the true question involved in the case, or, to state it another way, they have not stated exhaustively all the facts and circumstances essential to a decision of the pivotal issue, whether there has been negligence.

We hold though that there is evidence of a consideration for the bailment, and if the latter is found by the jury to exist, the measure of care, which the law requires to be exercised by the bank, would be that of an ordinarily prudent person in like circumstances, and not merely slight care, and its responsibility would consequently arise without the presence of gross negligence.

The facts recited by us in this opinion, and partially repeated elsewhere, are evidence of negligence indisputably, but only evidentiary in character, as the ultimate fact of negligence is not stated in the case, and whether the notice was given, or, if given, whether the plaintiffs would have removed the deposit before the theft are also, and at least, but matters of fact, as is the question whether the plaintiff had actual knowledge that the bonds had come (*Bank v. Burgwyn*, 110 N. C. 267, 14 S. E. 623) and were in the bank for them, or their order, thereby dispensing with notice. We do not decide such questions, but only questions of law. A case agreed must state all the facts necessary to a decision, which this case does not do. In this, if not in other respects, the agreed case lacks completeness. This must be so, unless, whether there is negligence is not a mixed one of law and fact.

For the reasons given, the case is remanded, with directions to submit it to a jury to find as to the question of negligence upon all the evidence, unless the parties agree to a reference for that purpose, or unless they can, and will, amend their case so as to present the bare question of law, which they are not likely to do.

Error, and remanded with instructions.

CLARK, C. J. (dissenting), is of the opinion that the facts are sufficiently set forth in the case agreed and that judgment should be entered thereon in favor of the plaintiff. The bank solicited the business, and by reason of its representations the plaintiff did forego other safe and convenient methods of transmitting the bonds. The bank held itself out as having safe means of preserving

the bonds. The plaintiff asked for insurance that would protect it and offered to pay any expenses incident thereto. The defendant bank was in the insurance business, and but for its negligence in acquainting itself with the terms of its own insurance policies would have been fully protected instead of being protected only to the extent of 10 per cent. The bank agreed to notify the plaintiff upon return of the bonds, but negligently failed for 26 days to do so. If it had given notice as it should have done, the plaintiff would have taken the bonds from the bank and have placed them in the safe of the college "where it was the custom for the college to keep its bonds." The college safe was not robbed. The bank did not keep these bonds where it kept its own money, and, if it had, they would not have been stolen, or, if they had been stolen the bank would have recovered from the insurance company 100 per cent. of such loss. The bank at the time of the loss, acknowledged its liability, and recovered \$440 insurance money by admitting its liability.

Upon these facts which the defendant has admitted, it would seem clear that there was no negligence on the part of the plaintiff, and that there was negligence on the part of the defendant bank against whom judgment should be rendered upon the case agreed.

(182 N. C. 234)

KIMBROUGH v. HINES, Director General of Railroads, et al. (No. 254.)

(Supreme Court of North Carolina. Oct. 26, 1921.)

1. Railroads \S 5½, New, vol. 6A Key-No. Series—Federal control prevents suit against company.

Where employee of railroad under federal control was injured through negligence of train crew, he could not proceed against the railroad, but must proceed only against the Director General of Railroads, in view of General Order No. 50.

2. Appeal and error \S 1173(1)—Joint judgment against railroad and Director General reversed as to railroad.

Where a railroad employee injured by negligence of train crew of a railroad under federal control sued both the Director General of Railroads and the railroad and obtained a joint judgment, the judgment was reversed as to the railroad and affirmed as to the Director General, where the nature of the evidence would in no respects have been changed and the verdict of the jury would have been the same if the action had proceeded against the Director General alone, in view of C. S. \S 658, 1412.

Walker, J., dissenting.

Appeal from Superior Court, Wake County; Connor, Judge.

Action by J. W. Kimbrough against Walker D. Hines, Director General of Railroads, and the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendants appeal. Affirmed as to the Director General, and reversed as to the railroad.

Murray Allen, of Raleigh, for appellants.
Douglass & Douglass, R. W. Winston, and J. M. Broughton, all of Raleigh, for appellee.

CLARK, C. J. This case was before us at fall term, 1920 (Kimbrough v. Hines, 180 N. C. 274, 104 S. E. 684), and a new trial was granted in an opinion by Walker, J. It appears from the transcript in this case that the trial judge has observed the directions in every respect laid down in that opinion, and therefore we do not deem that it is necessary to repeat the law applicable to the facts which are identical with those presented on the former appeal.

[1] This action was brought against Walker D. Hines, Director General, and the Atlantic Coast Line Railroad Company. The judgment is against each of the defendants. Since this case was tried, the United States Supreme Court, in the opinion in *R. R. v. Ault*, 256 U. S. —, 41 Sup. Ct. 593, 65 L. Ed. —, filed July 1, 1921, have held that where such actions as this have been brought against the Director General joining as a party the railroad company which was being operated under General Order No. 50, that the action cannot be sustained as against the railroad company. The plaintiff in this case now submits that a modification of the judgment should be ordered reversing the judgment, and dismissing the action, as to the Atlantic Coast Line Railroad Company.

[2] The issues in this case affecting the liability of the Director General and the railroad company were separate and distinct, and, had the trial judge stricken out all allegations in the complaint and the issues relating to the railroad company, there would have remained a perfectly alleged cause of action against the Director General. The nature of the evidence would in no respect have been changed, and the verdict of the jury would have been the same. The Director General has no ground to insist that the judgment against the railroad company should not be reversed and the action dismissed as to said company.

C. S. \S 658, reads thus:

"Upon an appeal from a judgment or order, the appellate court may reverse, affirm, or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to any or all of the parties, and may, if necessary or proper, order a new trial."

C. S. \S 1412, provides in part as follows:

"In every case the court may render such sentence, judgment and decree as, on inspection

of the whole record it shall appear to them ought in law to be rendered thereon."

Under the technical rules of the common law a different rule prevailed, but the court of equity always followed this procedure, which was adopted by this state when the distinction between law and equity was abolished. One court having taken the place of both law and equity, a joint judgment may be affirmed as to one defendant, and dismissed as to another. This has been the uniform course and practice since the blending of the two forms of procedure, and is expressly authorized by our statutes, above quoted. *Newberry v. R. R.*, 160 N. C. 156, 76 S. E. 233; *Hollingsworth v. Skelding*, 142 N. C. 242, 55 S. E. 212; *Long v. Swindell*, 77 N. C. 185. The same practice has been followed in the courts of the other states which have adopted the modern system of practice.

Every objection which could be presented by the Director General is presented before us by this record as fully as it would be if the judgment as to the Atlantic Coast Line Railroad Company were not dismissed in pursuance of the decisions of the United States Supreme Court in *R. R. v. Ault*, supra, and the appeal as to the Director General has been in no wise prejudiced by the reversal of the judgment and the dismissal of the action as against the railroad company. Indeed, in *Ault's Case* the court recognized this course, for, while reversing the judgment as to the railroad company as an unnecessary and improper party, it proceeded to review and discuss the appeal as to the Director General on the merits and reversed that appeal on an entirely different ground.

The judgment against the Atlantic Coast Line Railroad Company is reversed and set aside, and the action as regards that company is dismissed. In the appeal by the Director General we find no error.

WALKER, J. (dissenting). I concur with the other judges that the defendant railroad company is not liable under the recent decision of the United States Supreme Court in *Mo. Pac. R. R. Co. v. Ault*, appearing in 256 U. S. —, 41 Sup. Ct. 593, 65 L. Ed. —, filed July 1, 1921, and that therefore defendant has properly been dismissed from the case with its costs.

I also agree with my Brethren that judgments, under our Code of Procedure, may be joint or several, and therefore may be rendered against one or more of the defendants, and may also adjust matters in controversy as between plaintiffs and defendants, or between plaintiffs or between defendants, so elastic is our present system, be it said to its great credit. In extolling its virtues and its simple and practical methods of dealing with all matters of litigation, and its provisions should be most liberally construed in order to effectuate justice as speedily as

possible instead of delaying, or even defeating it, by dilatory pleading and practice which was the fault of the old common-law system intended to be remedied. For example, the pleadings are sufficient if they state, in a plain and concise manner without any unnecessary repetition (*Pell's Revisal*, § 467), the essential facts of the case (*Blackmore v. Winders*, 144 N. C. 215, 56 S. E. 874; *Brewer v. Wynne*, 154 N. C. 457, 70 S. E. 947; *Stokes v. Taylor*, 104 N. C. 395, 10 S. E. 566; *Warren v. Boyd*, 120 N. C. 53, 26 S. E. 700), and likewise, in the interest and furtherance of this more liberal and sensible procedure, it is provided that—

"(1) Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may determine the ultimate rights of the parties on each side, as between themselves.

"(2) It may grant to the defendant any affirmative relief to which he may be entitled.

"(3) In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment may be proper."

It was right to proceed further against the Director General. These latter exceptions of the defendant, as to the judgment, were properly denied, which brings us to the merits of the case.

Plaintiff brought this action to recover damages for personal injuries sustained at Selma, N. C., January 27, 1919, as the result of a collision at a public crossing between the automobile which he was driving and a train on the line of the Atlantic Coast Line Railroad Company, which was being operated by the United States Railway Administration. There was testimony, on behalf of plaintiff, tending to show that the train was running at a speed of 30 or 40 miles an hour; that no signal of approach to the crossing was given by whistle or bell; that the view of the track was cut off by a string of cars on a spur track; and that these cars extended two or three feet into the public road. Plaintiff testified that he looked and could not see down the track in the direction from which the train was coming, because his view was obstructed by the cars on the spur track.

There was testimony on behalf of the defendant tending to show that the cars on the spur track did not obstruct the plaintiff's view of the train, as the end of the car next to the crossing was some distance therefrom, that notice of the approach of the train had been given by blowing the whistle and ringing the bell, and that the speed of the train did not exceed 10 or 12 miles an hour. The defendants pleaded the plaintiff's contributory negligence as a defense, and contended at the trial that the failure of the plaintiff to stop before entering upon the track, when

it was his duty to do so, was, as matter of law, the proximate cause of his injury, as the facts with regard thereto were not questioned.

The case was before the court at the fall term, 1920, and a new trial was ordered. In the opinion of the court (180 N. C. 274, 104 S. E. 684), it is stated that the decision of the motion for a judgment of nonsuit would be reserved. This motion should be allowed, upon the facts as they now appear.

"The failure of a person about to cross a railway track, on a highway at grade, to look and listen for an approaching train, or stop for such purpose, where the view of the track is obstructed, or where there is noise which he may control, * * * is negligence per se, which will bar a recovery for an injury resulting from a collision with a train at such crossing." *Blackburn v. Railroad*, 34 Or. 215, citing numerous cases in support of this position at page 222, 55 Pac. 225, 226; *B. R. v. Biwer* (C. C. A.) 206 Fed. 965.

In *Chase v. Maine Central R. R. Co.*, 167 Mass. 383, 45 N. E. 911, it is said to be a general rule:

"That, if there is anything to obstruct the view of a traveler on the highway at a crossing at grade, it is his duty to stop until he can ascertain whether he can cross with safety."

See, also, *Shatto v. R. R.*, 121 Fed. 678, 59 C. C. A. 1; *R. R. v. Holden*, 93 Md. 417, 49 Atl. 625; *Ely v. R. R.*, 158 Pa. 233, 27 Atl. 970. "Contributory negligence under our statute is a matter of defense, and the burden of proof is placed upon the defendant to establish it unless it is proven by the testimony offered in behalf of the plaintiff." *Cook v. Furnace Co.*, 161 N. C. p. 41, 76 S. E. 474. Where the facts are admitted, or not disputed, contributory negligence is a question of law for the court. *Ovens v. Charlotte*, 159 N. C. 332, 74 S. E. 748; *Neal v. R. R.*, 126 N. C. 634, 36 S. E. 117, 49 L. R. A. 684. Where the facts necessary to constitute contributory negligence are established by the evidence of plaintiff, motion for judgment of nonsuit should be sustained. *Keller v. Fiber Co.*, 157 N. C. 575, 73 S. E. 115. Defendant may avail himself of the plea of contributory negligence on a motion to nonsuit upon evidence introduced by plaintiff. *Wright v. Railroad*, 155 N. C. 325, 71 S. E. 306; *Fulghum v. Railroad*, 158 N. C. 555, 74 S. E. 584, 39 L. R. A. (N. S.) 558; *Exum v. Railroad*, 154 N. C. 408, 70 S. E. 845, 33 L. R. A. (N. S.) 169; *Coleman v. Railroad*, 153 N. C. 322, 69 S. E. 251; *Mitchell v. Railroad*, 153 N. C. 116, 68 S. E. 1059; *Neal v. R. R.*, 126 N. C. 634, 36 S. E. 117, 49 L. R. A. 684.

Plaintiff was thoroughly familiar with the crossing, having passed over it on the morning of the accident on his way from Raleigh to Pine Level. He knew the lay of the ground at the crossing and that he was

approaching the crossing and says he slowed down. In describing the condition at the crossing and the circumstances of the accident, plaintiff testified that as he approached the crossing, he saw a long string of box cars on the connection track which extended 2 or 3 feet into the highway; that these cars entirely obstructed his view to the south, the direction from which the train was coming; that when he was within 20 feet of the crossing he "slowed down" his Ford automobile and brought it down practically to a stop, but did not stop. He described the situation with which he was confronted as looking like a "death trap." Plaintiff further testified:

"I said I came very near to a stop. I was practically right at the railroad track. I was 10 feet back from the railroad when I slowed up, and when I went through I put my foot on low gear. That Ford car would run under low gear not over 4 or 5 miles with all the gas I could give it. As well as I remember, I gave it all the gas I could."

On cross-examination plaintiff testified that he did not stop before going on the track; that if he had stopped behind the box cars the train would have passed on by, and he would not have been injured. He says:

"When I slowed down, I put my hands on the emergency brake. I was practically at a stop when I reached the edge of those box cars; I was in low gear and speeded up to go on through. I said in my direct examination that I gave all the gas I could when I started to go through there, and that I was 10 feet from the crossing when I slowed down and put my hands on the emergency. That nearly stopped my car; by pulling a little harder, I could have stopped it. If I had heard the train I could have stopped almost immediately. I did not have a starter on the Ford. If I had stopped there behind that car, I could also have stopped my engine—yes, stopped any noise the engine was making. I did not stop. When a Ford is in low gear, it makes more noise than at any other time. Yes, I started off from a point 10 feet. I started in low gear, and I went nearly to the crossing with the engine making more noise than when I came nearly to a stop. They make more noise when you put them in low gear. Of course, when I went in low, I speeded up my engine; the more you speed the engine the more noise you make."

On redirect examination plaintiff testified that he thought there might be a shifting engine there, and that is why he slowed down.

Richard Britt, witness for plaintiff, testified that just before plaintiff reached the crossing he put his automobile in low gear and speeded it up.

The motions of defendants for a nonsuit, on the ground that plaintiff was guilty of contributory negligence, should have been allowed.

Defendants excepted to the following instructions:

"It was the duty of the defendants to keep their premises at and near crossings free from obstructions which would prevent the plaintiff from seeing a train on the railroad approaching the crossing from a point on the highway at which he could stop his car in time to avoid a collision."

The court later instructed the jury that a failure to perform this duty would be negligence on the part of the defendants. It is not the unqualified duty of defendants to keep the premises free from obstructions. The duty could not be greater than to exercise the care of a prudent person in this respect.

The jury were also instructed as follows:

"It being admitted that Selma is a thickly settled town, that near the public crossing there is an intersection of the Atlantic Coast Line Railroad with the Southern Railroad tracks passing over the crossing and that the public highway is much frequented by travelers, it was the duty of the defendants not to run its train in approaching the crossing at a rapid and reckless speed without giving reasonable and timely notice of its approach. A failure on the part of the defendant to perform these duties or any one of them would be negligence on their part. * * * Now, gentlemen, there is no evidence here that there is any ordinance in the town of Selma prescribing the rate of speed at which they should pass, but I instruct you inasmuch as Selma is an important town and thickly settled, and that there are many tracks there, and there was an intersection of the Southern and Atlantic Coast Line, I instruct you that the defendant owed a duty to the public not to cause its locomotive to go through that town at a rapid and excessive rate of speed, and if under all the facts and circumstances you find that the speed was dangerous and reckless and not safe, then there would be negligence in that regard."

This instruction entirely disregards the fact that the burden of proof was on plaintiff to satisfy the jury by a preponderance of evidence that the train was being operated at a reckless speed. A finding "under all the facts and circumstances" is clearly insufficient.

The jury were further instructed:

"If, however, you find from this evidence that there has been negligence on the part of the defendant, then it would become your duty to further consider the evidence and ascertain whether or not such negligence as you may find was the direct and proximate cause of the injury which you may find that the plaintiff sustained, because, notwithstanding the fact that the defendant may have been negligent, unless that negligence caused the injury to the plaintiff, the defendant would not, in law, be liable to the plaintiff. For instance, suppose the railroad company had been negligent in obstructing his view of a train approaching from the south, but that he had been injured by a train coming from the north, as to which there

was no negligence, then, of course, his injury not having been caused by the negligence of the railroad, the railroad company would not be liable to him."

This instruction must have been exceedingly confusing to the jury in considering the relation of cause to negligence on the part of defendant, and the causal connection between the two.

The court then instructed the jury as follows:

"It was the duty of the defendants operating the locomotive and cars on the railroad to give reasonable and timely notice of the approach of the trains to the public crossing by ringing the bell, or blowing the whistle, or by doing both, if under the circumstances and conditions existing at the time such was reasonably necessary to give such notice."

This instruction was not supported by the evidence. There is nothing in the record to show the existence of circumstances requiring both the ringing of the bell and blowing of the whistle.

The court later instructed the jury that failure in performance of this duty would be negligence on the part of defendants. Considered together, these instructions are erroneous. An instruction not warranted by the evidence is erroneous, although correct as an abstract proposition of law. *King v. Wells*, 94 N. C. 344.

The following instruction was then given:

"I instruct you, gentlemen of the jury, that if you find from the evidence that the signals were not given, that is, the bell not rung and the whistle not blown, then there was negligence on the part of the defendant in that respect, and if you so find it would then be necessary for you to further consider this issue."

It has been thoroughly settled by us that it is not the absolute duty of a railroad engineer to blow the whistle and ring the bell, as that depends upon the exigencies of the occasion. Sometimes it will be sufficient to blow the whistle "or" ring the bell—and again, it may be the part of prudence, at times, to do both. *Edwards v. R. R.*, 132 N. C. 99, 43 S. E. 585. The particular charge here was that if they found that the signals (in the plural) were not given, that is, that the bell was not rung and the whistle not blown, which clearly implied, as the duty was expressed conjunctively, that both such signals must be given, and the jury must have so understood it.

The jury were further instructed:

"It becomes necessary for you to further consider the evidence and determine whether any such negligence as you find the defendant to be guilty of was the proximate cause of the injury."

It seemingly was error for the court to say to the jury that the facts recited in these instructions constituted negligence on

the part of the defendants. The issue reads "was plaintiff injured by the negligence of defendant," etc., and it would naturally impress the jury that they were being instructed by the court to answer the issue "Yes" if they found the facts as recited in the instructions.

The court instructed the jury as follows:

"Our Supreme Court has held that there is no absolute duty upon the driver of an automobile on approaching a railroad crossing to stop his car before going upon the crossing, but they have said that the rule being that a traveler must conform his conduct to that of a prudent man situated as the jury may find the plaintiff to have been immediately as he approached the crossing, that it is for the jury to say whether under all the facts and circumstances as they then appeared to him as a prudent man, that he should not only have looked and listened, but he also should have stopped his car. So it is necessary for you to consider and determine whether or not, in view of all the facts and circumstances as you find them to have been at the time that Mr. Kimbrough approached that crossing, whether as a prudent man he should have stopped that car. Unless you find, gentlemen of the jury, that the plaintiff was negligent, as I have instructed you, without further consideration, you will answer the fifth issue, 'No.'"

This instruction restricted the jury's consideration of this question to the elements of contributory negligence recited by the court. It prohibited consideration of other elements of negligence on the part of plaintiff, especially speeding up to go past the cars, permitting his engine to run with such noise as to interfere with his hearing, and others, and it excluded consideration of the combination of circumstances relied upon by defendant as contributory negligence; and there is this other defect, that his honor failed to give the converse of this proposition, and nowhere in his charge does he instruct the jury that upon finding certain facts they will answer the issue of contributory negligence, "Yes," as he then said:

"If, however, you find that he was negligent, you must proceed to the further consideration of the evidence and determine whether or not the negligence which you may find that the plaintiff was guilty of contributed to his injury." *Jarrett v. Trunk Co.*, 142 N. C. 466, 55 S. E. 338.

Proximate cause upon facts admitted or found by the jury is a question of law. If plaintiff failed to stop when it was his duty to stop, it is clear that such neglect of duty contributed to his injury, and it was error to leave this question to the jury. *Kimbrough v. Hines*, 180 N. C. 274, 104 S. E. 684.

The court had previously instructed the jury that if plaintiff "failed to exercise proper care within the rule stated, it is such negligence as will bar recovery, provided always it is the proximate cause of his in-

jury." This instruction is also subject to the objection that conduct of plaintiff which of itself would bar his right to recover was submitted to the jury on the question of proximate cause.

The court also instructed the jury as follows:

"The defendant says that if you find that notwithstanding the fact that they failed to give any signal, that notwithstanding that there was an obstruction that interfered with his view, and notwithstanding the fact that it was running the train too fast, still there would have been no injury, if Mr. Kimbrough had looked and listened and stopped his car, and that therefore you should find that his negligence in so doing was a contributing cause of his injury."

The defendants' contention was that, if the matters recited in this instruction were found to be true and plaintiff failed to look and listen and failed to stop, his conduct was contributory negligence as matter of law, and that the jury should have been so instructed.

Defendants noted an exception to the following instruction:

"If his view is obstructed or his hearing an approaching train is prevented, and especially if this is done by the fault of the defendant and the company's servants fail to warn him of its approach, and induced by this failure of duty, which has lulled him into security, he attempts to cross the track and is injured, having used his faculties as best he could, under the circumstances, to ascertain if there is any danger ahead, negligence will not be imputed to him, but to the company; its failure to warn him being regarded as the proximate cause of any injury he received."

It is patent that this instruction falls with the decision of this case on the former appeal (180 N. C. 274, 104 S. E. 684), in that it totally ignores plaintiff's duty to stop, if prudence on his part required it. If proximate cause is a question for the jury, the court erred in this instance in taking it from them.

It would not do to confine plaintiff's duty in the premises merely to two, or even three, recited facts, because the jury must be allowed to consider the situation in its entirety, and all the facts and circumstances connected with it, and then to say whether an ordinarily prudent man would have acted as plaintiff did on this occasion, or pursued a safer course, one which he himself says was open to him and which, if he had adopted it, would have prevented the injury to him. Nor is it true that the failure, on the part of the defendant, to warn of the train's approach, was, as matter of law, conclusively negligent, for whether so or not may depend very much upon all the facts and circumstances of the situation at the time, and the jury may well have found upon

the evidence that the plaintiff was grossly imprudent in taking so great a risk, but should have waited for only a few moments and until he was better informed as to the safety or danger of crossing before "leaping in the dark" and taking his life into his own hands.

Even if this instruction may have been correct in the abstract, it was error to give it in this cause, under the facts and circumstances as now presented.

Defendants assign as error the following instruction to the jury:

"I instruct you that the defendant had the right to put cars on that connection track, but that they had no right to leave the cars on the track extending up to the main line so as to obstruct the view of the traveler upon the highway approaching the crossing, as I have instructed you. If, however, you find that there was a breach of duty, in that regard, this establishes negligence on the part of the defendant in respect to that matter."

The record is entirely lacking in evidence that the defendants, or either of them, left these cars on the track extending up to the main line so as to obstruct the view of the traveler on the highway. The record is silent as to when and by whom the cars were put in such position, if it is granted that they were at any time so close to the crossing, which defendants denied, and it is error to give an instruction which is not supported by the evidence. *Griffin v. R. R.*, 137 N. C. 247, 49 S. E. 212; *King v. Wells*, 94 N. C. 344. It was also error to instruct the jury that the facts recited, taken by themselves, constituted negligence on the part of defendants. Besides, the recited facts did not constitute negligence, as matter of law, but whether so or not was for the jury to decide.

The defendants contended that it was the duty of the plaintiff to stop his automobile and to stop the noise of his engine before attempting to drive across the track, and that this duty was imperative, if his view of the track was totally obstructed, and whether this, or the obstruction of the string of cars, was the proximate cause of the injury, the jury should have been left perfectly free to determine.

The declarations of the plaintiff made after the accident, were incompetent, not being *pars rei gestae*. Evidence substantially the same was held to be incompetent in *Bumgardner v. R. R.*, 132 N. C. 438, 43 S. E. 948. See, also, *Smith v. R. R.*, 68 N. C. 107; *Williams v. Telephone Co.*, 116 N. C. 558, 21 S. E. 298; *Rumbough v. Improvement Co.*, 112 N. C. 751, 17 S. E. 536, 34 Am. St. Rep. 528; *Egerton v. R. R.*, 115 N. C. 645, 20 S. E. 184.

The evidence admitted, after objection by defendant, as to the shifting engine's not ringing their bells while running at Selma, was clearly incompetent and irrelevant and

prejudicial. That did not even tend to prove that the engineer on the train in question did not ring his bell or blow the whistle. Similar evidence was held to be incompetent in *Ice Co. v. R. R.*, 126 N. C. 797, 36 S. E. 279. This was manifest error. The court in that case (*Ice Co. v. R. R.*, supra), as appears from the headnote, said:

The evidence did not "throw any light on the question directly before the jury, and was calculated to divert and mislead the minds of the jury to an unsafe verdict," citing *Grant v. R. R.*, 108 N. C. 462, at 470, 18 S. E. 200; *Henderson v. R. R.*, 144 Pa. 461, 22 Atl. 851, 16 L. R. A. 299, 27 Am. St. Rep. 652.

There are other assignments of error which need not now be noticed.

The dominant and overshadowing error in the case is the refusal of the learned judge to nonsuit the plaintiff upon the evidence and at its close. The train was late, and naturally running at a high speed to make up for lost time. Plaintiff was injured about 11 o'clock, on January 27, 1919, while he was returning from Pine Level. He knew that a train was "due to pass there not until 11 o'clock," so that he should have known, according to his own testimony, that he was crossing the track at a dangerous time. He testified: "As I came up on the track the engine was there." And again:

"As I came up, it looked like a death trap, and the engine was right over me. When I got upon the track they hit me."

These excerpts are sufficient to show that he drove into the train and that he knew how dangerous his act was, as he called it a "death trap." There could not have been a more threatening situation and one that should have warned a man with the least sense of prudence to desist, rather than risk his life by his daring act. A few moments loss of time was nothing as compared with the chances he was taking. It was nothing short of recklessness upon his own version of the facts. The more careless the plaintiff proves the engineer to have been, the more and more reckless was he. There was evidence that the bell was rung, for the witness R. P. Oliver testified that he could hear it distinctly, and that he could see the train, and he was in no way connected with the plaintiff or the railroad company, but was an indifferent and impartial witness. There was other evidence of the fact. The witness L. M. Batton testified that he was at Selma that morning and heard the train coming and heard it blow, the crossing or the station blow, but thought it was the crossing blow, being unusually loud, which attracted his attention. J. T. Adams heard the train and also heard the whistle blow, and saw Kimbrough pass at the rate of 15 or 20 miles an hour. I. B. Early testified that he saw the train and Kimbrough could have seen it if

he had looked. The conductor stated that the train consisted of 12 cars, and it was running 15 miles an hour, and that it made a good stop. There was much other testimony to the same general effect. The fireman testified that he rang the bell for the road crossing where plaintiff was hit by the train, and had rung the bell from the railroad crossing to the road crossing. The conductor on this train stated that he blew the station and crossing signals, and that plaintiff's car just darted out. He described minutely the different blasts of the whistle for station and crossings. He and the automobile were running at the same speed and came together on the crossing. He took every precaution at those places to prevent any accident, and that he did everything in this instance that could be done to avoid an accident. He used the distress signal and applied the emergency brakes, which were the Westinghouse, usual and approved type, and in good order. So that there was strong evidence for the defense that no precaution against accident was omitted by the engineer and fireman. The evidence was not all one way.

But omitting the defendant's testimony, if the plaintiff had used the care not only of an ordinarily prudent man, but of a man of the slightest prudence, the accident could not, and would not, have occurred.

In *Railroad Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542, the court held that negligence of the railroad company was no excuse for negligence on the part of a traveler crossing its track, and that he must take the consequences when he carelessly walks or drives into a place of "possible" danger. He must use his sense of hearing and sight, and all other available precautions. If he goes upon the track, instead of waiting for an expected train to pass, he is guilty of culpable negligence and so far contributes to his injury as to deprive him of the right to complain of others, and the consequences of his reckless mistake and temerity cannot be cast upon the company. "No railroad company can be held for a failure of experiments of that kind. If one chooses, in such a position, to take risks, he must bear the possible consequences of failure. Upon the facts disclosed by the undisputed evidence in the case we cannot see any ground for a recovery by the plaintiff. Not even a plausible pretext for the verdict can be suggested, unless we wander from the evidence into the region of conjecture and speculation. Under these circumstances, the court would not have erred had it instructed the jury, as requested, to render a verdict for the defendant." It has been well and truly said that a traveler about to use the tracks of a railroad must take no chances. "Which of the tracks would or should be used for its various trains was, of course, a matter for the

exclusive determination of the railroad company." It was held in *Rich v. R. R.*, 31 Ind. App. 10, 86 N. E. 1028, that a traveler using a railroad track has no right to confine his precautions to his knowledge of the schedule and customs of the company, but must take due care against the approach of "extra trains" and even "wild trains," those which are expected as well as those not expected to use the track. He must look out for all trains, and any other rule, it was said, would measure his conduct by the altogether too liberal rule of chances and risks, and would impose upon the railroad company too rigorous and burdensome responsibilities, regardless of the inconvenience to the public arising from operating its trains under any such handicap. *Abernathy v. R. R.*, 164 N. C. 91-95, 80 S. E. 421, and cases; *Ward v. R. R.*, 167 N. C. 148, 83 S. E. 326, L. R. A. 1918F, 451; *Treadwell v. R. R.*, 169 N. C. 694, 86 S. E. 617.

No one can predict when a train will pass any given point. The tracks are in constant use and must needs be, not merely for any private use of the railroad but to serve the public, who have the right to prompt service. The railroad company cannot itself know at what times it may have to use its tracks, and therefore must be free to use them at all times. If they are tardy in the performance of their public duties, or delay performance, their patrons are swift to demand compensation if loss ensues. They are hedged in on all sides by these conflicting interests, and must serve as best they may an exacting public. They should be held to the strict discharge of these duties, it is very true, but to enable them to comply with the public demands, they must, and should, have the free and unrestricted use of their tracks, so far as is consistent with a proper regard for the rights of others, when carefully exercised, but not when done so carelessly and even recklessly as here in this case. One train was due at 11 o'clock a. m.; the accident occurred at 11:05 or 11:10, as testified. Another train, the one into which the plaintiff actually ran his car, was overdue several hours, and perhaps unavoidably so. The plaintiff knew these facts, for he stated that one of these trains was not due until 11 o'clock. There was no urgency which required him to cross at the very time that he did. If he had waited but two or three minutes, he would have crossed in safety and unscathed, but instead he risked his life to save a little time, which, so far as appears at least, was comparatively valueless. He did not leave his car and look toward Selma for the train. He could have seen far enough in that direction to have done so and returned to his car and driven across the track, out of any danger, before any train could possibly have reached him, and if he had done so, he would have seen the train

coming and averted the disaster. But he was lacking in every essential of care and precaution, and suffered the terrible consequences of his gross negligence. Any man of the least degree of prudence would have taken better care of himself.

I do not agree that the case, as now presented, is the same as the one on the first appeal, but "materially" different. I had grave doubt when I wrote the opinion in the first appeal as to whether the plaintiff should not have been nonsuited at that time, but preferred to give him the benefit of the doubt and allow the facts to be more fully developed at the new trial. Instead of improving his case, I think the plaintiff has made it worse for himself by the added facts and the new version of those in the record before.

My conclusion is that he should fail in his suit, because of his plain and palpable negligence, which, as matter of law, proximately caused the injury. It may be said that, at the least, the negligence of both the railroad company and himself were concurrent, which also would bar his recovery.

"Where * * * the negligence of both [plaintiff and defendant] concur and continue to the time of the injury, the negligence of the defendant is not in the legal sense the proximate cause of plaintiff's injury." *Hamilton v. Lumber Co.*, 160 N. C. 47, 75 S. E. 1087.

It was held in *Neal, Adm'r. v. Railroad*, 126 N. C. marg. p. 634 (Anno. Ed.); 36 S. E. 117, 49 L. R. A. 684:

"Where the evidence on the part of the plaintiff (the defendant having introduced none) is demurred to, and, if true, establishes negligence on the part of the plaintiff, and of the defendant, concurrent to the last moment, a judgment as of nonsuit, sustaining the demurrer, is proper."

I dissented in *Perry v. Railroad*, 180 N. C. 290, 104 S. E. 673, which had several features in common with this case, and they are so much alike that what I said in my dissenting opinion there (concurring in by Justice Brown) is applicable here, though this is a much stronger case against this plaintiff than were the facts there against Perry and his companions. I now strongly affirm what I then said, and also adopt what was written by Justice Brown in the first appeal of this case as my own view, though I think the case, as now presented, much stronger than it was when he so ably discussed the questions which were then involved. I refer to both opinions for further argument, without repeating what is there said. I also refer to *Coleman v. R. R.*, 153 N. C. 322, 69 S. E. 251, where Justice Brown gave the opinion of

this court, which was unanimous and which so clearly states the principle governing here as to the duty of the plaintiff under the menacing circumstances.

If the plaintiff had acted as any prudent man would have done, and not have rushed, or rather jumped with his car, under a quick driving low pressure upon the crossing, he would have passed over it without the least difficulty and in perfect safety, and, as I have said, he would have reached the other side unscathed. It was his rashness that brought the trouble upon him, which naturally followed his act. The fault was all his own, and he should bear the loss of which he was the guilty author, and proximately so.

This opinion, it will be observed, is mostly predicated on the assumption of defendant's negligence primarily, this concession being made for the sake of argument, and the negligence which bars plaintiff's recovery is held to be his own, first, as contributing proximately to his injury, and, second, if not, then as so concurring with that of defendant as to operate as a bar to his alleged right. The care of plaintiff must have been exercised, according to our authorities, before he had taken a position exposing him to peril or before he has entered into the zone of danger. *Coleman v. R. R.*, 153 N. C. 322, 69 S. E. 251. A traveler is not permitted to drive blindly upon a railroad track and impute any resultant injury he receives to the railroad company, when he is the principal cause of his own misfortune. It was held in *Coleman v. R. R.*, supra:

"A railroad crossing is itself a notice of danger, and all persons approaching it are bound to exercise care and prudence; and when the conditions are such that a diligent use of the senses would have avoided the injury, a failure to use them constitutes contributory negligence. * * * By stopping, looking, and listening before reaching a railroad right of way at a public crossing, and at a place where the view is obstructed by houses, the plaintiff has not performed his duty, or exercised the care required before crossing the track; and it appearing that the right of way extended some 65 feet from the track, with an unobstructed view, and that by stopping thereon before reaching the track the plaintiff could have seen, or have become aware of, the approaching train in time to have avoided the injury complained of, in failing to do so he is guilty of contributory negligence, the proximate cause of the injury, and his action is barred thereby."

If the plaintiff had stopped and gone near to the track, he would have had an unobstructed view of the approaching train, and would have avoided the injury.

My conclusion is that the action should have been dismissed.

(182 N. C. 253)

(109 S.E.)

**WYNE v. ATLANTIC COAST LINE R. CO.
et al. (No. 285.)**(Supreme Court of North Carolina. Oct. 26,
1921.)**1. Master and servant \S 137(4)—Negligence
to run train without signals and contrary to
rules.**

It was negligence, as to a railroad employee engaged on track, for train crew without warning to run in on a main line of the company's track where persons were likely to be at the time, and in violation of a rule that no train should run into a station yard between the station and a train engaged at the time in taking on and discharging passengers.

**2. Master and servant \S 289(26) — Brake-
man's contributory negligence in crossing
track held for jury.**

In an action by a brakeman on a freight train for injuries received while crossing main track from warehouse in the line of his duty and under the immediate orders of the conductor, whether plaintiff whose view was obstructed was guilty of contributory negligence in failing to observe train coming into yard without warning held for the jury.

**3. Railroads \S 5½, New, vol. 6A Key-No. Se-
ries—Federal control prevents suit against
company.**

Employee of a railroad injured by negligence of a train crew while the road was under federal control cannot proceed and obtain a judgment against the railroad, but must proceed against the Director General of Railroads, particularly in view of General Order No. 50.

**4. Appeal and error \S 1173(1).—Joint judg-
ment against railroad and Director General
reversed as to railroad.**

Where employee of railroad under federal control injured through negligence of train crew sued both the railroad and the Director General of Railroads and obtained a joint judgment against both of them, the judgment could be reversed as to the railroad and affirmed as to the Director General without nullifying the whole judgment, in view of C. S. § 602, subsecs. 1 and 3, and section 1412.

**5. Judgment \S 237(1)—When several judg-
ment may be rendered against one of several
defendants.**

Under C. S. § 602, subsecs. 1 and 3, and section 1412, a several judgment may be entered against one of several defendants, while the other has been relieved, unless it appears that the liability of the codefendants are mutually dependent one upon the other, or that the rights of the defendant who is held are in some way prejudiced by the presence of the other in the trial of the cause.

**6. Appeal and error \S 900 — Presumption
against error.**

On appeal there is a presumption against error.

Appeal from Superior Court, Cumberland County; Daniels, Judge.

Action by Gaston Wyne against the Atlantic Coast Line Railroad Company and W. D. Hines, Director General of Railroads. Judgment for plaintiff, and defendants appeal. Reversed as to the railroad, and affirmed as to the Director General.

The action is to recover damages for personal injuries, caused by alleged negligence of defendants, while plaintiff was engaged at his work as brakeman on a freight train on road of defendant company and while same was being operated by the government of United States under the supervision and control of W. D. Hines, Director General. A motion to dismiss the action as to the railroad corporation was overruled, and defendant company excepted. There was denial of liability and plea of contributory negligence by defendant, and on evidence offered the jury rendered the following verdict:

(1) At the time the cause of action alleged in the complaint arose, was the possession, operation, and control of the Atlantic Coast Line Railroad Company exercised by the Director General of Railroads under the proclamation of the President of the United States? Answer: Yes.

(2) Was plaintiff injured by the negligence of the agents, servants, or employees of federal administration, acting through the Director General of Railroads? Answer: Yes.

(3) Was plaintiff injured by the negligence of the defendant Atlantic Coast Line Railroad Company? Answer: Yes.

(4) Did the plaintiff by his own negligence contribute to his injury? Answer: No.

(5) What damage, if any, is plaintiff entitled to recover? Answer: \$8,000.

Judgment on verdict for plaintiff, and defendants appealed, assigning error.

Rose & Rose, of Fayetteville, for appellants.

Sinclair & Dye, of Fayetteville, for appellees.

HOKE, J. The facts in evidence tended to show that on June 15, 1918, plaintiff was employed and working as a brakeman on a freight train on defendant road, and while engaged in carrying freight from his train, then on the ground at Kenley, N. C., to the station warehouse of the defendant road, was run over by a passenger train on the road going south and received painful and protracted physical injuries "to his great damage," etc. That at the time and place of his injury the freight train on which plaintiff was working was on a pass track of defendant company. Lying to the east and between that and the company station and freight depot on the west there were two main line tracks, and a station or warehouse track lying next to the buildings. That the passenger train going north was at the time on the yard on the main line

track lying next to the freight train, and there was evidence permitting the inference that the train was then engaged in receiving and discharging passengers, that on the warehouse track and to the north there were freight cars standing and which to a great extent obstructed the view in that direction. That when plaintiff had placed a load of freight on the platform of the warehouse and under the direction of his conductor was going back across the track to couple up his train, the passenger train of defendant going south came on the yard and struck plaintiff, knocking him down and dragging him some distance, causing the injuries complained of. That the train came without signal or warning of any kind and was in violation of a special rule of the defendant put in evidence, to the effect:

"That trains must use caution in passing a train receiving or discharging passengers at a station and must not pass between it and the platform at which passengers are being received or discharged."

It was further shown that in crossing the track plaintiff passed just in front of No. 80, the passenger train going north, and that the noise of the train was such as to prevent or very much interfere with hearing the approach of the incoming train. It is stated also as an admission of record that the Atlantic Coast Line Railroad at the time was being operated by the federal administration.

[1, 2] On this a sufficient statement to a proper apprehension of the question presented, the motion of nonsuit, in our opinion, was properly overruled; it appearing that a south-bound train without any warning ran in on a main line of the company's track where divers persons were not unlikely to be at the time, and this, too, in violation of a rule of the company:

"That no train should run into a station yard between the station and a train engaged at the time in receiving or discharging passengers."

Both were breaches of a duty very likely to result in harm and leading directly to the plaintiff's injury. And as to the conduct of the plaintiff usually considered on the issues as to contributory negligence in *Sherill v. Railroad*, 140 N. C. 252, 52 S. E. 940, it was held that while one who enters on a railroad track is required to look and listen for trains that may be approaching when negligence of the defendant has been established the facts and attendant circumstances may so qualify the obligation as to require that the question of contributory negligence should be left to the jury, a position that is particularly insistent when one is upon the railroad track in the line of his duty and in this instance acting under the immediate direction of his conductor. The position so stated has been again and again approved in our decisions. *Lutterloh v. Railroad*, 172 N.

C. 118, 90 S. E. 8; *Penninger v. Railroad*, 170 N. C. 475, 87 S. E. 249; *Johnson v. Railroad*, 163 N. C. 431, 79 S. E. 690, Ann. Cas. 1915B, 598; *Fann v. Railroad*, 155 N. C. 136, 71 S. E. 81; *Inman v. Railroad*, 149 N. C. 126, 62 S. E. 878; *Wolfe v. Railroad*, 154 N. C. 569, 70 S. E. 993. Under these authorities and the principle they uphold and illustrate, it is clear, we think, that the question of contributory negligence should be referred to the jury; it appearing that plaintiff in the line of his duty and acting at this time under the immediate orders of the conductor was endeavoring to cross the track, that his view as he approached was shut off to a great extent by box cars standing on the warehouse track, that the incoming train ran into the yard without signal or warning of any kind, and the noise of the passenger train on the other track was such as to prevent taking note of the incoming train. A full discussion of the question citing most of the authorities on the subject in our own court to the time were approved in *Fann's Case*, supra, and the decisions in *Wolfe v. Railroad*, and *Inman v. Railroad*, are especially pertinent to the facts appearing in the present record. Even if contributory negligence should have been made to appear both under federal and state law, it would not avail defendant on motion for nonsuit—the only exception urged before us on the general question of liability.

[3-5] It has been held, in several of our cases construing the federal statutes under which the government had taken over this and other roads, that both the Director General and the railroad corporation are liable for an injury under the circumstances presented in the record, and his honor below, in accord with these cases, very properly entered judgment against both defendants. Since this case was tried, the Supreme Court of the United States, the final authority on the interpretation of federal law, has held that under the federal statutes applicable and the various orders of those in control of the roads thereunder, particularly General Order No. 50, judgment could not be properly had against the corporation. *Missouri Pacific Railroad Company v. Ault*, 256 U. S. —, 41 Sup. Ct. 593, 65 L. Ed. —. In deference to this authoritative ruling, we must direct that the judgment against the Atlantic Coast Line be set aside; but we do not approve the position further insisted on that, for this reason, the entire judgment must be nullified. We were referred to several of the older decisions of our court to the effect that—

"A judgment is to be regarded as an entirety and that it cannot be affirmed as to one or more defendants and reversed as to the others," citing *Davis v. Campbell*, 23 N. C. 482.

But if that and other like decisions could be considered as applicable to the facts of

the record under the former law, they do not prevail under our present system of procedure, wherein the same court administers principles of both law and equity, and further there is express statutory provision that—

A "judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may determine the ultimate rights of the parties on each side, as between themselves," and "in an action against several defendants, the court may, in its discretion, enter judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper." C. S. § 602, subsecs. 1 and 3.

And further see section 1412:

"In every case the court may render such sentence, judgment and decree as on inspection of the whole record it shall appear to them ought in law to be rendered thereon."

There is therefore no objection as a conclusion of law to the entry of a several judgment against one of the defendants while the other has been relieved, unless it appears that the liability of the codefendants are mutually dependent the one upon the other or that the rights of the defendant who is held has been in some way prejudiced by the presence of the other in the trial of the cause. There is, however, a presumption against error, and not only does it not appear that the rights of the Director General have been prejudiced by the presence of the corporation, but a perusal of the record will disclose that on the facts in evidence the question of liability was determined by the jury on a separate issue and entirely as between plaintiff and the Director General in the present control and management of the road, and the liability of the corporation also on a separate issue was ruled by the court as a conclusion of law from the verdict against the Director General. The trial as to him, therefore, could in no way have been prejudiced by the presence of the corporation; nor is there any reason in law or fact why, under our present system, a several judgment may not be upheld. The admission of the rule as to the approaching of an incoming train alleged to have been violated was not objected to, nor does it appear as an assignment of error, and is evidently a rule under which the road is being presently operated. In this aspect of the matter the request of the plaintiff to a several judgment is fully upheld in *Kimbrough v. Hines Director General*, 109 S. E. 11, a case decided at the present term.

For the reasons stated, the judgment against the Atlantic Coast Line Railroad will be set aside and action dismissed, and the judgment against the Director General is affirmed.

Modified and affirmed.

(182 N. C. 251)

FRANCK v. HINES, Director General of Railroads, et al. (No. 284.)

(Supreme Court of North Carolina. Oct. 26, 1921.)

1. Negligence §136(10)—Conflicting evidence for jury.

In a negligence case, court is not warranted in granting a motion for nonsuit simply because plaintiff's witnesses apparently contradict each other in their testimony; such conflict being a matter for the jury.

2. Railroads §5½, New, vol. 6A Key-No. Series—Federal control prevents suit against company.

Where a servant of a railroad under federal control is injured through negligence, he may not maintain an action against the railroad company, but must proceed against the Director General of Railroads.

3. Appeal and error §1173(1)—Joint judgment against railroad and Director General reversed as to railroad and affirmed as to Director General.

Where injured railroad servant obtained joint judgment against railroad and Director General of Railroads, when under the federal law he could not maintain an action against the railroad for his injuries, on appeal a judgment against the railroad will be reversed and action dismissed as to it, but, with the consent of the plaintiff, the judgment will be affirmed as against the Director General.

Appeal from Superior Court, Cumberland County; Daniels, Judge.

Action by W. H. Franck against Walker D. Hines, Director General of Railroads, and the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendants appeal. Reversed as to the railroad, and affirmed as to the Director General.

Civil action to recover damages for an alleged negligent injury to plaintiff while a passenger on defendants' "shuttle train," which was a mixed train composed of an engine and several cars and used in carrying workmen from the city of Fayetteville, N. C., to Camp Bragg and back, a distance of several miles.

There was evidence tending to show that on May 9, 1919, the plaintiff boarded the train in the city of Fayetteville while it was down near the water tank, some distance from the Norfolk-Southern station; that the coaches and platforms were at that time crowded with passengers; and that the plaintiff was standing on the step of the car, holding to the grabirons, when he was struck by a switch target as the train started with a sudden jerk. It was permissible for passengers to get on the train at the coal chute, the ice plant, the water tank, and they

"would stop first at one place and then another," and, wherever they stopped, "people would crowd on the cars." There was also evidence tending to show that the switch target was only 6½ feet from the center of the track.

On the other hand, there was evidence, elicited on cross-examination, tending to show that plaintiff undertook to get on the train while it was in motion and was struck by the switch stand in his effort to board the moving cars.

Upon the issues of negligence, contributory negligence, and damages being answered in favor of the plaintiff, and from a judgment rendered thereon, the defendants appealed.

Rose & Rose, of Fayetteville, for appellants.

Averitt & Blackwell and Bullard & Stringfield, all of Fayetteville, for appellee.

STACY, J. [1] Defendants rely chiefly upon their motion for judgment as of nonsuit, and they contend that the case at bar falls squarely under the decision of this court in *Gilliam v. R. R.*, 179 N. C. 508, 103 S. E. 10, where we had occasion to consider another accident which occurred on this same "shuttle train." But we think the present facts are somewhat different and sufficient to sustain the verdict of the jury. It is true the plaintiff's own witnesses apparently contradicted each other in their testimony, but this would not warrant the court in granting the defendants' motion for nonsuit. Where the evidence is conflicting, with respect to a material matter, it must be submitted to the jury. *Shell v. Roseman*, 155 N. C. 90, 71 S. E. 86; *Ward v. Mfg. Co.*, 123 N. C. 252, 31 S. E. 495.

[2, 3] This action was instituted against Walker D. Hines, Director General, and the Atlantic Coast Line Railroad Company. The judgment is against both of the defendants. Since this case was tried, the United States Supreme Court, in *R. R. v. Ault*, 256 U. S. —, 41 Sup. Ct. 593, 65 L. Ed. — (opinion filed July 1, 1921), has held that in such actions arising under federal control, the same may not be maintained against the railroad company. Hence the judgment against the Atlantic Coast Line Railroad Company will be reversed and the action dismissed as to said company. The plaintiff consenting to this modification, the judgment against the Director General will be upheld under authority of *Kimbrough v. Hines*, 109 S. E. 11, at the present term, where the reasons for this position are fully stated in an opinion by Clark, C. J., and therefore we will not repeat them here. See, also, *Wyne v. Director General*, 109 S. E. 19, at this term.

In the trial and judgment on the verdict against the Director General, we find:

Modified and affirmed.

(182 N. C. 290)

SMITH v. SEABOARD AIR LINE RY. CO.
(No. 253.)

(Supreme Court of North Carolina. Oct. 26, 1921.)

1. Master and servant ⇨264(4) — Proof restricted to negligence alleged.

In an action by a railroad employee under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) to recover for personal injuries, where he alleged several acts of negligence in respect to condition of water tank exploding, he was restricted to those specified.

2. Trial ⇨253(1) — Court instructing on branch of case must not omit matter.

Where judge is attempting to state the law on a particular branch of a case, he must state it correctly, and must not omit part of it, for any material omission is an affirmative error.

3. Master and servant ⇨125(2)—Knowledge of defect essential to liability under federal act.

A defect in a water tank was not sufficient of itself to charge a railroad with liability for negligence under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), unless the defect was either known to it or had existed so long that the law will impute such knowledge when the defect could have been discovered by a reasonable inspection which should be made by the master at proper intervals to secure safety in its use by the servants.

4. Master and servant ⇨101, 102(2)—Not absolute duty under federal act to furnish safe place.

It is not the absolute duty of a master under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) to furnish even a reasonably safe place for the servant to do his work, but only to use ordinary care to provide for him such place.

5. Railroads ⇨5½, New, vol. 6A Key-No. Series—Federal control prevents suit against company.

An employee of a railroad under federal control injured through negligence cannot maintain an action against the railroad, but must proceed against the Director General of Railroads; and where he has started an action against both jointly and has obtained a joint judgment against them, which is reversed for error, and dismissed as to the railroad, he may continue to prosecute the action as to the Director General, in view of C. S. § 602.

Appeal from Superior Court, Wake County; Connor, Judge.

Action by Oscar Y. Smith against the Seaboard Air Line Railway Company. Judgment for plaintiff, and defendant appeals. New trial.

Plaintiff brought this action to recover damages for personal injuries alleged to have been sustained at Sanford, N. C., July 18, 1919, by being thrown from a standpipe while putting water in the tank of an engine.

(109 S.E.)

Plaintiff testified that he was fireman on one of the engines being operated on the Seaboard Air Line Railway while under federal control, and that it became necessary for the engine to take water at Sanford; that the engine was properly placed, and he pulled the standpipe to the tender and around to the manhole and leaned against the standpipe to hold it down, and, as he pulled the lever to release the water, the standpipe exploded and threw him backwards. In explaining his position when leaning against the standpipe, plaintiff testified that he assumed a sitting posture. Plaintiff also testified that he had used this standpipe before the time of his injury; that he would pull the lever about halfway over and the water would come with a rush. The lever referred to was on top of the spout of the standpipe and was used to regulate the flow of water through the pipe and into the tank of the engine.

It will perhaps be better, or at least more accurate, to state the substance of the testimony for plaintiff substantially in his own language, or rather in that of his counsel as it is set forth in their brief, which we now do:

The plaintiff testified: That, at the time of his injury, he was temporarily performing the duties of a railroad fireman; that he was a locomotive engineer by trade and was employed on the Seaboard Air Line Railway on the 18th of July, 1919.

The plaintiff testified in part as follows:

The engineer ran up to the standpipe. He told me to take water on the tender, and I went to take water. He stopped the engine right even with the standpipe. I pulled the standpipe to the tender and around to the manhole and leaned against it to hold it down, and as I pulled the lever to release the water the standpipe exploded and threw me backwards. The standpipe that I was leaning against exploded. * * * Before the 18th of July, I took water the same way I was taking it when I got hurt. There was nothing unusual before this time. * * * I had seen different firemen take water at the same pipe, all the time. * * * I was taking water on this day the same as they were. I was taking it in the same manner as I had authority to take it. I was working the lever with my left hand. The lever works the valves that let the water flow in the standpipe. * * * And I pulled it out to get water. * * * As you pull it toward you it opens the valve and the water comes in. * * * There was no place on the side of the spout that you could put your foot on and hold the spout down in the tank. I was not aware of the fact that there was more pressure there than at any other standpipe. * * * I pulled the lever up halfway, and still holding it down I took a seat on the side and pulled the lever over, and that is when it exploded. That is the position I had always assumed. I mean by the explosion that the pipe burst and there was compressed air and water and it all came out at the same time. It was not solid force of water. There was a gush of air. The air and water came out at the same time. Q. What

kind of noise was it making? A. A blow and a sudden jerk. The blow was very strong and powerful. I had never heard anything like that at a standpipe before. It all happened at the same time. I do not know how high the standpipe was thrown by the explosion. The last I remember it was going up and I was going with it. Q. You stated, Mr. Smith, on cross-examination, that some time before that in resting on it you had felt it go down and come up; explain to the jury what it was doing? A. There was no force as there was that day. I don't suppose it ever raised four or five inches. I was leaning there on it and pushed it down. I could not have done it on the day of the explosion.

The defendant's witness J. L. Kelly testified, in part:

Something broke loose. I don't know what it was. It pitched him 15 feet high. * * * A whole lot of stuff went up there with him. It exploded and he went up in the air. I did not see anything but a little water come out of that explosion. No, that little water would not have exploded with the tank that way. No, I did not hear the water running in the tank before that. I saw the piece break just as it was pulled down. I don't know whether he had hold of the lever at that time or not.

The defendant's witness Yow testified, in part:

I guess this standpipe exploded as soon as he pulled the lever. Yes, it suddenly exploded. * * * It was about as quick as lighting. He had not more than got it down when he reached up and got the lever. Just as he pulled it, it exploded. I was struck with the water. This whole arm was up straight. The explosion took place as soon as this man pulled the lever down. From where they picked him up I should say he went 20 feet into the air. * * * I think he was thrown 50 feet.

The defendant's witness Gold testified, in part: That the column was 12 inches thick; that the ball was made of brass and was an inch thick. The ball was crushed and drawn in. * * * Mr. Owens, the pump repairer, was working on the same main that supplied this standpipe the day of Mr. Smith's injury. * * * Mr. Owens had the immediate supervision and upkeep of this standpipe.

Defendants offered the testimony of two eyewitnesses of the accident, neither of whom was connected in any way with the defendants, and they both testified that plaintiff straddled the spout of the standpipe and attempted to operate the lever while in that position. M. H. Gold, witness for defendants, testified that at the time of this accident he was division engineer in charge of the standpipe; that he went to Sanford on the day this accident occurred and after the accident; that he had been there two days before and the standpipe was in very good condition; that there were two grabirons on the spout by which you could pull it around, and there was sufficient room on the grab-

iron for a fireman to place his foot and hold the spout in position; that a fireman could stand on the tender and place his foot on the grabiron and hold the pipe in place; that by pulling the lever on top of the spout you could control the opening of the valve in the pipe so as to control the flow of water; that by pulling it gradually the water would flow gradually; that if the lever was pulled up suddenly that would throw the entire pressure on the standpipe and that would have a tendency to straighten the pipe out at the end. This witness also testified that he examined the standpipe after the accident and that there were no weak places in it.

D. T. Owens, witness for plaintiff, testified that he was pump repairer and on the North Carolina division of the railroad; that he remembers this identical standpipe; that he gave Mr. Gold notice of the condition of the standpipe before the accident; that every time he talked to Mr. Gold he spoke to him about the standpipe; that he told him he did not like it because it would give him trouble; that they were too weak for the pressure. The witness further testified that the trouble with the standpipe was that it was leaking. He said that he worked the lever on this standpipe and that by working it slowly it would let the water in gradually, and if you pulled the lever suddenly that would cause the water to rush up suddenly. This witness further testified that the standpipe was all right before plaintiff was injured; that it was in good working order and there was nothing about it that was broken; that he inspected it on the fourth of the month before the accident and put it in good condition; that after the accident he could find no defect except such as was caused by the spout flying up; that the tank is 70 feet high at Sanford.

At the conclusion of the evidence plaintiff admitted that he was employed in interstate commerce at the time of his injury, and, over defendants' objection, was permitted to amend his complaint so as to allege that defendants were engaged in interstate commerce, and that he was employed in such commerce.

The judge charged the jury, among other things, as follows:

"I instruct you that if you find by the greater weight of the evidence in this case that this plaintiff in the performance of his duty, after the engine had been placed opposite the water tank, took down the spout and placed the mouth of it in the tender in order that the water might flow, and further find that the usual and customary way was to pull the lever, and then find, gentlemen of the jury, that the plaintiff leaned his weight upon the spout in order to hold it in position, and you further find that when the water did come that it came in such a rush and force as to throw the young man in the air, and further find that the violence with which the water came was due to some defect in the apparatus, or was due to careless-

ness on the part of the defendant, and if you find that such negligence was the direct and proximate cause of the injury, you will answer both of the two issues, 'Yes.'"

The jury returned a verdict in favor of plaintiff on all the issues and fixed the damages at \$40,000.

Judgment thereon, and defendant appealed, assigning errors.

Murray Allen, of Raleigh, for appellant.
Armistead Jones & Son and Douglass & Douglass, all of Raleigh, for appellee.

WALKER, J. (after stating the facts as above). [1] The plaintiff alleged several acts of negligence in respect to the condition of the water tank at the time of the accident, and, of course, he is restricted to those specified. If he desired to show others, the proper way was to ask the court for an amendment, giving the defendants reasonable opportunity to amend their answer and prepare to meet the new phase of the case. Being thus confined to his own statement of the particular acts of negligence, it was error for the court to instruct the jury as appears in the above excerpt from the charge.

[2, 3] But there is a still more fatal defect in this instruction. The judge was attempting to state the law on this branch of the case, and there is nothing better settled than the rule that he must state it correctly, for any material omission is an affirmative error. A defect in apparatus is not sufficient, of itself, to charge the defendant with liability for negligence, unless the defect was either known to it or had existed so long that the law will impute such knowledge, when the defect could have been discovered by a reasonable inspection of the machinery and implements, which should be made by the master at proper intervals to secure safety in their use by his servants. This element of liability was entirely omitted from this instruction and not even a reference made to it. The cases have thoroughly established this principle in the law of negligence. The following cases will show that this is so: *Hudson v. R. R.*, 104 N. C. 491, 10 S. E. 669; *Railway v. Barrett*, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136; *Patton v. Railway*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; *Railroad v. McDade*, 135 U. S. 554, 10 Sup. Ct. 1044, 34 L. Ed. 235; *Blevins v. Cotton Mills*, 150 N. C. 493, 64 S. E. 428; *Labatt on Master and Servant*, § 119 et seq. And to these cases we add a recent one (which was carried from this court by writ of error to the Supreme Court of the United States) in which this same doctrine is discussed, and formulated according to the view of it as above stated. *S. A. L. Rwy. Co. v. Horton*, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. p. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475, and especially the same case on second appeal, 239 U. S. 595, 36 Sup. Ct. 180, 60 L. Ed.

p. 458, where a water gauge was alleged to be defective and exploded. In the Hudson Case, 104 N. C. 491, 10 S. E. 669, we held that—

"The burden is upon the servant who sues his master for damages, resulting from the use of defective machinery furnished by the latter, to establish prima facie (1) that the machinery was defective; (2) that the defects were the proximate cause of the injuries; and (3) that the master had knowledge of them, or might, by the proper exercise of care and diligence, have acquired such knowledge."

Now, in this case, when the testimony is closely and carefully examined, it will be found that it is both ways as to this point. There is perhaps some evidence from which the jury might fairly and reasonably infer that, if the tank or the pipe leading to it was defective, or that there was air in the latter which should have been expelled before using it, the defendant either knew it or should have known it by the exercise of ordinary care, and there also is testimony to the contrary, and some tending to show that the tank was put in good condition by repairs to it, before the accident and was in such condition just before the explosion took place. In view of this conflict of testimony, the case should have been submitted to the jury with proper instructions as to the law. A carrier is not liable for every accident that may occur and injure one of its employees, but, by the very terms of the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) only for those "due to its negligence." Federal Employers' Liability Act by Richie (2d Ed.) p. 122, § 53, and cases in notes. Extended comment is not required to further demonstrate the correctness of this rule as to the duties of the master to his servant, with respect to machinery and implements furnished to him by the latter, nor the citation of other authorities, though there are very many decisions of this and other state courts, and of the highest federal courts, that might be added to those we have cited above. We will, though, refer especially to Texas & Pac. R. R. Co. v. Barrett, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136, in this connection.

[4] There is also another exception to which we should advert, as it may be repeated unless attention is directed to it. The court instructed the jury:

"That, under the law, it was the duty of the defendant to furnish to the plaintiff, while in its employment, a safe place to do his work and reasonably safe implements with which to do the work required of him."

His honor corrected this charge afterwards by instructing the jury that he should have told them that the defendant was required to furnish only "a reasonably safe place for the servant to do his work," but left it otherwise intact. It is not the absolute duty of the master to furnish even a reasonably

safe place for the servant to do his work, but the true and correct rule is that he must use ordinary care to provide for him such a place. Choctaw, O. & G. R. Co. v. McDade, 191 U. S. at page 64, 24 Sup. Ct. 24, 48 L. Ed. 96; Garner v. R. R., 150 U. S. at page 359, 14 Sup. Ct. 140, 37 L. Ed. 1107; Washington & G. R. Co. v. McDade, 135 U. S. at page 570, 10 Sup. Ct. 1044, 34 L. Ed. 235; B. & O. Railroad v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772. See, also, Powell v. Anderson S. & T. P. Co., 216 Pa. 618, 65 Atl. 1113, and Kyner v. Gold Mining Co., 184 Fed. 43, 106 C. C. A. 245. Justice Brewer said in Patton v. Texas & Pac. R. Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361:

"It is also true that there is no guaranty by the employer that place and machinery shall be absolutely safe. Hough v. Texas & P. R. Co., 100 U. S. 213, 218, 25 L. Ed. 612, 615; Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 386, 37 L. Ed. 772, 780, 13 Sup. Ct. Rep. 914; Baltimore & P. R. Co. v. Mackey, 137 U. S. 72, 87, 39 L. Ed. 624, 630, 15 Sup. Ct. Rep. 491; Texas & P. R. Co. v. Archibald, 170 U. S. 665, 669, 42 L. Ed. 1188, 1190, 18 Sup. Ct. Rep. 777. He is bound to take reasonable care and make reasonable effort; and the greater the risk which attends the work to be done and the machinery to be used, the more imperative is the obligation resting upon him. Reasonable care becomes, then, a demand of higher supremacy; and yet, in all cases it is a question of the reasonableness of the care; reasonableness depending upon the danger attending the place or the machinery."

"The rule in respect to machinery, which is the same as that in respect to place, was * * * accurately stated by Mr. Justice Lamar, for this court, in Washington & G. R. Co. v. McDade, 135 U. S. 554, 570, 34 L. Ed. 235, 241, 10 Sup. Ct. Rep. 1044."

Justice Lamar's statement of the law in this respect in 135 U. S. 554, 10 Sup. Ct. 1044, 34 L. Ed. 235, referred to by Justice Brewer, is a strong and very lucid exposition of the subject; but it is not necessary that we should insert it verbatim here, as it can easily be found in the volume where it is reported, and it is substantially covered by Justice Brewer's own version of the principle, as stated above. It also will be found stated by us in Marks v. Cotton Mills, 135 N. C. 287, 47 S. E. 432, and the same case, 138 N. C. 401, 50 S. E. 769, 3 Ann. Cas. 812, where it was held:

"In all cases involving the question of negligence the standard by which to measure the conduct of the employer and the employee is" that "followed by the ideal prudent man."

What was held in the first of the two cited cases (135 N. C. at page 290, 47 S. E. 432) is directly in point here, that—

"The employer does not guarantee the safety of his employees. He is not bound to furnish them an absolutely safe place to work in, but is required simply to use reasonable care and prudence in providing such a place. He is not

bound to furnish the best known machinery, implements and appliances, but only such as are reasonably fit and safe and as are in general use. He meets the requirements of the law if, in the selection of machinery and appliances, he uses that degree of care which a man of ordinary prudence would use, having regard to his own safety, if he were supplying them for his own personal use. It is culpable negligence which makes the employer liable, not a mere error of judgment. We believe this is substantially the rule which has been recognized as the correct one and recommended for our guide in all such cases. It measures accurately the duty of the employer and fixes the limit of his responsibility to his employees. *Harley v. B. C. M. Co.*, 142 N. Y. 31. This court has said that all machinery is to some extent dangerous, but the fact that it is dangerous does not of itself make the owner liable in damages. It is the negligence of the employer in not providing for his employees safe machinery and a reasonably safe place in which to work that renders him liable for any resulting injury to them."

That case was cited and the principle it states approved by the court in *Pressly v. Yarn Mills*, 138 N. C. at page 413, 51 S. E. 69, and has been cited and approved in numerous subsequent cases.

There are other exceptions worthy of consideration if the result depended, in any way, upon them; but it does not, and we will not prolong this opinion in order to foreclose them.

[5] The action should be dismissed as to the Seaboard Air Line Railway Company, as the Supreme Court of the United States has recently decided that there is no liability as to it. *Mo. Pac. R. R. Co. v. Ault* (No. 16, July 1, 1921), 256 U. S. —, 41 Sup. Ct. 593, 65 L. Ed. —. The plaintiff may continue, though, to prosecute the action against the Director General, under our present procedure, as will appear from *Consol. Statutes*, § 602, where it is provided specially that a several judgment may be entered. This is discussed fully in the dissenting opinion of the writer in *Kimbrough v. A. C. L. Ry. Co.* and Director General (at this term) 109 S. E. 11; the court being unanimous on this point. Reference is made to that opinion to avoid repetition.

There was error, in the respects indicated, because of which another jury must be called.
New trial.

(182 N. C. 366)

POINDEXTER v. CALL. (No. 356.)

(Supreme Court of North Carolina. Nov. 2, 1921.)

1. Landlord and tenant §94(3)—Verbal notice to quit sufficient.

A verbal notice by landlord to tenant to quit is sufficient, *Revisal 1908*, § 878, applying to a different class of notices.

2. Landlord and tenant §308(1)—Burden on landlord to show tenancy has come to an end.

In a summary proceeding of ejectment by landlord against tenant, the burden to prove that the tenancy has come to an end rests upon the plaintiff.

3. Evidence §91—Burden of proof upon party asserting affirmative issue.

The burden of proof is on the party who substantially asserts the affirmative of an issue, whether he be nominally plaintiff or defendant.

4. Appeal and error §1062(5)—Issue upon which court improperly placed burden of proof on defendant held immaterial and harmless.

In summary proceeding in ejectment by landlord, where court submitted the issues, "Was the tenancy existing between the plaintiff and the defendant from month to month, and if so when did such tenancy expire?" and "Was the tenancy between plaintiff and defendant from year to year; if so when did the same expire?" the second issue was immaterial, and error of the court in placing the burden of proof as to such issue upon the defendant was harmless, the jury having answered "Yes" to the first issue, upon which the court placed the burden of proof upon plaintiff.

Appeal from Superior Court, Forsyth County; Webb, Judge.

Action by H. D. Poindexter against C. R. Call. Judgment for plaintiff, and defendant appeals. No error.

Jones & Clement, of Winston-Salem, for appellant.

Holton & Holton, of Winston-Salem, for appellee.

WALKER, J. This is a summary proceeding in ejectment, brought by the plaintiff, as landlord, against the defendant, as his tenant.

There are only two questions presented for our consideration:

I. Can a tenancy be terminated by a verbal notice to quit?

II. Upon which party rests the burden to prove that the tenancy has come to an end?

[1] First. The notice in this case was oral. The defendant contends that it should have been in writing, and for this he relies on *Pell's Revisal*, § 878, but that section applies to a different class of notices. In *Vincent v. Corbin*, 85 N. C. 108-111, it was held that a verbal notice to the tenant by his landlord is sufficient. This disposes of the first exception.

[2] Second. As to this exception, it is necessary to state that the court below submitted two issues to the jury, as follows:

"(1) Was the tenancy existing between the plaintiff and the defendant from month to month, and, if so, when did such tenancy expire?" The jury answered this issue, "Yes; January 1, 1921."

"(2) Was the tenancy between the plaintiff and the defendant from year to year; if so, when did the same expire?" The jury answered this issue "No."

This action to eject the defendant was commenced in February, 1921. The court placed the burden as to the first issue upon the plaintiff, and, as to the second issue, upon the plaintiff. Submitting two issues was unnecessary. The defendant's counsel, Messrs. Jones and Clement, correctly insisted here, in their brief and in their argument, that in no event could the burden of proof be placed upon the defendant Call, for that the burden of proof was upon the plaintiff from the beginning to the end of the trial. There was but one question for the jury to pass upon, and that was, "Had the defendant's term, or lease, expired when this action was commenced?" The burden of the issue could not rest on both plaintiff and defendant. The plaintiff became the actor at the institution of the suit, which placed the burden of proof on him, citing *Garris v. Harrington*, 167 N. C. 86, 83 S. E. 253; *Tillotson v. Fulp*, 172 N. C. 499, 90 S. E. 500. This, as we have said, is very true. There was only one issue, and that was the one stated by the learned counsel for the defendant, but that one was submitted by the first of the issues, and the judge properly placed the burden as to it upon the plaintiff.

[3, 4] The contention of the defendant that the tenancy was one from year to year, and required 30 days' notice to end it, was not a separate or distinct defense, but was in the nature of a denial of plaintiff's allegation that it was one from month to month, and was involved in the general issue or traverse of plaintiff's allegation. If plaintiff failed to establish his contention that the tenancy was one from month to month, he failed to do what the law required him to do, and the verdict and judgment should have been against him. Defendant, though, should have stood his ground upon the general issue, simply denying the plaintiff's allegation. The form of the second issue may have placed the burden upon the defendant, as he was required to prove the affirmative of it. The court said in *Walker v. Carpenter*, 144 N. C. 675, 57 S. E. 461:

"However they may be arrayed on the docket, it is a fundamental rule of evidence that the burden of proof is on the party who substantially asserts the affirmative of the issue, whether he be nominally plaintiff or defendant. * * * The first rule laid down in the books on evidence is to the effect that the issue must be proved by the party who states an affirmative and not by the party who states the negative."

To the same effect is *McKeel v. Holloman*, 163 N. C. 135, 79 S. E. 445. But we regard the second issue as entirely immaterial and

without any proper significance in the case. The jury having found, under the evidence and the charge, that the tenancy was one from month to month, and that it expired on January 1, 1921, the plaintiff was entitled to recover. Having found that the tenancy was from month to month, in response to the first issue, the jury would hardly have found, in response to the second, that it was a tenancy from year to year. They evidently found, and intended to find, for the plaintiff. While there was a formal error in the respect indicated, it was harmless, as the case turned out, and was not, therefore, prejudicial.

It was held in *Cotton v. Mfg. Co.*, 142 N. C. 531, 55 S. E. 358, that instructions to the jury are to be considered with reference to the theory upon which the case is tried, and with reference to the evidence and contentions of the parties. And Chief Justice Ruffin once said that the language of the judge is to be read with reference to the evidence and the point disputed on the trial, and of course is to be construed with the context.

When thus considered, there is no room for doubt that the jury fully understood the real and only issue decided with the plaintiff, and intended their verdict to be for him.

No error.

(182 N. C. 328)

STATE v. LEMONS. (No. 349.)

(Supreme Court of North Carolina. Nov. 2, 1921.)

1. Intoxicating liquors \S 146(4)—"Sale" includes loan of liquor.

In a prosecution for the unlawful sale of spirituous liquors, it was not error to exclude evidence as to whether the liquor was paid for, since a sale on credit, or a loan of liquor, to be returned, comes within the statute.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Sale.]

2. Intoxicating liquors \S 219—Indictment need not allege sale to particular person.

That the indictment in a prosecution for unlawfully selling spirituous liquors did not allege a sale to any particular person, or to persons to the jurors unknown, was no ground for arrest of judgment, C. S. \S 3383, making it unnecessary to allege a sale to a particular person.

3. Indictment and information \S 87(9)—Indictment need not allege date of unlawful sale of liquor.

That the date of the unlawful sale of spirituous liquor was not set out in the indictment is not material, C. S. \S 4625, providing that no judgment can be stayed for failure to state the time of an offense when time not of its essence.

4. Criminal law §970(8)—Indictment for unlawful sale not insufficient for failure to state place of offense.

That an indictment for unlawfully selling spirituous liquor did not allege that the offense was committed in the county, was no ground for arrest of judgment, the objection being waived by failure to plead in abatement, and in view of the statutes of jeofails, O. S. §§ 4623, 4625.

5. Criminal law §875(1)—Duty of trial judge to see that verdict is returned in proper form.

In a prosecution for unlawfully selling spirituous liquors, it was not error for the trial judge to require the jury to return a verdict of "guilty or not guilty," it being his duty to see that the verdict was returned and recorded in proper form.

6. Criminal law §1152(1)—Permitting jury to give reasons for verdict in discretion of court.

How far the court should permit the jury to give their reasons for a verdict is within its discretion and not subject to review by the Supreme Court.

Appeal from Superior Court, Rockingham County; Long, Judge.

Tom Lemons was convicted of violating the prohibition law, and he appeals. No error.

This was an indictment for violation of the prohibition law (O. S. §§ 3367-3411), setting out 4 counts, the first of which alleged an unlawful sale of spirituous liquors and the second for having spirituous liquors in possession for the purpose of sale. The defendant introduced no evidence. Verdict of guilty. When the foreman began giving the reasons for the verdict the court told him that the jury must find for their verdict "guilty or not guilty," and thereupon the jury returned a verdict of guilty with a recommendation for mercy. Judgment and appeal by defendant.

J. R. Joyce, of Reidsville, and U. Leland Stanford, of Stoneville, for appellant.

J. S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

CLARK, C. J. The witness Price testified that the defendant let him have three half pints of whisky which was loaned to him; that he did not buy it, but that he agreed to return it, and told the defendant that he did not know when he would get the whisky to return, and afterwards offered to pay him.

[1] The defendant excepted to the refusal to let the witness Price answer the question whether he afterwards paid the defendant. The question was immaterial and irrelevant, for a sale on credit, or a loan of liquor to be returned, comes within the statute. In *State v. Mitchell*, 156 N. C. 659, 72 S. E.

632, 37 L. R. A. (N. S.) 302, Ann. Cas. 1913A, 469, the court held:

"When one lends spirituous liquor with the understanding that it shall be returned in kind, the title to the liquor passes absolutely on the consideration of its being replaced, and the transaction is a barter or exchange and comes within the meaning of the word 'sale,' and therefore is a violation of the state prohibition law."

Brown, J. (156 N. C. at page 662, 72 S. E. 634, 37 L. R. A. [N. S.] 302, Ann. Cas. 1913A, 469), very appropriately said:

"In adopting the prohibition statute enacted by the General Assembly, our voters had in view the prevention of the traffic in intoxicating liquors in the state. If it were allowable to carry on an exchange or barter in whisky, the law would be rendered practically worthless and incapable of enforcement. Whenever a person was charged with an illicit sale of liquor the defense in most cases doubtless would be that the transaction was only an exchange or barter."

The defendant introduced no evidence, but contented himself with demurring to the evidence of the state, which was properly submitted to the jury. The exceptions to the charge do not require discussion.

The defendant moved here in arrest of judgment on the grounds:

[2] (1) That the bill of indictment does not allege a sale to any particular person or to a person or persons to the jurors unknown. Laws 1913, c. 44, § 6, now O. S. § 3383, prescribes that in an indictment for this offense "it shall not be necessary to allege a sale to a particular person, and the violation of law may be proved by circumstantial evidence as well as by direct evidence." This section was sustained in *State v. Brown*, 170 N. C. 714, 86 S. E. 1042.

[3, 4] (2) That the offense is not alleged to have been committed in Rockingham county, and also argued that the date of the transaction was not set out in the indictment. O. S. § 4625, which was previously Rev. § 3255, and Code, § 1189, provides that no judgment can be stayed or reversed (among other things) for failure to state the time or stating an impossible time of the commission of the offense when time, as in this case, is not of the essence of the offense. *State v. Williams*, 117 N. C. 755, 23 S. E. 250, nor for want of a proper and perfect venue when the court shall appear to have had jurisdiction of the offense.

The heading of the indictment was probably, "North Carolina, Rockingham County," and the indictment merely recites that the offense occurred on May —, 1921, "at and in the county aforesaid." But whether there was such heading or not, the indictment was found by the grand jury of Rockingham which had jurisdiction of the offense, and if

(189 S.E.)

the offense had not been committed in that county the defendant waived the objection by not pleading in abatement. *State v. Lewis*, 142 N. C. 636, 55 S. E. 600, 7 L. R. A. (N. S.) 669, 9 Ann. Cas. 604. The authorities that a motion in arrest of judgment will not be allowed after conviction for the omission of the date or failure to state the venue of the offense are collected in *State v. Francis*, 157 N. C. 612, 72 S. E. 1041; *State v. White*, 146 N. C. 606, 60 S. E. 505, and *State v. Lancaster*, 169 N. C. 284, 84 S. E. 529.

C. S. § 4623, provides that no bill or warrant shall be quashed for informality:

"Every criminal proceeding by warrant, indictment, information, or impeachment is sufficient in form for all intents and purposes if it express the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding sufficient matter appears to enable the court to proceed to judgment."

This and C. S. § 4625, are our principal statutes of jeofails, which have been frequently cited. See citations thereto in C. S. under the above sections.

Chief Justice Ruffin, with his strong common sense in the administration of the law, quotes the above words from the Act 1811, c. 809, and says:

"This law was certainly designed to uphold the execution of public justice, by freeing the courts from those fetters of form, technicality and refinement, which do not concern the substance of the charge, and the proof to support it. Many of the sages of the law have before called nice objections of this sort a disease of the law, and a reproach to the Bench and lamented that they were bound down to strict and precise precedents, neither more brief, plain, nor perspicuous than that which they were constrained to reject. In all indictments, and especially those for felonies, exceptions extremely refined and often going to form only, have been, though reluctantly, entertained. We think the Legislature meant to disallow the whole of them and only requires the substance, that is a direct averment of those facts and circumstances which constitute the crime to be set forth. It is to be remarked that the act directs the court to proceed to judgment without regard to two things—the one, form, the other, refinement."

These clear expressions by this eminent judge have been often quoted since in the opinions of this court.

[5, 6] The requirement of the judge that the jury should find the defendant "guilty or not guilty" was eminently proper (*State v. Godwin*, 138 N. C. 586, 50 S. E. 277), and without that there would have been no sufficient verdict. It was his duty to see that the verdict was returned and recorded in proper form. *State v. Whitaker*, 89 N. C.

472; *State v. Whitson*, 111 N. C. 697, 16 S. E. 332, and cases there cited. How far the court should permit the jury to give their reasons was a matter within his discretion which is not subject to review by us, nor does it appear how far he allowed them to explain their verdict, beyond the fact that they did make a recommendation for clemency—which is mere surplusage, and does not vitiate the verdict. *State v. McKay*, 150 N. C. 816, 63 S. E. 1059.

No error.

(182 N. C. 330.)

GRAVES v. REIDSVILLE LODGE NO. 2128 et al. (No. 353.)

(Supreme Court of North Carolina. Nov. 2, 1921.)

1. Justices of the peace §119(3)—Judgment in personam without voluntary appearance or service void.

A judgment in personam without voluntary appearance or service of process within the jurisdiction is void in a justice court as well as in courts of more extended jurisdiction, and where the fact appears on inspection of the record such judgment may be treated as a nullity, or will be set aside on motion, but where lack of service does not so appear, but is established, the party affected may have judgments set aside on motion that his defense may be considered and passed upon.

2. Justices of the peace §127—Justice may set aside judgment which is irregular or void for want of service notwithstanding accusation of fraud.

The doctrine that a judgment can only be set aside for fraud by an independent action of which a justice has no jurisdiction applies only to final judgments which are otherwise in all respects regular, and does not prevail where judgments are irregular or are void for want of jurisdiction by reason of nonservice of process.

3. Justices of the peace §127—Statute as to application for rehearing inapplicable to motion to set aside judgment for want of service.

C. S. § 1500, rule 21, requiring application for rehearing before a justice when a party is absent from the trial because of sickness, excusable mistake, or neglect within 10 days, held inapplicable to motion to set aside judgment for want of service.

4. Justices of the peace §127—Statute relating to time of appeal inapplicable to motion to set aside judgment for want of service.

C. S. § 1530, providing for an appeal from a justice's judgment on notice given within 10 days, or within 15 days after personal notice of judgment if it was rendered on process not personally served, held not applicable to motion to set aside judgment for want of service.

Appeal from Superior Court, Rockingham County; Webb, Judge.

Actions by R. S. Graves against Reidsville Lodge No. 2128 and others before a justice. Judgment for plaintiff set aside by the justice, and plaintiff's motion to dismiss denied, and he appealed to Superior Court. Motion to dismiss granted, and named defendant excepts and appeals. Reversed.

Motion to set aside three several judgments on a money demand entered against defendant lodge et al., heard on appeal from a justice court before his honor J. L. Webb, judge presiding, at February term 1921, of the superior court of Rockingham county. The justice having set aside judgment for lack of service and on allegations tending to establish fraud, on appeal his honor, being of opinion that the justice was without jurisdiction to entertain the motion for the reason that an issue of fraud was involved, dismissed the proceedings. The ruling of his honor and the reason for it are more fully embodied in the judgment as follows:

"The court finds as a fact that there is an issue of fraud arising upon the motion and affidavits in the bringing of said action and obtaining said judgment before the justice of the peace, and, that fact appearing to the court, on motion of the plaintiff that the said motion of the defendant to set aside the judgment be dismissed, on the ground that the justice had no power to hear and determine the matter, and that said justice had no power to make his findings of fact and render said judgment as herein set out as to fraud, the court finding as a fact that an issue of fraud arises herein and the justice had no jurisdiction of that issue, it is further ordered and adjudged that the finding of fact and judgment of the said justice be overruled, and that the said motion be dismissed, and that the motion of the plaintiff to dismiss is hereby sustained, and that the defendant be taxed with the cost of this proceeding."

Defendant lodge excepted and appealed.

J. M. Sharp, of Reidsville, for appellant.

P. W. Glidewell and W. R. Dalton, both of Reidsville, for appellee.

HOKE, J. [1-4] It is the accepted principle here and elsewhere that a judgment in personam without voluntary appearance or service of process within the jurisdiction is void, and where the fact appears on inspection of the record, such a judgment may be treated as a nullity, or it will be set aside on motion and the party charged allowed to make his defense. And where the lack of service does not so appear but is established, the party affected may have the same set aside on motion in the cause, that his defense may be considered and passed upon. *Herdon v. Autry*, 181 N. C. 271, 107 S. E. 3; *Stocks v. Stocks*, 179 N. C. 285-288, 102 S. E. 306; *Johnson, Trustee, v. Whilden*, 171 N. C. 153, 88 S. E. 223, 225; *Massie v. Hainey*, 165 N. C. 174, 81 S. E. 185; *Flowers v. King*, 145 N. C. 234, 58 S. E. 1074, 122 Am. St. Rep.

444. The same principle, both as to the right and the procedure, prevails in reference to judgments in a justice court as well as in courts of more extended jurisdiction. *Herdon v. Autry*, supra; *Lowman v. Ballard*, 168 N. C. 16, 84 S. E. 21, L. R. A. 1915D, 427, Ann. Cas. 1917B, 899; *Ballard v. Lowry*, 163 N. C. 488, 79 S. E. 966; *King v. Railroad*, 112 N. C. 318, 16 S. E. 929; *Whitehurst et al. v. Transportation Co.*, 109 N. C. p. 342, 18 S. E. 937. The position is not affected because there may be allegations and evidence of fraud presented. The gravamen of the application is the failure of service of process showing an entire lack of jurisdiction, and the court that has unwittingly countenanced the wrong is charged with the duty and has the power to right it. In such a case, the fraud, and the evidence of it, is only an incident. The doctrine that a judgment can only be set aside for fraud by an independent action, of which a justice has no jurisdiction, applies only to final judgments which are otherwise in all respects, regular, and does not prevail in reference to judgments that are irregular, or which are void for want of jurisdiction by reason of nonservice of process. And so in reference to other principles of law, statutory and otherwise, urged upon our attention in support of his honor's ruling. In C. S. § 1500, rule 21, which provides that a judgment of a justice may be reheard when a party is absent from the trial and such absence is caused by sickness, excusable mistake, or neglect of the party, and requiring that such an application be made in 10 days, and section 1530, which provides for an appeal from a justice's judgment on notice given within 10 days, and if on process not personally served allowing 15 days after personal notice of the judgment, they all contemplate and apply to causes of which the court has acquired jurisdiction, either by personal service or by attachment and publication, and do not affect a case like the present, which enables one to obtain relief from a judgment entered against him when the court, for lack of service, was without jurisdiction to make any orders in any way affecting his rights of person or property. In *Lowman v. Ballard*, supra, it was held, as stated, that—

"Where a judgment obtained before a justice of the peace is sought to be set aside by the defendant for lack of service of summons, the remedy is by motion in the cause made before the court which had rendered the judgment."

And speaking to the question the court, in the opinion said:

"Both in the superior and justices' courts the statutory limits as to time within which motions of this character shall be made are cases where the proceedings are in all respects regular, and do not apply in cases where there is

defective service of process or an entire absence of it" citing *Massie v. Hainey*, 165 N. C. 174, 81 S. E. 135; *McKee v. Angel*, 90 N. C. 60.

It may be well to note that if on investigation it should be made to appear that service of process had been made, giving the justice jurisdiction of the appellant, that would present the case in a different aspect, and some of the positions urged for appellee may be made available in his favor.

For the reason stated, the judgment of his honor will be reversed, and the superior court will proceed to hear the motion on the affidavits and facts as properly presented.

Reversed.

(182 N. C. 276)

WHITE v. HINES, Director General of Railroads, et al. (No. 289.)

(Supreme Court of North Carolina. Oct. 26, 1921.)

1. Evidence \S 208(1)—Admission in answer held admissible in evidence without submitting entire allegation.

Where plaintiff alleged that the train in which her ward was traveling was wrecked by derailment, the admission in defendant's answer that it was so wrecked was properly admitted without the entire allegation that it was without the negligence or fault of defendants.

2. Evidence \S 478(1)—Nonexpert may testify that a person was crazy or not normal.

Nonexpert witnesses may testify that a person whose sanity was involved was "crazy," or "not normal."

3. Release \S 56—Evidence of treatment of family and stay in hospital admissible on mental competency.

On issue of the mental competency of a person injured and executing a release, evidence as to the manner in which he treated his family before and after the injury was properly admitted, and also evidence of his stay in various hospitals after the injury.

4. Release \S 56—Declarations of alleged incompetent admissible.

Conduct and declarations of an injured person who executed a release were competent on the question of his mental condition.

5. Evidence \S 501(3)—Declarations of alleged incompetent admissible as basis for opinion.

Conduct and declarations of a person alleged incompetent were admissible as a fact in connection with other circumstances on which a witness might found her opinion of mental capacity.

6. Damages \S 168(1)—Evidence of mental condition three years before injury admissible.

Where a guardian suing a carrier for injury to the ward by derailment alleged that prior

to the injury the ward was "strong and healthy both mentally and physically," testimony as to the ward's mental condition three years before the injury was not too remote.

7. Damages \S 168(2)—Evidence of mental condition at time of trial held admissible.

Where a guardian sued a carrier for injury to the ward by derailment, alleging as one of the results of the injury the ward's permanent insanity, testimony based on observation concerning the condition of the plaintiff's ward at the trial was competent.

8. Witnesses \S 389—Evidence of contradictory statement held admissible.

Where the competency of an injured person executing a release was in question, and defendant's witness testified that he paid the injured person a sum of money, and that his mental condition at that time was good, and denied on cross-examination having told plaintiff that the injured person was in a mighty bad shape when witness gave him the check, evidence of such statement was admissible for purpose of contradiction.

9. Evidence \S 380—Photograph may be vouched for by other than photographer.

That a photograph is a true representation may be shown by witnesses other than the photographer.

10. Appeal and error \S 1052(1)—Error in preliminary evidence was harmless where the final evidence was not introduced.

Any error in preliminary evidence to the verity of a photograph was harmless where the photograph was neither introduced in evidence nor exhibited to the jury.

11. Carriers \S 321(21)—Instruction as to burden of proof as to injury of passenger held proper.

In an action for injuries to passenger from derailment, instruction that burden originally was on the plaintiff to satisfy the jury by the greater weight of the evidence that there was negligence on the part of the defendant which was the proximate cause of the injury, but if the jury should be satisfied that plaintiff's injury was the proximate result of a derailment, then "the burden shifts to defendant and defendant must go forward and produce evidence to relieve itself of the charge of negligence and show the jury it was not guilty of the negligence, or that its negligence was not the proximate cause," held not erroneous in connection with the balance of the instructions, and was not to be understood as shifting to defendant the burden of the issues or the burden of preponderating proof, but imposed on him the duty of going forward with evidence tending to relieve itself of charge of negligence.

12. Negligence \S 121(1)—Doctrine of "res ipsa loquitur" and "prima facie" evidence, stated.

The expressions "res ipsa loquitur" and "prima facie" evidence or "prima facie case" are used synonymously, and each expression signifies nothing more than evidence to be considered by the jury, and a "prima facie case" or

evidence is that which is received or continues until the contrary is shown, and if called a presumption of negligence, that presumption still is only evidence of negligence for the consideration of the jury.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, *Prima Facie*; *Res Ipsa Loquitur*.]

13. Negligence ⇨ 121(1)—Rule as to burden of proof stated.

Where plaintiff has established a *prima facie* case of negligence, as by showing the event and the injury therefrom, the jury might be warranted in answering the issue as to negligence in plaintiff's favor, but is not required to do so as a matter of law, and it is incumbent on defendant to offer proof in rebuttal, but not to the extent of preponderating evidence, though if he offer evidence plaintiff may introduce evidence in reply, and the final question for the jury is whether plaintiff is entitled by the greater weight of all the evidence to an affirmative answer; for throughout the trial the burden is on plaintiff to show by the greater weight of the evidence that he is entitled to such answer.

14. Trial ⇨ 295(1)—Instructions must be considered as a whole.

The charge must be considered as a whole in the connected way in which it was given, and on presumption that the jury did not overlook any portion of it, and if when so construed it presents the law fairly and correctly, it will afford no ground for reversal, though expressions standing alone might be regarded as erroneous.

Appeal from Superior Court, Cumberland County; Daniels, Judge.

Action by Samuel A. White, by his guardian, against Walker D. Hines, Director General of Railroads, and another. From a judgment for plaintiff, defendants appeal. No error.

This was a civil action brought by the plaintiff to recover damages for injury to Samuel A. White, the ward of the plaintiff, alleged to have been caused by the negligence of the defendants. The case was tried before his honor, Frank Daniels, Judge, and a jury at the March term, 1920, of the superior court of Cumberland county, the trial resulting in a verdict and judgment for the plaintiff, from which defendants appealed to the Supreme Court.

The plaintiff moved to substitute John Barton Payne as the successor of Walker D. Hines as Director General of Railroads.

Upon the trial, there was evidence for the plaintiff tending to show that her ward, Samuel A. White, while a passenger on a train of the defendants, was injured by the derailment of the train; that he was "thrown about within the coach," which was overturned; that he was injured on the back of the head about the base of the brain, and

that his body and limbs were bruised; that his mind was seriously affected; that he was treated, after the injury, in the Tranquil Park Sanitarium in Charlotte, at Johns Hopkins in Baltimore, and at the Highsmith Hospital in the city of Fayetteville; and that he is now confined in the State Hospital for the Insane. The plaintiff alleged that the injuries were caused by the negligence of the defendants in the operation of the train, in the negligent care of the rolling stock and roadbed, and in the negligent failure properly to inspect and to care for them. The plaintiff further alleged that her ward, by reason of said injuries, had suffered great pain, had incurred expense for medical and hospital service, had been ruined in physical health, and made permanently insane; that his earning capacity had been destroyed, and his family deprived of his support; that prior to the alleged injuries, to wit, July 20, 1917, her ward had been strong and vigorous, both mentally and physically; and that he had been industrious, skillful, and proficient in his occupation of "beamer and stationary engineer."

The defendants denied that they were negligent in any of the respects complained of, and that the plaintiff's injury, if any, was due to an accident which could not reasonably have been foreseen or prevented.

The defendants further alleged that the plaintiff's ward had executed to the Atlantic Coast Line Railroad Company, one of the defendants, a release and receipt in full for his claim for damages resulting from the alleged injuries. This alleged release was introduced in evidence.

There was evidence tending to show that the derailment had been caused by a wash-out in the roadbed; that the section master had examined the track about three hours before the derailment occurred, and had found it apparently in safe condition; that the train had been inspected before it left Rocky Mount, and was found to be in good condition in all respects; and that it was skillfully operated by a competent crew. There was evidence tending to show that there had been heavy rains for one or two days, and that a hole under the track, five or six feet deep, had been caused by water running underneath.

There was evidence for the plaintiff tending to show that her ward's mind had been seriously impaired by the injuries which he had sustained in the derailment, and that he did not have sufficient mental capacity to execute the release introduced in evidence by the defendants, and that the release had been procured by fraud and undue influence. Plaintiff contended that said release, for this reason, was voidable. There was evidence for the defendant tending to show that the plaintiff's ward had sufficient mental capacity to execute said release. Evidence was in-

troduced tending to show his mental condition prior to the alleged derailment, at that time and thereafter, and especially with reference to his mental condition at the time the release was alleged to have been signed. There was further evidence for the plaintiff tending to show that her ward had judicially been declared a lunatic in July, 1918, by a proceeding duly prosecuted before the clerk of the superior court of Cumberland county, and that the plaintiff had duly been appointed as his guardian.

At the close of the plaintiff's evidence, the defendants moved for judgment as in case of nonsuit, and at the close of all the evidence, this motion was renewed.

The defendant's motion was allowed as to the Railroad Administration and denied as to the Atlantic Coast Line Railroad Company. To the court's refusal to dismiss as to the railroad company, the company duly excepted.

The issues were answered by the jury, as follows:

(1) Was the plaintiff injured by the negligence of the defendant as alleged in the complaint? A. Yes.

(2) Did plaintiff execute the release set out in the answer? A. Yes.

(3) Was the execution of said release procured by fraud, or undue influence, as alleged in the reply? A. Yes.

(4) Was plaintiff incapable, by reason of mental affliction, to execute the said release, as alleged in the reply? A. Yes.

(5) What damages, if any, is plaintiff entitled to recover of the defendant? A. \$12,500, less \$554 paid.

Judgment was entered for \$11,946, together with the costs of this action. The defendants appealed.

Rose & Rose, of Fayetteville, for appellants.

Evans & Eason, of Raleigh, for appellee.

ADAMS, J. There are 52 exceptions in the record, several of which have been formally abandoned.

[1] The plaintiff alleged that the train in which her ward was travelling "was wrecked by derailment." In their answer the defendants admitted that the train was "wrecked by derailment without fault or negligence on the part of the defendants, or any of their agents or employees." The plaintiff offered in evidence the following portion of the answer:

"Answering the allegations contained in article 5 of the complaint, the defendants admit that on July 20, 1917, S. A. White was a passenger on train No. 89 of defendants, en route to Hope Mills, N. C., and that while said White was a passenger on said train, about 1½ miles from Hope Mills, said train was wrecked by derailment."

The defendants objected on the ground that the remainder of their allegations was

omitted, and that the court below should have excluded the evidence or required the plaintiff to offer the additional phrase denying "fault or negligence on the part of the defendants." The evidence offered by the plaintiff was admitted, and the defendants excepted. This is the first exception in the record.

Evidence of the derailment and of the ward's injury as the proximate result was sufficient on the question of negligence to carry the case to the jury. The plaintiff's allegation that the train had been wrecked by derailment was the distinct statement of a circumstance relevant to the first issue. Proof of the plaintiff's qualification as guardian, of the derailment of the train, and of the ward's personal injury as the proximate result, nothing else appearing, made a prima facie case for the plaintiff, and upon the defendants devolved the duty of explaining the alleged wreck. In a number of decisions this principle has been applied, and it has frequently been held, in accordance with his honor's ruling, that the admission of a separate fact relevant to the inquiry, though only a part of an entire paragraph, is competent without qualifying or explanatory matter inserted by way of defense. *Sawyer v. R. R.*, 145 N. C. 30, 58 S. E. 598, 22 L. R. A. (N. S.) 200; *Stewart v. R. R.*, 136 N. C. 387, 48 S. E. 793; *Wade v. Contracting Co.*, 149 N. C. 177, 62 S. E. 919. The first exception cannot be sustained.

[2, 3] Exceptions 9, 10, 11, 21, 23, 24, 29, 30, 32, 35, 36, 38, and 39 are addressed, directly or inferentially, to the mental condition of the plaintiff's ward, and may be grouped and considered together. All these exceptions are without real merit. The defendants offered in evidence a paper writing purporting to be the ward's receipt for \$554, and a release of the railroad company from all liability resulting from the derailment. The plaintiff replied that Samuel A. White was mentally incapacitated to such an extent that at the time of its execution he could not comprehend the nature and effect of the instrument to which he had affixed his signature. Evidence as to White's mental condition, then, was both material and essential. The defendants contended that testimony to the effect that he "was crazy" or "not normal" was the statement of a positive conclusion, or fact, and, for this reason incompetent. But in this jurisdiction it is established that a nonexpert witness, who has had conversations and dealings with another, and a reasonable opportunity, based thereon, of forming an opinion as to the mental condition of such person, is not disqualified on the ground that his testimony is a mere expression of opinion. *McLean v. Norment*, 84 N. C. 235; *In re Stocks*, 175 N. C. 224, 95 S. E. 360; *In re Broach*, 172 N. C. 522, 90 S. E. 681. One not an expert may give an opinion, founded upon observation, that a certain per-

son is sane or insane. *Whitaker v. Hamilton*, 126 N. C. 470, 35 S. E. 815; *Clary v. Clary*, 24 N. C. 78. Evidence as to the manner in which White treated his family before and after the injury was admitted on the issue of mental competency. His honor carefully limited this evidence to the fourth issue. Upon this issue evidence of his stay in various hospitals was likewise competent.

[4, 8] The admission of Mrs. Porter's testimony that "we all begged him (White) not to go to Hopewell, and he went anyhow, and that the doctor advised him not to go back," is not reversible error. White's conduct and declarations were competent on the question of his mental condition, and as a fact in connection with other circumstances upon which Mrs. Porter founded her opinion of his mental capacity. *McLean v. Norment*, supra; *Clary v. Clary*, supra; *State v. Cooper*, 170 N. C. 719, 87 S. E. 50, 8 A. L. R. 1214.

[6] Nor is the testimony of Deaver touching White's mental condition three years before the injury ground for reversal. The plaintiff's allegation that prior to the injury her ward was "strong and healthy both mentally and physically" was denied by the defendants, and this evidence, offered in support of the plaintiff's allegation, was not too remote to be considered by the jury.

[7] We are unable to see why the testimony of Dr. Small, based upon his observation, concerning the condition of the plaintiff's ward at the trial was not competent. The plaintiff distinctly alleged that White's insanity was permanent, and this the defendants denied. Evidence as to his mind subsequent to the injury and at the time of the trial was clearly competent in support of the plaintiff's contention. This disposes of exceptions 45, 46, and 47.

[8] E. L. McDonald, a witness for the defendants, testified that he had paid White a check for \$554, and that his mental condition at that time was good. On cross-examination he denied having told the plaintiff that White "was in mighty bad shape" when he gave White the check. The evidence of J. W. McFayden and of the plaintiff was admitted only for the purpose of contradicting McDonald. Exceptions 33 and 34 are therefore overruled.

[9, 10] Exception 22 also is untenable. A witness for the plaintiff was permitted to testify, over the objection of the defendants, that a photograph "was a correct picture of the wreck." That a photograph is a true representation may be shown by witnesses other than the photographer. *Bane v. R. R.*, 171 N. C. 332, 88 S. E. 477. But the evidence was harmless in any event, since the photograph was neither introduced in evidence nor exhibited to the jury.

Exceptions 43 and 44 relate to interrogatories propounded to Dr. Small, a medical expert. The objection is that the questions

were not sufficiently definite, and that they contained hypotheses for the support of which there was no evidence. We have bestowed upon these questions a critical examination, and have concluded that the evidence was properly admitted. *State v. Cole*, 94 N. C. 960; *State v. Keene*, 100 N. C. 509, 6 S. E. 91; *State v. Wilcox*, 132 N. C. 1120, 44 S. E. 625; *Summerlin v. R. R.*, 133 N. C. 550, 45 S. E. 898.

[11] Exceptions 49 and 50, which are directed to the charge of the court concerning the "shifting of the burden of proof," cannot be sustained.

His honor instructed the jury as follows:

"Our Supreme Court has laid down the principle that where one is a passenger on a train and the train is derailed and he is injured, and the derailment is the proximate cause of the injury then the burden shifts to the defendant. The burden originally was on the plaintiff in this case to satisfy the jury by the greater weight of the evidence that there was negligence in respect to the roadbed, on the part of the defendant, and that this negligence was the proximate cause of the injury, but where it is admitted that plaintiff was a passenger on a train of defendant, and that train was derailed, and if the jury should be satisfied by the greater weight of the evidence that the plaintiff was injured, and that his injury was the proximate result of the derailment of defendant's train, then the burden shifts to defendant, and the defendant must go forward and produce evidence to relieve itself of the charge of negligence and show to the jury that it is not guilty of the negligence, or that its negligence was not the proximate cause of the injury. * * * Now under this first issue, the burden of it being upon the plaintiff, if you are satisfied by the greater weight of the evidence that plaintiff was a passenger on the train of the defendant company, and if you are satisfied by the greater weight of evidence that he was injured, and that his said injury was proximately caused by the negligence of defendant, then you will answer the first issue 'Yes'; otherwise, you will answer it 'No.' * * * And if you should be satisfied, by the greater weight of the evidence, that there was a derailment by which the plaintiff's injury was proximately caused, nothing else appearing, you should answer the first issue 'Yes,' unless the defendant has satisfied you that there was no negligence on the defendant's part with reference to the construction of the roadbed, and with respect to the proper inspection of conditions that prevailed there.

"Then, if you are satisfied, gentlemen, by the evidence, or if you are satisfied by the testimony introduced by the defendant, the burden being on the defendant that in the construction of its roadbed the defendant exercised reasonable care, and that it was inspected and repaired in a proper manner, then you would answer the first issue 'No.' If you answer the first issue 'No,' that ends the case, and you need not consider the issues further."

To each of these instructions the defendant duly excepted, contending that they were tan-

tamount to shifting the burden of proof from the plaintiff to the defendant. In this connection the court further said:

"The defendant contends that this was an accident; that it had done all of its duty, as I have told you was required of it, but that on account of the heavy rains existing there, it could not, in the exercise of its proper care, have discovered the conditions of the roadbed; that the roadbed had been properly constructed and inspected (there is evidence that it had been inspected on that day by the roadmaster and the section master), and that the defendants did not and could not, in the exercise of such reasonable care, as I have described to you, have discovered that it was in defective condition."

The exceptions require a brief examination of former decisions of this court, which, it is admitted, unfortunately disclose expressions as to the burden of proof and the burden of the issue that are inconsistent, contradictory, and confusing. Beginning with *Ellis v. R. R.*, 24 N. C. 138, in which the plaintiff sought to recover damages for loss caused by fire escaping from the defendant's locomotives, this court, in discussing the principle to which the exceptions relate, said:

"We admit that the gravamen of the plaintiff is damage caused by the negligence of the defendants. But we hold that when he shows damage resulting from their act, which act, with the exertion of proper care, does not ordinarily produce damage, he makes out a prima facie case of negligence, which cannot be repelled but by proof of care or of some extraordinary accident which renders care useless."

Referring to *Ellis' Case*, 24 N. C. 138, Justice Reade said:

"In that case the plaintiff proved that his fence was 50 feet from the railroad and that sparks from the engine set it on fire; and that although it had been there for a long time it had never caught fire before, and that the engine usually had a spark catcher, but it did not appear whether it had one on that day. There was no other evidence by the plaintiff, and the defendant offered none. It was held to be prima facie negligence. Of course it was. There was the plain fact that the defendant had set fire to the plaintiff's fence, which the prudent use of his engine had never fired before. That made it necessary for the defendant to show that he had used the same care on that day as had been used theretofore. If he had proved that the engine was supplied with a spark catcher and that the usual care was used, the decision would have been the other way." *Bryan v. Fowler*, 70 N. C. 597.

In *Aycock v. R. R.*, 89 N. C. 321, a suit for the recovery of damages caused by fire from a passing locomotive, Chief Justice Smith in discussing *R. R. v. Schultz*, 2 A. & E. R. R. Cases, 271, used this language:

"A numerous array of cases are cited in the note in support of each side of the question as to the party upon whom rests the burden of proof of the presence or absence of negligence,

where only the injury is shown, in case of fire from emitted sparks. While the author favors the class of cases which imposes the burden upon the plaintiff, we prefer to abide by the rule so long understood and acted on in this state, not alone because of its intrinsic merit, but because it is so much easier for those who do the damage to show the exculpatory circumstances, if such exist, than it is for the plaintiff to produce proof of positive negligence. The servants of the company must know and be able to explain the transaction, while the complaining party may not; and it is but just that he should be allowed to say to the company, 'You have burned my property, and if you are not in default show it and escape responsibility.'"

The learned Chief Justice followed this decision by another in *Lawton v. Giles*, 90 N. C. 380, in which he said:

"The reason for the exception to the general rule that one required to allege must prove negligence, in the case of fire caused by steam engines, is thus stated in a late and valuable treatise: 'All information as to the construction and working of its engines is in the possession of the company, as are also the means of rebutting the charge of negligence entirely in its power. An outsider can hardly be expected to prove that in the construction of the engine, or in the use of it, at the time the injury occurred, the company was guilty of negligence. He can only prove that his property was destroyed by one of the company's locomotives; and having done this, it is but proper to call on the defendant to show that he was not negligent, that he employed careful and competent servants, and that he had used the most improved appliances to prevent the escape of fire from his engines.' 1 *Thomp. Neg.* 153, par. 8."

In *Grant v. R. R.*, 108 N. C. 467, 13 S. E. 209, there may be observed a marked departure from the principle announced in preceding decisions. There the plaintiff brought suit to recover damages for personal injury caused by derailment. The trial judge instructed the jury that after the prima facie case of negligence was shown by the derailment of the train, "the laboring oar is shifted to the defendant, and the defendant must show by a preponderance of evidence that the company has not been guilty of negligence." The judgment of the lower court was affirmed, but in *Williams v. R. R.*, 130 N. C. 128, 40 S. E. 979, and in *Shepard v. Telegraph Co.*, 143 N. C. 244, 55 S. E. 704, 118 Am. St. Rep. 796, a similar charge was expressly disapproved. The *Williams Case* was followed by another in which it was held that the trial judge was in error when he instructed the jury that if the fire originated from the defendants' engine, "this would not of itself cast the burden on the defendants to prove that the engine was properly equipped with spark arresters, and skillfully operated." *Hosiery Co. v. R. R.*, 131 N. C. 240, 42 S. E. 602. In *Manufactur-*

ing Co. v. Raleigh & G. R. Co., 122 N. C. 888, 29 S. E. 575, it is said that, when the origin of the fire is fixed upon the defendant, the presumption of negligence arises, and the burden rests upon the defendant to show that approved appliances were used; and in *Marcom v. R. R.*, 126 N. C. 204, 35 S. E. 423, it is said that the burden of proving a failure of legal duty rests upon the plaintiff, but when that fact is shown or admitted, the burden is on the defendant to excuse its failure. To the same effect is *Wilkie v. R. R.*, 127 N. C. 208, 37 S. E. 204, which was the case of a derailment. In *Overcash v. Electric Co.*, 144 N. C. 573, 57 S. E. 377, 12 Ann. Cas. 1040, the plaintiff sued to recover damages for personal injury caused by the derailment of an electric car. The plaintiff's counsel, undertaking to conform their prayer to the cases theretofore decided, requested the court to give the following instruction, which was declined:

"That if they find as a fact, from the evidence, that the plaintiff got aboard defendant's car and paid his transportation therefor, then he was a passenger on same; and if they further find as a fact, from the evidence, that the said car on which he was riding ran off the track and plaintiff was injured thereby, as alleged in the complaint, and that said derailment was the proximate cause of the injury, then the law presumes that the defendant was negligent in allowing said car to become derailed, and the burden is upon it to satisfy the jury that said derailment was not caused by its negligence; and unless it has so satisfied the jury they should answer the first issue 'Yes.'"

The defendant prayed this instruction, which also was refused:

"That while proof or admission of the derailment of the car raised what the law terms a presumption that such derailment was the result of the defendant's negligence, and casts upon it the burden of disproving negligence, yet the court charges you that, notwithstanding the fact that the car was derailed, if you shall find by the greater weight of the evidence that the track at the place of derailment was in good condition, the car properly equipped and in good repair, and being carefully run at a proper rate of speed, then the court instructs you that the defendant was not guilty of negligence, and you will answer the first issue 'No.'"

The charge, which was approved by this court, was as follows:

"If you believe the evidence in this case that there was a derailment of the defendant's car at the time of the injury complained of, and if there was a derailment, there would arise from this fact alone a presumption of negligence upon the part of the defendant, and this presumption of negligence, if not rebutted, is evidence of negligence for consideration of the jury, and if it satisfies you that the defendant was negligent and that this negligence was the real and proximate cause of the injury, then it would be the duty of the jury to answer the

first issue 'Yes.' This presumption of negligence may be rebutted by showing that the track of the defendant company was in a reasonably safe condition; that the car was equipped in a reasonably safe manner, and that it was being operated in a reasonably prudent way; and, if rebutted, then the presumption of negligence arising from the derailment is no longer evidence of negligence."

In this charge the "burden" is not devolved upon the defendant. In fact, the judge declined the defendant's prayer that the presumption of negligence arising from the derailment "cast upon the defendant the burden of disproving negligence." The case of *Stewart v. R. R.*, 137 N. C. 690, 50 S. E. 313, had previously decided, certainly in effect, that "the burden is thrown upon the defendant to disprove negligence on its part." Apparently inconsistent with this position are such cases as *Womble v. Grocery Co.*, 135 N. C. 474, 47 S. E. 493; *Stewart v. Carpet Co.*, 138 N. C. 60, 50 S. E. 562; *Ross v. Cotton Mills*, 140 N. C. 115, 52 S. E. 121, 1 L. R. A. (N. S.) 298; *Shepard v. Telephone Co.*, supra; *Mumpower v. R. R.*, 174 N. C. 743, 94 S. E. 515. In *Cox v. R. R.*, 149 N. C. 117, 62 S. E. 884, supra, the question is again presented. The court charged the jury:

"If you find from the evidence that the fire which injured the plaintiff's property escaped from the defendant's engine, there is a presumption in law of negligence on the part of the defendant in the operation of its train, and in that event the burden of proof is cast upon the defendant to satisfy you that it was not negligent in the respect complained of."

The court said:

"To this instruction exception was duly taken, and we think it was erroneous. It evidently made the impression upon the jury that the emission of the sparks raised a legal presumption of the defendant's liability and shifted the burden of proof to the defendant, in the sense that it had failed to satisfy them that there was no negligence; in other words, that [if] its engine was properly equipped and operated, they should return a verdict for the plaintiff. This charge is not sustained by the decisions of this court. The presumption is one of fact and not law. Evidence that the sparks were emitted from the engine and that they set fire to the timber, made a prima facie case for the plaintiff, but only to the extent of being evidence sufficient to carry the case to the jury and to warrant a verdict in favor of the plaintiff, if the jury should find the ultimate or crucial fact that the fire was caused by the defendant's negligence. In the recent case of *Winslow v. Hardwood Co.*, 147 N. C. 275, 60 S. E. 1130, we said: 'The burden of the issue does not shift, but the burden of proof may shift from one party to the other, depending upon the state of the evidence. When the plaintiff introduces testimony in a case of this kind to the effect that the injury to him was caused by the derailment of a train, it is sufficient to carry the case to the jury; but the burden of the issue remains with the plaintiff, though the

burden of proof may shift to the defendant in the sense that, if he fails to explain the derailment by proof in the case, either his own or that of the plaintiff, he takes the chance of an adverse verdict, for then the jury may properly conclude that the plaintiff has established the affirmative of the issue as to negligence by the greater weight of the testimony. But the defendant is not required to overcome the case of the plaintiff by a preponderance of the evidence.' This fits our case exactly, and distinctly shows the error in the instruction of the court. Judge Elliott states the general rule which applies in cases of this kind with clearness and accuracy, when he says: 'The burden of the issue, that is, the burden of proof in the sense of proving or establishing the issue or case of the party upon whom such burden rests, as distinguished from the burden or duty of going forward and producing evidence, never shifts, but the burden or duty of proceeding or going forward often does shift from one party to the other, and sometimes back again. Thus, when the actor has gone forward and made a prima facie case, the other party is compelled in turn to go forward or lose his case, and in this sense the burden shifts to him. So the burden of going forward may, as to some particular matter, shift again to the first party in response to the call of a prima facie case or presumption in favor of the second party. But the party who has not the burden of the issue is not bound to disprove the actor's case by a preponderance of the evidence, for the actor must fail if, upon the whole evidence, he does not have a preponderance, no matter whether it is because the weight of evidence is with the other party or because the scales are equally balanced.' 1 Elliott on Evidence, 139. We have approved the rule, as thus stated by Judge Elliott, and notably in Board of Education v. Makely, 139 N. C. 31, and Shepard v. Telegraph Co., 143 N. C. 244. The charge of the court was, we think, contrary to the principle established by those and the following cases: Overcash v. Electric Co., 144 N. C. 572; Ross v. Cotton Mills, 140 N. C. 115; Stewart v. Carpet Co., 138 N. C. 60; Womble v. Grocery Co., 135 N. C. 474; Stanford v. Grocery Co., 143 N. C. 419, and Furniture Co. v. Express Co., 144 N. C. 644."

As to the duty of the defendant, it will seem that various expressions have been used. It has been held that, after the plaintiff has established his prima facie case, the defendant must repel it by proof of care (Ellis v. Railroad, supra), or repel the presumption of negligence (Aycock v. R. R., supra), or excuse its failure (Marcom v. R. R., supra), or assume the burden of proving that it had used the necessary precautions (Aman v. Lumber Co., 160 N. C. 324, 75 S. E. 931), or go forward with proof (Ross v. Cotton Mills, supra).

The attempt to reconcile all the cases on this question would be a useless task; but from the perplexing variety of decisions this court in the more recent cases has undertaken to formulate a rule that should be accepted as reasonable, definite, and stable.

Although there are expressions in some of

our decisions that seem to indicate a distinction between the terms *res ipsa loquitur* and *prima facie* case, the distinction is most plausibly drawn in those cases which require the defendant to disprove negligence. The terms are often used interchangeably, as in Kay v. Metropolitan Co., 163 N. Y. 447, 57 N. E. 751, in which it is said:

"In the case at bar the plaintiff made out her cause of action *prima facie* by the aid of a legal presumption" (referring to *res ipsa loquitur*).

See State v. Wilkerson, 164 N. C. 435, 79 S. E. 888.

In 20 R. C. L. § 156, it is said concerning the doctrine of *res ipsa loquitur*:

"While it may be true that the mere fact of injury will not give rise to a presumption of negligence on the part of any one, it is also true that some accompanying elemental facts have long been deemed to be sufficient proof of negligence to establish a *prima facie* case in favor of a person maintaining an action therefor. The presumption arises, it has been said, from the inherent nature and character of the act causing the injury. Presumptions arise from the doctrine of probabilities. The future is measured and weighed by the past, and presumptions are created from the experience of the past. What has happened in the past, under the same conditions, will probably happen in the future, and ordinary and probable results will be presumed to take place until the contrary is shown. More precisely the doctrine *res ipsa loquitur* asserts that, whenever a thing which produced an injury is shown to have been under the control and management of the defendant, and the occurrence is such as in the ordinary course of events does not happen if due care has been exercised, the fact of injury itself will be deemed to afford sufficient evidence to support a recovery in the absence of any explanation by the defendant tending to show that the injury was not due to his want of care. * * * The presumption of negligence herein considered is, of course, a rebuttable presumption. It imports merely that the plaintiff has made out a *prima facie* case which entitles him to a favorable finding unless the defendant introduces evidence to meet and offset its effect. And, of course, where all the facts attending the injury are disclosed by the evidence, and nothing is left to inference, no presumption can be indulged—the doctrine *res ipsa loquitur* has no application."

[12] A *prima facie* case or evidence is that which is received or continues until the contrary is shown. It is such as in judgment of law is sufficient to establish the fact, and if not rebutted remains sufficient for the purpose. Troy v. Evans, 97 U. S. 3, 24 L. Ed. 941; Kelly v. Jackson, 6 Pet. 622, 8 L. Ed. 523; Jones on Evidence, § 8; State v. Floyd, 35 N. C. 385; State v. Wilkerson, supra. Even if the *prima facie* case be called a presumption of negligence, the presumption still is only evidence of negligence for the consideration of the jury. Overcash v. Electric

Co., supra; Shepard v. Telephone Co., supra; Mumpower v. R. R., supra.

In some of our decisions the expressions *res ipsa loquitur*, *prima facie* evidence, *prima facie* case, and presumption of negligence have been used as practically synonymous. As thus used each expression signifies nothing more than evidence to be considered by the jury. *Womble v. Grocery Co.*, supra; *Stewart v. Carpet Co.*, supra; *Ross v. Cotton Mills*, supra; *Shepard v. Telegraph Co.*, supra; *Mumpower v. R. R.*, supra; *Perry v. R. R.*, 176 N. C. 69, 97 S. E. 162.

When the plaintiff proves, for instance, that he has been injured by the fall of an elevator, or by a derailment, or by the collision of trains, or other like cause, the doctrine of *res ipsa loquitur* applies, and the plaintiff has a *prima facie* case of negligence for the consideration of the jury. Such *prima facie* case does not necessarily establish the plaintiff's right to recover. Certainly, it does not change the burden of the issue. The defendant may offer evidence or decline to do so at the peril of an adverse verdict. If the defendant offer evidence the plaintiff may introduce additional evidence, and the jury will then say whether upon all the evidence the plaintiff has satisfied them by its preponderance that he was injured by the negligence of the defendant.

We may remark in this connection that in *Currie v. R. R.*, 156 N. C. 422, 72 S. E. 488, the burden of the second issue was imposed upon the defendant, because, contrary to the usual practice, two issues instead of one were submitted to the jury on the question of negligence.

[13] As applicable to this class of cases, the rule formulated by the more recent decisions of this court is substantially as follows: In all instances of this character, after the plaintiff has established a *prima facie* case of negligence, if no other evidence is introduced, the jury will be fully warranted in answering the issue as to negligence in favor of the plaintiff, but will not be required to do so as a matter of law. When such *prima facie* case is made, it is incumbent upon the defendant to offer proof in rebuttal of the plaintiff's case, but not to the extent of preponderating evidence. The defendant, however, is not required as a matter of law to produce evidence in rebuttal; he may decline to offer evidence at the peril of an adverse verdict. If he offer evidence, the plaintiff may introduce other evidence in reply; and the jury will finally determine whether the plaintiff is entitled by the greater weight of all the evidence to an affirmative answer to the issue; for throughout the trial the burden is upon the plaintiff to show by the greater weight of the evidence that he is entitled to such answer.

[14] In his instructions to the jury, his honor evidently had in mind the principle

stated in the later decisions of this court. The charge must be considered as a whole in the connected way in which it was given, and upon the presumption that the jury did not overlook any portion of it. If, when so construed, it presents the law fairly and correctly, it will afford no ground for reversing the judgment, though some of the expressions when standing alone might be regarded as erroneous. *State v. Exum*, 138 N. C. 602, 50 S. E. 283; *Hodges v. Willson*, 165 N. C. 323, 81 S. E. 340.

We do not understand that his honor shifted to the defendant the burden of the issue, or even the burden of preponderating proof, but imposed on the defendant merely the duty of going forward with evidence tending to relieve itself of the charge of negligence, or to show there was no negligence, or, if there was, that the defendant's negligence was not the proximate cause of the injury. The paragraph of the charge in which his honor used the expression "the burden being on the defendant" must be construed in connection with the first paragraph. It is manifest that his honor used the word "burden" in each paragraph as signifying merely the burden of going forward with evidence tending to rebut the plaintiff's case.

His honor conformed his charge to the requirements of *Perry v. Mfg. Co.*, 176 N. C. 70, 97 S. E. 162, in which there are expressions apparently going beyond the exigencies of the case in devolving upon the defendant the burden of establishing his defense to the satisfaction of the jury. In that case the trial judge instructed the jury that the burden would be shifted to the defendant to show that the fire was not due to its negligence. Justice Walker said, referring to the charge:

"The instruction, reasonably construed, means that if the jury found from the facts recited by the judge the main fact that the engine sparks started the fire, a *prima facie* case was presented, calling upon the defendant to go forward with his proof or take the risk before the jury of an adverse verdict."

See *Williams v. Mfg. Co.*, 177 N. C. 512, 99 S. E. 370.

In view of one or two expressions in *Perry's Case*, we suggest that, in cases of negligence in which the doctrine of *res ipsa loquitur* applies, after all the evidence is introduced the vital question is not whether the defense specifically relied on is established to the entire satisfaction of the jury, but whether on the issue of negligence the evidence preponderates in favor of the plaintiff, and by this test the answer to the issue is to be determined. The conclusion reached in *Page v. Camp Mfg. Co.*, 180 N. C. 335, 104 S. E. 669, is directly in point.

"It is true that expressions are to be found in some of our cases, filtered there from two

(109 S.E.)

or three cases based on the English rule, which justified his honor's charge, but since they were decided we have adhered to the true and correct rule, which is stated in *Stewart v. Carpet Co.*, supra; *Womble v. Grocery Co.*, supra; *Cox v. R. R.*, supra; *Shepard v. Telegraph Co.*, supra, and many other cases, and which we have applied in this case, the substance of which is that the burden to prove his case is always on the plaintiff, whether the defendant introduces evidence or not. Where we have said 'it is the duty of the defendant to go forward with his proof,' it was only meant in the sense that if he expects to win it is his duty to do so or take the risk of an adverse verdict, and not that any burden of proof rested upon him. He pleads no affirmative defense but the general issue, and this puts the burden throughout the case on the plaintiff, who must recover, if at all, by establishing his case by the greater weight of evidence. The Supreme Court of the United States has so stated the rule, and it referred with approval to our cases above cited. We say this much again, in the hope that the rule, as we have stated it, may hereafter be considered as the correct one."

The other exceptions are formal and require no discussion. Of course it will be understood that the rule herein stated is not intended in any way to modify the well-established principles that apply in case of homicide.

We find no error.

No error.

(181 N. C. 326)

STATE v. DORSETT et al. (No. 348.)

(Supreme Court of North Carolina. Nov. 2, 1921.)

Robbery \S 24(1)—Evidence sufficient to sustain conviction.

In a prosecution of three defendants for robbery, evidence held to sustain a verdict of guilty.

Appeal from Superior Court, Rockingham County; Long, Judge.

Hudy Dorsett, Paul Kirkman, and Will Coford were convicted of robbery, defendant Coford being also found guilty of assault with a deadly weapon, and they appeal. No error.

On Sunday night, June 6, 1921, F. H. Finney, an elderly man, was called from his home by the defendant Coford and another man in company with him. Just as the prosecuting witness opened the front door, the two men grabbed him and jerked him out into the yard. They both had pistols. Finney testified:

"The unknown man went into the house while Coford held me at the door. While they were robbing my wife, just about the time they got through and the shooting was over, a car came up to my hogan just below the house and these two men, Coford and the unknown man, went down, got in it, and left. I didn't know who the men in the car were. I didn't see them; just heard them talking. They took \$13 from me and \$35 from my wife. I was shot in the leg; had to go to the hospital, have my leg split to the bone and the ball taken out. When the men started to the car they gave me back \$3 and my knife."

There was much evidence pro and con as to whether Coford was the real assailant and as to whether Dorsett and Kirkman were present, aiding, abetting, and assisting in the perpetration of the crime.

The defendants denied having anything to do with the affair; and upon their evidence, if believed, the jury undoubtedly would have returned a verdict of acquittal.

The three defendants were convicted of robbery, and the defendant Coford was also found guilty of an assault with a deadly weapon. From a judgment of two years' imprisonment with assignment to work upon the public roads, the defendants appealed.

J. M. Sharp and Glidewell & Mayberry, all of Reidsville, for appellants.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

STACY, J. The record discloses a serious and aggravated breach of the criminal law. The prosecuting witness was called from his home in the night time, assaulted, robbed, and shot. There was ample evidence, offered by the state, tending to show that the defendants were the guilty parties. On the other hand, there was much evidence offered by the defendants, in support of their defense, which tended to establish their innocence. But upon the controverted questions of fact and the ultimate issue of guilt, the verdict of the jury was adverse to the appellants.

There are a number of exceptions appearing on the record relating to the admission and exclusion of evidence and to his honor's charge, but we have failed to discover any prejudicial or reversible error. The case apparently has been tried in substantial conformity to our decisions on the subject; and, after a careful consideration of all the material questions presented, we find no error, and this will be certified to the superior court.

No error.

(182 N. C. 333)

CITY OF DURHAM v. DURHAM PUBLIC SERVICE CO. (No. 335.)

(Supreme Court of North Carolina. Nov. 2, 1921.)

1. Municipal corporations \Leftrightarrow 434(6) — Ordinance held not to exempt street railroad from duty of paving tracks.

A city ordinance licensing a street railway company which recited that nothing therein contained should be construed to require the company to pave its roadbed held not to exempt the company for all time, notwithstanding C. S. § 2708, authorizing local improvement assessments, provides that franchises shall not be affected; the exemption not being in terms so explicit as to be free from substantial doubt.

2. Municipal corporations \Leftrightarrow 406(1) — Legislature may directly or through agencies impose assessments for local improvements.

The Legislature, either directly or through its recognized governmental agencies, may impose assessments for local improvements, such as street paving.

3. Municipal corporations \Leftrightarrow 425(1) — Street railway property assessable for local improvements as abutting property.

The property and franchise of street railways laid along a street within the effects and benefits of a local improvement may be assessed under the principle relating to abutting owners.

4. Municipal corporations \Leftrightarrow 406(1), 465—Necessity and apportionment of local improvement assessments within discretion of legislative agents.

The imposition of assessments for local improvements, both as to necessity and apportionment, is very largely in the discretion of the Legislature and its subordinate agencies.

5. Municipal corporations \Leftrightarrow 472, 473—Paving assessment against street railway company not excessive nor discriminatory.

In proceedings to assess the roadbed of a street railway company for street paving, held, that the assessment was not excessive nor discriminatory.

6. Street railroads \Leftrightarrow 37 — Width of paving charged to street railway company for "tracks" held not excessive.

In the imposition of assessments against a street railway company for paving its roadbed, it was not improper, under C. S. § 2708, defining the space to be assessed as 18 inches outside of the tracks, to include the rails and cross-ties within the term "tracks."

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Track.]

Appeal from Superior Court, Durham County; Devin, Judge.

Action by City of Durham against the Durham Public Service Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The action is to recover the sum of \$102,942.30, assessed against the defendant company for its proportion of the cost of paving the Main street of said city on which the tracks of defendant, a street railway, are laid. Defendant having refused to make the improvement as required by a city ordinance, the work was done by the city and assessed against the company as the statute provides. There is no claim but that the proceedings were formally correct, but defendant resists recovery on the ground that the company is protected by a clause in the license or permit under which its tracks were laid, and which amounts to a contract on the part of the city that the costs of such an improvement shall not be imposed upon the company; second, that the width of the improvement is in excess of the amount allowed by the statute.

J. S. Manning, of Raleigh, and W. L. Foushee and W. J. Brogden, both of Durham, for appellant.

S. C. Chambers and Fuller, Reade & Fuller, all of Durham, for appellee.

HOKE, J. The charter of the Durham Traction Company, under which defendant holds and is operating the street railway (Private Laws 1901, c. 25, § 2), contains the provision that said company may construct and operate railway lines upon and along the streets of said city, permission being first had from the board of aldermen, etc. And the ordinance of the city by which the permit or license was given, after conferring the privilege and designating the routes over which the tracks may be laid, etc., is in part as follows:

"As soon as the said tracks are completed and the poles, wires, and appliances are erected and placed, the portions of the streets and avenues that may have been used for these purposes shall be repaired and restored at said company's cost and expense to their former condition so far as they may have been damaged by the placing and erecting of the tracks, poles, wires, and appliances. The said Durham Traction Company, in laying its track upon the route herein described on, over, and along the streets and avenues, shall follow the grade to be designated by the street commissioner, and it shall be his duty upon the application of said Durham Traction Company to furnish it with grades. The said Durham Traction Company, whenever it shall be required so to do, shall cause its roadbed and track to be brought to surface grade at its own expense and costs, but nothing herein contained shall be construed to require said Durham Traction Company to pave its roadbed, but it shall be required to restore its roadbed to the conditions in which it was at the time of laying of said track, provided, however, that if the city decides to put in or change its sewerage pipes on any of the streets of the said city on which the tracks of said Durham Traction Company

may be laid, the said city may require the said traction company to remove and replace, at its own expense, the said tracks, for said purpose, and said city shall incur no liability for any delays or interruptions of the business or traffic of said traction company caused thereby."

And in the act of the Legislature more directly pertinent which authorized the imposition of these assessments for local improvements, and in the portion appertaining to street railways, etc. (Consolidated Statutes, § 2708), it is provided:

"That where any such company shall occupy such street or streets under a franchise or contract which otherwise provided, such franchise or contract shall not be affected by this section, except in so far as may be consistent with the provisions of such franchise or contract."

[1] And it is earnestly contended for the appellant that this clause in the ordinance referred to fully recognized in the legislative proviso amounts to a contract stipulation protecting the defendant company at all times from any charge for paving the streets, and that the burden here imposed upon it is without warrant of law, but in our opinion and on the facts presented the position may not be sustained.

[2] It is fully established that the Legislature, either directly or through its recognized governmental agencies, may impose assessments for these local improvements. *City of Raleigh v. Carolina Power & Light Co.*, 180 N. C. 234, 104 S. E. 462; *Felmet v. Canton*, 177 N. C. 52, 97 S. E. 728; *Justice v. Asheville*, 161 N. C. 62, 76 S. E. 822; *Tarboro v. Staton*, 156 N. C. 504-509, 72 S. E. 577; *Kinston v. Wooten*, 150 N. C. 295, 63 S. E. 1061; *Asheville v. Trust Co.*, 143 N. C. 360, 55 S. E. 800; *Raleigh v. Peace*, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330; *Milwaukee, etc., R. R. v. State of Wisconsin, etc.*, 252 U. S. 100, 40 Sup. Ct. 306, 64 L. Ed. 476, 10 A. L. R. 892; *French v. Barber & Co.*, 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879.

[3] And it is very generally held that the property and franchise of street railways laid along a given street or in a designated locality within the effects and benefits of the proposed improvement may be lawfully brought within the principle as abutting owners. *City of New Bern v. A. & N. C. R. R.*, 159 N. C. 542, 75 S. E. 807; *Commissioners of Chatham v. S. A. L. R. R.*, 133 N. C. 216, 45 S. E. 566; *Cicero R. R. v. City of Chicago*, 176 Ill. 501, 52 N. E. 860.

The power to impose these assessments for local improvements is properly referred to the sovereign power of taxation, and it is the accepted principle of interpretation that no license, permit, or franchise from a municipal board or from the Legislature itself will be construed as establishing an exemption from the proper exercise of this power, or in derogation of it, unless these bodies are

acting clearly within their authority, and the grant itself is in terms so explicit as to be free from any substantial doubt. *Railroad v. Alsbrook*, 110 N. C. 137, 14 S. E. 652, affirmed on writ of error in 146 U. S. 279, 13 Sup. Ct. 72, 36 L. Ed. 972; *Cleveland Electric R. R. v. City of Cleveland*, 204 U. S. 116, 27 Sup. Ct. 202, 51 L. Ed. 399; *Lincoln Street Railway v. City of Lincoln*, 61 Neb. 109, 84 N. W. 802; *Sioux City Street Railway v. Sioux City*, 78 Iowa, 367, 43 N. W. 224, affirmed on writ of error, 138 U. S. 98, 11 Sup. Ct. 228, 34 L. Ed. 898; *Railway Co. v. Philadelphia*, 101 U. S. 528, 25 L. Ed. 912.

In *Alsbrook's Case* it was held:

"The power of taxation being essential to the life of government, exemptions therefrom are regarded as in derogation of sovereign authority and common right, and will never be presumed.

"2. The grant of an exemption from taxation must be expressed by words too plain to be mistaken; if a doubt arise as to the intent of the Legislature, that doubt must be resolved in favor of the state."

And in *Cleveland v. Electric Railway Co.*, 204 U. S. 116, 27 Sup. Ct. 202, 51 L. Ed. 399: Grants of franchises are usually prepared by those interested in them and submitted to the Legislature with a view to obtain the most liberal grant obtainable, and for this and other reasons such grants should be in plain language, certain, definite in their nature, and containing no ambiguity in their terms, and should be strictly construed against the grantee.

Under a proper application of these decisions and the principles they approve and illustrate, there is nothing in the ordinance that contains the exemptions contended for by the company. The terms relied upon for the purpose appear in the second section of the ordinance in the immediate connection with the provision:

"The said Durham Traction Company whenever it shall be required to do so shall cause its roadbed and track to be brought to surface grade at its own expense and cost but nothing herein contained shall be construed to require said Durham Traction Company to pave its road but it shall be required to restore its roadbed to the conditions in which it was at the time of laying the track," etc.

The ordinance is dealing and intends to deal only with the things there required and under conditions then existing. There is nothing that purports to affect the future, nor which could prevent the city government under more advanced conditions in the exercise of the powers conferred upon it for the public good from enacting ordinances that its streets be paved, and that this railway as an abutting owner should bear its proper proportion of the cost. Several of the authorities already referred to are in direct

approval of the position. *City of New Bern v. Railroad*, 159 N. C. 542, 75 S. E. 807, *Sioux City Railway v. Sioux City*, 138 U. S. 98, 11 Sup. Ct. 226, 34 L. Ed. 898, *Railway Co. v. Philadelphia*, 101 U. S. 528, 25 L. Ed. 912, and numerous others could be cited.

We are confirmed in this view, if confirmation were needed, by the fact that there is grave doubt if either Legislature or city government in abdication of the police powers conferred upon them for the public good could enter into a valid contract binding on their successors that never under any circumstances and regardless of changing conditions could any future city government order that its streets be paved and the railway company as abutting owner bear its proportion of the costs. *Powell v. Railroad Co.*, 178 N. C. 243, 100 S. E. 424; *Railroad v. Goldsboro*, 155 N. C. 356, 71 S. E. 514, affirmed on writ of error 232 U. S. 548, 34 Sup. Ct. 364, 58 L. Ed. 721. In case of ambiguity permitting construction, the courts will lean against an interpretation that threatens the constitutionality of a statute. *Black's Interpretation of Laws* (2d Ed.) p. 110.

[4] It is further insisted for the appellant that the assessment is invalid because the same is excessive in amount and discriminative as between this company and other abutting owners, but in our opinion the facts in evidence do not support the objection. It is fully established that in the imposition of these assessments, both the necessity of the proposed improvement and its apportionment are very largely in the discretion of the Legislature and its subordinate agencies in charge and control of the matter. Speaking to the question in *Felmet v. Canton*, supra, the court held:

"The authority conferred by statute on municipal corporations to assess lands abutting upon the streets for public local purposes comes within the power of taxation and is largely a matter of legislative discretion, usually held to be conclusive as to the necessity of the improvement, and in respect to the apportionment and the amount only becomes a judicial question in cases of palpable and gross abuse."

[5] *Tarboro v. Staton*, 156 N. C. 509, 72 S. E. 577, *Kinston v. Wooten*, 150 N. C. 295, 63 S. E. 1061, and authority generally on the subject is to the same effect. True, the court finds that the value of the property on this main street is only \$100,000, but this is the objective or tangible property, constituting the 202 miles of trackage on that street, and contains no estimate of the value

of the company's franchise under which it is operating, and which by fair apportionment must be included in the estimate. The only data presented on that subject is that the net earnings of the company for the year ending December 31, 1920, was \$147,000 from this and other activities under the franchise. There is a further finding to the effect that for the year ending May 31, 1921, the operation of defendant's railway showed a loss of \$17,388.73. Whether this results by reason of exceptional costs and charges accruing during that period does not definitely appear, but there is a presumption against error, and under the principles referred to as controlling and approved in the cases cited, the facts presented are entirely insufficient to justify the court in upsetting the action of the municipal authorities having charge of the assessment, and this exception must be overruled.

[6] Again, appellant objects, contending that the width of the pavement charged against them exceeds the amount allowed by the statute under which the city government proceeded; the limitation being that the burden imposed shall not exceed "the space between the tracks, the rails of the tracks, and eighteen inches in width outside of the tracks of such company." Consolidated Statutes, § 2708. The court finds that the width of assessment where the track is single is eight feet, and the cross-ties of company are seven feet and ten inches, so that, if the language and meaning of the statute "eighteen inches outside of the tracks of the company" by correct interpretation include the rails and the cross-ties, the width of the paving imposed upon the company is well within the statutory provision. The term "railroad tracks" in several dictionaries is defined to include both the rails and the cross-ties upon which they are placed, and to extend even to the roadbed. This definition has been approved in authoritative cases dealing with the subject. In *Attorney General v. Common Council*, 148 Mich. 71, 111 N. W. 860, *Gates v. Chicago R. R.*, 82 Iowa, 518, 48 N. W. 1040, and in cases of this character, there is every reason to include the cross-ties as coming within the meaning of the term.

The form of the judgment allowing payment by installments is expressly provided for in the statute (Consolidated Statutes, § 2716).

On careful consideration, we find no reversible error, and the judgment of the superior court is affirmed.

Affirmed.

(182 N. C. 325)

WALKER v. BURT. (No. 257.)

(Supreme Court of North Carolina. Nov. 2, 1921.)

1. Accord and satisfaction \S 1.—Definition of term; "accord and satisfaction."

The doctrine of "accord and satisfaction" is a method of discharging a contract or settling a cause of action arising either from a contract or a tort by substituting for such contract or cause of action an agreement upon satisfaction thereof and an execution of such substituted agreement.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accord and Satisfaction.]

2. Accord and satisfaction \S 7(2)—Arises on acceptance of less amount in full.

Under C. S. \S 895, payment of a less amount according to agreement and compromise of the whole is a full and complete discharge of the same.

3. Appeal and error \S 1062(1)—In action for tort and on breach of contract, where defense was accord and satisfaction, submitting only this issue was not prejudicial.

In an action for tort and breach of contract, where all the evidence showed that a settlement was in the nature of an accord and satisfaction, the submission of this issue only, instead of three issues on this subject proposed by plaintiff, is not prejudicial, since the questions raised in plaintiff's issues were presented under the issue submitted.

4. Trial \S 352(3)—Number of issues is for discretion of court.

If issues are directed to material facts under the pleadings and afforded an opportunity to present the various phases of the controversy, their number is a matter within the discretion of the trial court.

5. Evidence \S 402, 408(2)—In absence of fraud, imposition, or mistake, parol evidence not admissible to vary checks and receipts in full settlement.

Where plaintiff accepted and collected two checks, both marked in full settlement, and signed and delivered a receipt at the time of the first payment that it was in full settlement of all accounts and for all crops sold up to date, in the absence of an allegation of fraud, imposition, or mistake, parol evidence cannot be admitted to vary the terms of the checks and receipt.

6. Appeal and error \S 215(1)—Objection to instructions must be made in lower court.

Where exceptions related to statements as to the contention of the parties in the instructions, and the court was not advised of the objection at the time, the question cannot be raised on appeal.

7. Appeal and error \S 171(1)—On appeal party may not change theory of case from that relied on at trial.

After a party has elected to try his case on one theory in the lower court, he may not

change his attitude with respect thereto on appeal.

Appeal from Superior Court, Wake County; Connoe, Judge.

Action by Willie Walker against J. J. Burt. From judgment for defendant, plaintiff appeals. No error.

The plaintiff alleged that in December, 1918, he rented a farm from the defendant for the cultivation of certain crops during the year 1919; that he agreed to plant 10 acres in tobacco, 10 in cotton, 10 in corn, and 10 in wheat on certain conditions or agreements which are fully stated in the complaint. He alleged that the defendant in several respects had failed to comply with his contract; that he had sold a part of the plaintiff's crop of tobacco and had refused to account for all the proceeds; that the defendant had declined to permit the plaintiff to cultivate in cotton the land agreed on, but had required the plaintiff to cultivate another tract about a mile distant; that the defendant had sold the plaintiff's cotton and failed to account for it; that the defendant had retained more rent corn than he was entitled to, and had wrongfully detained certain of the plaintiff's wheat. The plaintiff alleged further that sundry other dealings had taken place between him and the defendant, which need not be recited here, and that the defendant was indebted to him in the sum of \$2,769.86, with interest from January 1, 1920.

The defendant denied the material allegations in the complaint, setting out particularly his contentions as to the several matters relied on by the plaintiff, and alleged that the plaintiff had failed to cultivate the land according to the agreement, and in other particulars had failed to comply with the contract. The defendant by way of amendment incorporated the following allegation in his answer:

"That on or about the 22d day of November, 1919, the plaintiff and the defendant had a full accounting and settlement between them of all their claims, accounts, and demands, except small remnants of ungathered crops, and that at said time and in connection with said settlement it was ascertained, determined, and agreed between them that the total indebtedness of the defendant to the plaintiff was \$872.65, and that accordingly at said time the defendant paid to the plaintiff the said sum of \$872.65, which said sum the plaintiff received and accepted from the defendant in full settlement of all matters, except the said remnants of ungathered crops, and that thereafter, to wit, on or about the 14th day of January, 1920, the plaintiff and the defendant had a full accounting and settlement of said remnants of ungathered crops not included in the said former settlement, and that thereupon upon a full accounting between them it was ascertained and

determined that the full and final balance owing by the defendant to the plaintiff in adjustment, payment, and settlement of all accounts, claims, and demands existing between them was the sum of \$14.45, and that thereupon the defendant paid to the plaintiff the said sum of \$14.45 in full settlement as aforesaid, and the plaintiff received and accepted from the defendant the payment of the said sum of \$14.45 in full, complete, and final settlement of all claims, accounts, or demands whatsoever of the plaintiff against the defendant, and that the plaintiff is by said settlement barred and estopped to set up the claims and demands set forth in his complaint, and is barred to maintain his said action."

The plaintiff tendered the following issues:

- (1) Was the check dated November 22, 1919, for \$872.65, given and received with intent on the part of both parties thereto that said check should be and was in full settlement of a disputed account and demand existing between the plaintiff and defendant on said date, except small remnants of ungathered crops?
- (2) Was any check given by the defendant and received by the plaintiff on January 14, 1920, in the sum of \$14.25?
- (3) If so, was said check given and received with intent on the part of both plaintiff and defendant that said check should be, and was, in full settlement of disputed balance due from defendant to the plaintiff as of January 14, 1920, as alleged in defendant's supplemental answer?

His honor submitted only one issue to the jury, which, with the answer, is as follows:

"Has there been a full and final accounting and settlement between the plaintiff and the defendant of the matters in controversy referred to in the pleadings as alleged in the answer? A. Yes."

Thereupon judgment was rendered, adjudging that there had been a full and final accounting and settlement of all matters referred to in the pleadings.

All the exceptions in the original brief of the appellant's counsel, not including the last three, which are purely formal, relate either to the issue submitted and the court's refusal to submit the issues tendered by the plaintiff, or to the admission and rejection of evidence, or to declining or giving instructions to the jury. At the trial defendant testified that on November 22, 1919, he and the plaintiff had a settlement to date of all matters in dispute between them, and that he gave the plaintiff a check for \$872.65, on which were written the words, "In full settlement to date," that the plaintiff thereupon delivered to the defendant a receipt "in full settlement of all accounts and for all crops sold up to date," and that on January 4, 1920, there was a complete settlement, and that the defendant paid the plaintiff \$14.45 by a check marked "in full settlement." There was evidence for the defendant tending to show that the alleged settlements included all matters in controversy.

The plaintiff contended that the defendant was due him more than \$872; that he did not understand the transactions as purporting to be in settlement of all matters in dispute; that the defendant admitted owing the plaintiff about \$1,500; and that defendant in November or December refused, after demand, to make further payment to the plaintiff. On each side there was corroborative evidence. The plaintiff appealed.

A. J. Fletcher, of Raleigh, R. B. Lewis, of Fuquay Springs, and J. W. Bailey, of Raleigh, for appellant.

Allen J. Barwick, of Raleigh, for appellee.

ADAMS, J. [1, 2] From the evidence, the charge, and the plaintiff's prayers for instructions, as well as his exceptions, it appears that the theory upon which the case was tried is that of accord and satisfaction. This doctrine is recognized as a method of discharging a contract, or settling a cause of action arising either from a contract or a tort, by substituting for such contract or cause of action an agreement for the satisfaction thereof and an execution of such substituted agreement. 1 R. C. L. p. 177. Consolidated Statutes, § 895, provides:

"In all claims, or money demands, of whatever kind, and howsoever due, where an agreement is made and accepted for a less amount than that demanded or claimed to be due, in satisfaction thereof, the payment of the less amount according to such agreement in compromise of the whole is a full and complete discharge of the same."

[3, 4] The defendant testified, it is true, that the plaintiff was satisfied with the settlement, and that there was no dispute, but in addition the defendant said in substance that after considering the claims of each party he finally agreed to make payment in settlement of all matters; and it is somewhat difficult to conform all the evidence to the conclusion that the settlement was not in the nature of an accord and satisfaction. We are therefore unable to see how the plaintiff could have been prejudiced by the court's embodying in one issue the substance of the three issues tendered by the plaintiff. It is obvious that the question whether the defendant gave, and the plaintiff accepted, the checks in part payment or in full settlement, could easily have been presented under the issue submitted. In fact, this seems to have been one of the controverted questions: for the plaintiff distinctly testified that the checks were not accepted in final settlement, and that he thereafter made demand on the defendant for the remainder claimed to be due. If the issues are directed to the material facts arising upon the pleadings and afford an opportunity of presenting the various phases of the controversy, their number is a matter within the discretion of the court. *Millikin v. Sessoms*, 173 N. C. 723, 92 S. E. 359; *Drennan v. Wilkes*,

179 N. C. 512, 103 S. E. 9; Dalrymple v. Cole, 181 N. C. 285, 107 S. E. 4.

[5] Only a few of the exceptions to the admission and rejection of evidence require discussion. The plaintiff contends that the court erroneously excluded evidence offered by him for the purpose of showing in connection with the receipt and the first check what had and what had not been sold, and for the purpose of showing in connection with the second check that the words, "In full settlement," did not include all matters in controversy. We recognize the principle which under certain circumstances permits the introduction of parol evidence for the purpose referred to, as, for instance, in *Long v. Guaranty Co.*, 178 N. C. 507, 101 S. E. 11; but we are of opinion that the principle is not applicable to the plaintiff's exceptions. The plaintiff accepted and collected both the checks and signed and delivered the receipt. There is no allegation in the pleadings that the plaintiff was induced by fraud, imposition, or mistake to accept the checks or to sign the receipt, and he is therefore bound by their terms. In view of the limitation in the first check of "payment in full to date," and in the receipt of "full settlement of all accounts and for all crops sold up to date," it is not unreasonable to assume that the plaintiff accepted the second check "in full settlement" of all matters in controversy (*Kerr v. Sanders*, 122 N. C. 638, 29 S. E. 943), and hence he "will not be permitted to collect the check and repudiate the condition" (*Aydlett v. Brown*, 153 N. C. 336, 69 S. E. 243; *Cline v. Rudisill*, 126 N. C. 524, 36 S. E. 36; *Davis Co. v. Powers*, 130 N. C. 153, 41 S. E. 6; *Mercer v. Lumber Co.*, 173 N. C. 54, 91 S. E. 588).

We have carefully examined all the prayers for instructions, and find them untenable. The granting of some would have required the judge to invade the province of the jury, and the granting of others would have withdrawn the issue or directed an answer.

[6] In his honor's instructions to the jury we find no reversible error. Several of the exceptions relate to statements as to the contentions of the parties, and the court was not advised at the time of the plaintiff's objection. *State v. Foster*, 172 N. C. 960, 90 S. E. 785; *McMillan v. Railroad*, 172 N. C. 853, 90 S. E. 683; *State v. Little*, 174 N. C. 801, 94 S. E. 1.

[7] We are precluded from giving to a part of Mr. Bailey's interesting argument the consideration which ordinarily it would merit for the reason that it was based upon a theory distinct from and inconsistent with that upon which the case was tried before the jury. There is a uniform line of decisions which hold that after a party has elected to try his case on one theory in the lower court he may not be permitted to

change his attitude with respect thereto on appeal. *Brown v. Chemical Co.*, 165 N. C. 424, 81 S. E. 463; *Lindsey v. Mitchell*, 174 N. C. 459, 93 S. E. 955; *Barcliff v. Railroad*, 176 N. C. 41, 96 S. E. 644; *King v. Railroad*, 176 N. C. 306, 97 S. E. 29; *Lipsitz v. Smith*, 178 N. C. 100, 100 S. E. 247; *Hill v. Director General of Railroads*, 178 N. C. 612, 101 S. E. 376; *Starr v. O'Quinn*, 180 N. C. 94, 104 S. E. 66. All the plaintiff's exceptions are disallowed.

No error.

(182 N. C. 851)

STATE v. HAIRSTON. (No. 377.)

(Supreme Court of North Carolina. Nov. 9, 1921.)

1. Homicide \S 167(8)—Evidence that defendant possessed a pistol held material.

In a prosecution for murder, reply of witness, when asked why he went to the scene of the shooting, that he went to see who was shooting, and that defendant and another were shooting, was material, where defendant stated that he did not have a pistol.

2. Homicide \S 169(2)—Evidence that deceased sheriff was rightfully on premises held material.

In a prosecution for murder, where a witness was asked why he, the deceased, a sheriff, and another approached the scene of shooting, his reply that the defendants had weapons and that they were going to take them away was material, as showing that the parties accompanied the sheriff in his attempt to prevent a general affray, and were rightly on the premises.

3. Homicide \S 339—Error in striking out evidence explaining flight held cured by its admission later and by charge to the jury.

In prosecution for murder, striking out the testimony of defendant that he fled from his home because he was warned that a mob was looking for him, if error, was cured by its admission later and by a charge that defendant fled because of being warned of danger from a mob.

4. Criminal law \S 351(3)—Flight of accused competent evidence.

Unexplained flight of the accused is competent evidence of guilt in a criminal prosecution.

Appeal from Superior Court, Stokes County; Finley, Judge.

Bunk Hairston was convicted of murder in the second degree, and he appeals. No error.

Wm. P. Bynum, of Greensboro, McMichael & Johnson, of Winston-Salem, and Folger, Jackson & Folger, of Mount Airy, for appellant.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

WALKER, J. The defendant assigns only three errors on this appeal. Exceptions 1, 2, and 3. It appears that, on April 18, 1920, some dozen or fifteen negro men were congregated in and about a café and soft-drink stand of Nick Hairston in the village of Walnut Cove, when the firing of pistols attracted the attention of citizens of the town. Sheriff R. P. Joyce, taking with him Mr. Matthis and the witness Neal, went up to the stand. Neal was asked:

"Why did you men go there on this occasion? A. Well, there was some shooting going on around the back of the building, and I walked out to see who was doing the shooting, and it was Billy Covington and Bunk Hairston."

[1, 2] The defendant objected to this question and answer on the ground that they were immaterial and irrelevant. But the defendant Bunk Hairston denied that he had a pistol at all on that occasion, and certainly this evidence was material for this reason. Again the same witness, Neal, was asked:

"Why did you and Mr. Matthis and Sheriff Joyce come up later? A. Well, these boys had had their guns out, and we saw them and went to take the guns away from them."

It would seem that this evidence was very material, as showing that these parties, accompanying the sheriff in his attempt to prevent a general row, were rightly on the premises. As a matter of fact, both Sheriff Joyce and Mr. Matthis were killed inside the stand by pistol shots, and the defendant was being tried for the killing of the sheriff. There was direct evidence that the defendant, Bunk Hairston, fired the shot which killed the sheriff.

[3, 4] Defendant's exception 6, assignment of error 3, was taken under the following circumstances: The defendant, Bunk Hairston, was on the stand testifying in his own behalf, and said that he had no pistol over there, and nothing to do with the killing of Sheriff Joyce or of Mr. Matthis. After the killing he seems to have gone off, and was arrested about a mile from Walnut Cove. He testified further:

"I went home, was fixing to go to church that night, and while standing by the dresser combing my hair, my coat and hat off, a white man came to the window, tapped on it, and told me that I had better look out, that a mob was looking for me, and I had better leave."

Upon the state's objection, this evidence was stricken out, and defendant excepted. It is quite probable that the defendant was entitled to this testimony, and that the ruling of the judge, standing alone, upon that testimony may have been error. But it does not stand alone, because he expressly states on his cross-examination:

"I was afraid to stay at home. Somebody told me they were hunting for me. I was not at home when arrested."

Again, on redirect examination:

"I was afraid because some one told me that they were looking for me; that a mob had been made up, and I had better skin out. I heard the crowd, and it seemed like about 50 men. I then left. I was arrested about a mile from home."

In stating the contentions of defendant on this point, the judge charged the jury that when he left it was because he was informed that they were looking for him. He left for fear of being lynched, or receiving bodily harm, and not as a result of the consciousness of guilt. Thus the defendant had the full benefit of the evidence stricken out before, and the error, if one was committed at first in excluding the evidence, was corrected by permitting the same evidence to come in afterwards, or, at most, the error became harmless.

We have treated the testimony concerning what was said to the defendant at his home when he was preparing to go to church, as in the record, because it is afterwards referred to in the charge. This testimony, the subject of the fourth assignment of error, was offered for the purpose of explaining defendant's flight after the homicide. The defendant's objection to the exclusion of the evidence is based upon the fact that witnesses testified for the state, that the defendant fled immediately after the killing, offering this as some evidence of his guilt, and that he was apprehended near Dr. J. W. Slate's, about a mile from Walnut Cove, a day or two after the killing. In some way this testimony is not set out in the record, though it was offered by defendant and is referred to incidentally in the record and in the charge of the court, while stating the contentions of the state, viz.:

"The state contends that after the killing he fled, and the next day he was captured."

This was a proper reference on the part of his honor, because of the fact that this was a contention of the state, and evidence was offered on that point. The defendant contends that his honor erred in denying him the right to explain his flight, which, unexplained, has been held by the courts to be some evidence of the defendant's guilt, and fit to be considered by the jury. Defendant says it was therefore competent for him to state that after the killing he went home and was preparing to go to church and that while standing near the dresser he was warned of the approach of a mob, and it was on this account that he fled, and not from any realization of his guilt or fear of a trial.

But we have shown that he had the full benefit of the evidence, the same in substance, and this removes the error, or renders it innocuous. One's flight, wherever and whenever occurring, is generally offered by the state as an evidence of guilt, and unexplained is some evidence of it, and was par-

ticularly so in this case. The rule is clearly stated in Chamberlayne's Handbook on Evidence, § 559, beginning at bottom of page 423 and continuing on page 424, as follows:

"Prominent among relevant acts of the accused showing a consciousness of guilt is flight. Where the prosecution can show in a criminal case that the accused has become a fugitive from justice," such a fact can be considered on the question of his guilt.

And, further:

"Where one charged with crime, without good ground, departs from the jurisdiction shortly after the commission of the crime, with which he is charged, the circumstance may often be highly significant. The law of early times made flight conclusive evidence of guilt. Under the more rational system of later times, the fact of flight is merely a circumstance tending to establish consciousness of guilt. It is settled that the defendant may offer any relevant explanation of his act. The accused may, for example, allege, in explanation of his flight; that he was apprehensive of personal violence. The advice of friends may be assigned as the cause of fleeing from the jurisdiction, and, in all cases, the accused is entitled to prove by his own testimony the actual motive which has influenced his conduct."

The author cites the following cases: Webb v. Comm., 4 Ky. Law Rep. 436 (1882); Le-wallen v. State, 33 Tex. Cr. R. 412, 26 S. W. 832; 2 Chamb. Ev. 1399a, note 11; State v. Phillips, 24 Mo. 475; State v. McDevitt, 69 Iowa, 549, 29 N. W. 459; State v. Barham, 82 Mo. 67; People v. Cleveland, 107 Mich. 367, 65 N. W. 216; Sewell v. State, 76 Ga. 836; 2 Chamb. Ev. § 1399a, notes 8 and 9. To these may be added our own case of State v. Malonee, 154 N. C. 200, at page 203, 69 S. E. 786, and 12 Cyc. 610.

We said in the Malonee Case:

"While it is true, as contended by the defendant's counsel, that it was a circumstance from which, in connection with other circumstances, the jury might draw an inference of conscious guilt unless explained (12 Cyc. 610), the whole matter is for them to pass upon, and they must decide what weight they will give to the fact of flight, and, if there was explanatory evidence, to what extent it affects the probative force of the flight as a fact tending to show guilt. The entire charge is not set forth in the record, and we must assume, therefore, that it correctly stated the law of the case to the jury, in the absence of any showing to the contrary. We cannot condemn it by what was said in one or two detached portions, even if they are erroneous, because they may have been explained and corrected in other parts of the charge"—citing State v. Kinsauls, 126 N. C. 1097, 36 S. E. 81.

But we need not prolong the discussion as to this feature of the case, for we have already virtually disposed of this assignment of error by showing that, while the defendant was entitled to explain his flight, by

showing the real cause of it—that is, fright—and not a sense of his guilt, upon the theory that the wicked flee when no man pursueth, he had the full benefit of his explanation subsequently, and this is all-sufficient.

We find no error that was committed at the trial, and none in the record.

No error.

(182 N. C. 402)

TRANSOU v. DIRECTOR GENERAL OF RAILROADS, et al. (No. 354.)

(Supreme Court of North Carolina. Nov. 9, 1921.)

1. Trial \S 165—Evidence considered in light most favorable to plaintiff on motion for nonsuit.

On motion for nonsuit, the evidence will be considered in its most favorable light for the plaintiff.

2. Master and servant \S 286(15)—Negligence as to brakeman on car passing platform truck held for jury.

In an action under O. S. § 160, for death of a brakeman, whose body was found beside train at a car ladder which had parts of broken platform truck hanging to it, the question whether the railroad was guilty of negligence contributing to his death held for the jury.

3. Railroads \S 5½, New, vol. 6A Key-No. Series—Not liable for injuries during federal control.

A railroad is not liable for injuries to servant sustained while the road was being operated by the Director General of Railroads.

Appeal from Superior Court, Forsyth County; Webb, Judge.

Action by F. M. Transou, administrator, against the Director General of Railroads, the Southern Railway Company, and another. Judgment of nonsuit as to named defendants, and plaintiff appeals. Affirmed as to the Southern Railway Company, and reversed as to the Director General of Railroads.

Plaintiff's intestate on the night of August 15, 1919, was brakeman on the Winston-Salem yards of the Southern Railway Company, which at that time was being operated by the Director General of Railroads.

Just north of Seventh street in Winston-Salem a switch track branched off from the main line of the railroad running south, and on the west side of this industrial track, as it was called, after it crossed Seventh street, was a woodyard building belonging to the defendant Hicks. This building was about 18 feet high. Beside the switch track for a part of the distance of this building is a platform several feet long and about 4 feet high that extended up to within 10 inches of passing trains. The part of the building where

there was no platform stood about 5 feet from the track. Hicks' woodyard used a truck for hauling wood around the yard and carrying wood to load and unload cars. The truck was several feet long and 4 feet wide. For some months this truck was left at night, and during the day when not in use, on the platform and on the ground beside the track within 8 or 10 inches of passing cars, and was so placed for some time before the death of plaintiff's intestate.

There was a string of 12 cars on this industrial track, and at about 1 o'clock at night of August 15th the switch engine and crew were to get out 2 of these cars. The engine backed in, coupled up to this string of cars, pulled out, and cut the twelfth car down the main line. The train was to then back into the switch with 11 cars remaining. Plaintiff's intestate was ordered by the conductor in charge to set the brakes on the car placed on the main line and to come over and catch the backing train on the switch track, and get on top, give, receive, and pass signals to the engineman. There was no light on lead end of backing cars, though all members of the train crew had lanterns and it was a clear night. The ladders going to the top of all box cars at the front end as the cars were backing in were on the west side next to the woodyard building.

The deceased set the brakes on the car on the main line, and the train backed into the switch track. The truck was caught by a ladder of the backing train, torn to pieces, and parts of the broken truck were scattered along the track for 15 or 20 feet. The top of the platform at one place was torn up, and the deceased was found on the ground beside the train, right at a car ladder that had parts of this broken truck hanging to it. His clothes were torn to pieces, his legs, arms, head, and entire body bruised and broken, and he was covered with blood.

At the close of plaintiff's evidence, the court entered judgment of nonsuit as to the Director General of Railroads and the Southern Railway Company, and from this ruling plaintiff appealed.

Raymond G. Parker and J. C. Wallace, both of Winston-Salem, for appellant.

Manly, Hendren & Womble, of Winston-Salem, for appellees.

STACY, J. [1, 2] Considering the evidence in its most favorable light for the plaintiff, the accepted position on a motion to nonsuit, we think the case should have been submitted to the jury. True, no one testified with exactness as to how the deceased met his death. But the objective and physical facts speak louder than witnesses. Can there be any doubt of the truth of the allegation that

the moving train, the demolished truck, and the torn up platform all played a part in producing the injury which resulted in Transou's death? It would seem that an affirmative answer might be entirely permissible, and not altogether unlikely. At least such is a reasonable inference arising from the attendant conditions and surrounding circumstances. Maybe the jury will take a different view of the matter, and maybe not. At any rate, upon the record—it appearing that the deceased was at the time engaged in the discharge of his duties as a brakeman—we think the question of liability is one for the jury under proper instructions from the court. But, of course, we express no opinion as to how it should be found. *Southern Ry. Co. v. Diseker*, 13 Ga. App. 799, 81 S. E. 269.

In *Brown v. Missouri, K. & T. Ry. Co.*, 201 Mo. App. 316, 212 S. W. 27, a case somewhat similar to the one at bar, the Supreme Court of Missouri states the law as follows:

"Railroad companies will not be held to have exercised ordinary care to provide reasonably safe conditions for their employees to do their work when they permit standpipes, telegraph poles, fences, buildings, and other structures to be maintained so close to their tracks that employees being on the outside of their moving cars or engines, in the performance of their duties, are crushed by them"

—and to which should be added, unless due care is used and proper means are employed to prevent such injuries.

To like effect are our own decisions. *Heilig v. Railroad*, 152 N. C. 469, 67 S. E. 1009; *Williams v. Railroad*, 168 N. C. 363, 84 S. E. 408, and cases there cited. The question has been so fully discussed in *Williams v. Railroad* that we deem it unnecessary to repeat here what has so recently been said there. See, also, *Virginian Ry. Co. v. Halstead*, 258 Fed. 428, 169 C. C. A. 444, and *Sanderson v. Boston & M. R. R.*, 91 Vt. 419, 101 Atl. 40, cases directly in point.

With the case going back for a new trial, we refrain from further discussion, as we do not wish to prejudice the rights of any of the parties.

[3] The judgment of nonsuit as to the Southern Railway Company will be sustained under authority of the recent decision of the United States Supreme Court in *Mo. Pac. R. R. Co. v. Ault*, decided June 1, 1921, 256 U. S. —, 41 Sup. Ct. 593, 65 L. Ed. —. But as to the Director General of Railroads the judgment will be reversed, and a new trial ordered.

Affirmed as to the Southern Railway Company.

Reversed as to the Director General of Railroads.

(182 N. C. 350)

WELLS et al. v. CRUMPLER et al.

SAME v. HART et al.

(No. 283.)

(Supreme Court of North Carolina. Nov. 2, 1921.)

1. Trusts ⇐191(2) — Declaration of trust held to contain power of sale.

Where title to land was taken in the name of one of two persons who both contributed toward the purchase price, the purchase being for the purpose of resale, and the grantee executed a declaration of trust in favor of the other, *held* that the declaration gave a power of sale to be exercised by the grantee.

2. Estoppel ⇐83(3)—When failure to assert rights, estops one stated.

Where a party, having or claiming a right, abandons it, or fails to assert it when he should, and induces another to believe it does not exist, or that it is abandoned, and, acting on such conduct, as it was intended he should, he is induced to do something whereby he will be prejudiced if the first party is permitted to recall what he has done, equity will protect the party thus misled, and will forbid the assertion of the former right.

3. Trusts ⇐191(3)—Property may be conveyed in trust for sale by trustee under duty to sell.

Property may be conveyed to a trustee in trust for sale, and it is not only the right of the trustee, but his duty, to sell if and when the terms of the power authorize it.

4. Trusts ⇐192—Trustee justified in selling if cestui que trust concurs in desiring it.

Where title to land was taken in the name of one of two persons, both of whom contributed to the purchase price, and the grantee executed a declaration of trust in favor of the other, the purpose of the purchase being to resell, and the grantee subsequently sold the property, even if the sale was not a strict performance of the trust it was justified where the other person, being the only other one having an interest, concurred with the trustee in desiring it.

5. Trusts ⇐61(3)—Equitable interest in land held surrendered.

Where title to land purchased for resale was taken in the name of one of two persons, both of whom contributed toward the cash payment, the grantee executing a mortgage for the balance, whatever equitable interest the other party to the venture had *held* surrendered by him when he failed to help carry the property and informed the title holder that he could do with the property as he saw fit.

6. Deeds ⇐93—To be construed to effectuate intention of parties.

Deeds and other writings are to be construed so as to effectuate the intention of the parties as ascertained from the language of the instrument.

7. Trusts ⇐17, 18(6)—Written trust to sell land held not within statute of frauds.

Where title to land purchased for resale was taken in the name of one of two persons who both contributed toward the purchase price, and the grantee executed a declaration of trust in favor of the other, reciting an intention to divide profits, and subsequently sold the property, the other not joining in the deed, *held* that the contract to sell and divide profits was not within the statute of frauds, and that a joinder in the deed was not necessary.

Appeal from Superior Court, New Hanover County; Kerr, Judge.

Action by Percy Wells and others against W. B. Crumpler, B. F. King, Jr., and others, and by the same plaintiffs against Godfrey Hart, B. F. King, Jr., and another. Cases consolidated, and from a judgment for plaintiffs, defendant B. F. King, Jr., appeals. No error.

This appeal is prosecuted by one of the defendants, B. F. King, Jr., from a judgment for plaintiffs in two cases, which were consolidated and tried together by consent of counsel and order of the court.

The two cases were brought by the above-named plaintiffs, one against W. B. Crumpler and Ira Scott, partners trading as Crumpler & Scott, and B. F. King, Jr., and D. R. Foster, and the other by the same plaintiffs against Godfrey Hart, D. R. Foster, and B. F. King, Jr.

The purpose of both actions was the same, and was to have the court declare that the plaintiffs were the owners and entitled to convey the property, which had been conveyed to them by the defendant D. R. Foster, freed from any trust or other claim of B. F. King, Jr., and to compel the defendants Crumpler & Scott and Godfrey Hart to accept a deed and pay the purchase price of that portion of the property purchased by each respectively, and which each had declined to take and pay for on account of an alleged claim by the defendant B. F. King, Jr.; or alternately to make the defendant D. R. Foster liable on his covenants.

To better understand the case it is necessary to make a short recital of the facts: D. R. Foster was engaged in the real estate business in Wilmington, and B. F. King, Jr., was working for him, and, at the instance of said King, and upon his assurance that he had already secured purchasers for the property, the said Foster purchased, on the 16th day of July, 1912, the tract of land, the title to which is in controversy, from A. D. Westsell and wife for the sum of \$28,000, of which \$6,000 was paid in cash—\$1,000 by B. F. King, Jr., and \$5,000 by D. R. Foster, who gave his note to the vendors for the sum of \$20,000, with interest, payable two years after date, secured by mortgage upon the

property for the deferred payments. At the same time D. R. Foster executed and had recorded in the office of the register of deeds of New Hanover county, the following paper writing:

"To B. F. King, Jr., or his assigns. This is to declare that I, D. R. Foster, hold in trust for B. F. King, Jr., or his assigns an undivided one-half interest in the property on South Front street, described in a deed to me from A. D. Wessell, Sr., and wife. We have purchased the property jointly at the price of \$26,000.00. I have executed a mortgage for \$20,000.00 thereon and have advanced \$5,000.00 in cash; King has advanced the balance of \$1,000.00. The property is to be sold by us, and after the above cash advances are repaid, the net profits shall be divided equally, loss and expense shall be borne equally.

"In the event of my death or inability, I hereby appoint B. F. King, Jr., or the assignee whom he shall appoint, to execute proper conveyance and otherwise carry out the trust.

"Witness my hand and seal this 16th day of July, 1912.

"D. R. Foster [Seal.]"

The debt secured by the mortgage on this property was not paid, and the land was advertised and sold by the mortgagee, Wessell, and bid off, and a deed taken for it, by Foster, who erroneously thought he thereby became the sole owner of the property, freed from any trust or obligation which might have been created by the above-quoted paper writing; but Foster at the same time offered to allow the said B. F. King, Jr., to retain his one-half interest in the profits on a resale if he would put up \$500 to help carry the loan, and this King at first promised, but found himself unable to do, and finally told Foster that he was unable to raise the money and would claim no further interest in the property, and that he could sell it or dispose of it as he saw fit.

The defendant Foster was unable to sell the property, and was compelled to carry it unaided and at considerable expense in the way of insurance, taxes, and repairs, until the rise in price which took place generally in 1918, and on the 14th day of May, 1918, sold and conveyed the property to the plaintiffs for the sum of \$30,000, which the verdict finds to be the best price he could obtain, and that the sale was bona fide.

Plaintiffs caused this property to be subdivided into lots, and put up the same and sold them by public auction in the year 1920, and the defendants W. B. Crumpler and Ira Scott became the purchasers of one portion of the property, and the defendant Godfrey Hart of another portion. After the sale by plaintiffs, King made claim to an interest in the property or the profits on these sales, arising out of the paper writing dated July 16, 1912; and Crumpler and Scott and Hart declined to accept deeds and pay the purchase money. Plaintiffs thereupon brought these suits as hereinabove referred to.

The answer of the defendants Crumpler & Scott set up the fact that they are willing to take the property, but that plaintiffs cannot convey a good and indefeasible title free from trusts, etc., because B. F. King, Jr., claims an interest therein; the defendant Godfrey Hart, in his answer, denies that plaintiffs had, and could convey, a good and indefeasible title in fee simple for the same reason; the defendant B. F. King, Jr., in his answer, claims that he was half owner of the property at the time that it was sold by plaintiffs to the defendants Crumpler & Scott and Godfrey Hart, but is willing to affirm the sale to them on condition that he is paid one-half the net profits of the purchase and sale of the property.

The cases were consolidated and tried together before a jury upon the issues set out in the record, and resulted in a finding that King had no interest, by way of trust or otherwise, in said property, and was not entitled to any profits upon a just accounting between him and the defendant D. R. Foster.

The issues as submitted to the jury, with the answers thereto, were as follows:

"(1) Did the defendant, B. F. King, Jr., assent to the sale of the Wessell property, by the defendant Foster? Ans. Yes.

"(2) Did the defendant Foster make a bona fide sale of the property for the best price which he could obtain? Ans. Yes.

"(3) What amount, if anything, is due from the defendant Foster to the defendant B. F. King, Jr., upon a fair and equitable accounting of the purchase and sale of the Wessell property? Ans. Nothing.

"(4) What amount, if anything, is due from the defendant B. F. King, Jr., to the defendant Foster upon a fair and equitable accounting of the purchase of the Wessell property? Ans. Nothing."

From this judgment the defendants Crumpler & Scott noted an appeal, as did also the defendant Godfrey Hart, but their appeals have been abandoned, and this appeal involves only the claim of B. F. King, Jr.

The defendants, B. F. King, Jr., and Crumpler & Scott and Godfrey Hart, insisted that the deed from Wessell and wife to D. R. Foster, dated in 1912, together with the declaration of D. R. Foster hereinbefore recited, constituted Foster a trustee for themselves (Crumpler & Scott and King), as beneficiaries, and this was freely admitted by the defendant Foster, and not controverted by the plaintiffs. But the defendant King insisted, through his counsel, that he is the equitable owner of a one-half interest in the property, and that his equitable estate, or interest in the property, could not be conveyed, terminated, or otherwise disposed of otherwise than by a formal deed of conveyance by him or by some act or conduct of his which would operate as an estoppel, and he

denied that there was any such thing, and that he still owned the said interest.

On the other hand, the defendant Foster contended, and a perusal of the record will show that the jury decided, that the property was purchased by Foster from Wessell at the instance of King, to be resold and the profits or losses divided equally. And this view of the case was concurred in by the plaintiffs and adopted by the court. So the whole controversy turns upon the simple point whether the interest of B. F. King, Jr., could be transferred, terminated, or disposed of by a deed from Foster, the grantee and trustee, to a purchaser by and with the assent of King, expressed by word or conduct, or whether King must join in the deed.

The assignments of error state, and restate variously and somewhat redundantly, the actual basis for a recovery on which B. F. King, Jr., relied in the court below, and which is clearly, and sufficiently expressed in the second, sixth, and seventh assignments of error, the seemingly unavoidable repetition being thought necessary to emphasize and clarify his main contention. Those are as follows:

"Second. That the court erred in allowing and permitting the plaintiffs to ask and have Mr. Foster to testify to what he (Foster) said was the exact contract and agreement he had with King regarding the handling and the sale of the property, the title to which is in dispute, as shown by the defendant's second exception, for the reason that it appears that the agreement was in writing under seal, signed and recorded, and that as a matter of law, after the said agreement was entered into, the defendant, B. F. King, Jr., could not convey his interest, or lose his rights in the property, or be cut off from his interest therein, by parol, or oral statement, or without a valuable consideration.

"Sixth. That the court erred in allowing the plaintiffs to ask the witness Foster, 'Now state to his honor and the jury what authority he gave you to sell, and his abandonment of the agreement, if any?' and have the witness answer the same, as shown by the defendant's eighth and ninth exceptions.

"Seventh. That the court erred in allowing and permitting the plaintiffs and the defendant Foster to offer any evidence of the witness Meredith, which in any way tended to cut off the interest of B. F. King, Jr., in the property by parol declaration, as shown by the defendant's tenth exception."

On the trial counsel for Foster and for the plaintiffs admitted that Foster did not relieve himself of the trust, as he at the time erroneously supposed that he did, by purchasing the property at the mortgage sale of Wessell; and they further admitted that by the sale of the property by Foster to the plaintiffs with the concurrence of King the latter was still entitled to one-half of the net profits made, and was obliged to pay one-half of the net loss, if there should be a loss. As said above, this view of the matter was

adopted by the presiding judge, and the case was tried on that theory. The jury found by the answer to the third issue that on a just accounting, after making proper deductions, there were no profits and Foster owed King nothing. Judgment upon the verdict, and the defendant B. F. King, Jr., having reserved exceptions, appealed to this court and assigned errors.

Herbert McClammy, of Wilmington, for plaintiffs.

E. K. Bryan and J. C. King, both of Wilmington, for appellant King.

Rountree & Carr, of Wilmington (Geo. Rountree, of Wilmington, of counsel), for appellee Foster.

WALKER, J. (after stating the facts as above). The decision of this appeal must turn largely upon the construction, or meaning, of the trust declared by D. R. Foster in the writing dated July 16, 1912. If D. R. Foster purchased the property in his own name for no other purpose than that of a resale by him and a division of the net proceeds of such sale between him and B. F. King, Jr., there can hardly be any doubt that the trial proceeded correctly in the court below, but the defendant King contends that by that instrument an equitable estate was vested in him as to an undivided one-half of the land, and that the sale thereof was to be made jointly by Foster and himself, and consequently that the statute of frauds applied, and that no valid sale, or transfer, of his half interest, or estate, in the land could be made without his joinder in the deed, or other written instrument of conveyance. We cannot concur entirely in this view. The title was validly in Foster, who bought at the Wessell sale, the deed having been made to him alone, with a declaration of trust, as contained in the writing of July 16, 1912. It appears therefrom that Foster paid \$5,000 on the purchase price of \$28,000 and King \$1,000, but the latter was to pay Foster \$500 more to help him carry the loan, for which consideration Foster agreed that King might still enjoy the right to share with him in the net profits realized by a resale of the land, according to their prior agreement. But King did not comply with his part of this offer to let him in, so that he might participate in the net profits gained upon a resale of the property, and there is ample evidence to support the finding that B. F. King, Jr., finding that he was unable to carry out his part of the bargain, voluntarily and deliberately waived and abandoned his right thus to share in the proceeds of a resale, the consideration of which was that Foster should assume, and was compelled to assume, and pay King's share of the purchase price, and was otherwise forced to assume the burdens and inconveniences which in law and in equity rested solely upon King. There can

be no question as to the sufficiency of the consideration, and King's claim might, perhaps, be otherwise met and overthrown by a resort to the principle of equitable estoppel. He should be thankful that he has been voluntarily let in by Foster at all to enjoy the fruits of the resale, instead of imputing bad motives or conduct to him. He has been treated considerably and even generously in the matter.

There seems to have been but one motive in the purchase of this property, which was to hold the same securely for resale, and, stripping the entire case of all irrelevant matter, it narrows itself down to the one pivotal thought in the mind of the defendant King, and that was, How much can I get out of it? King admits that the property was purchased for a resale, and admits that it was purchased for the purpose of making a quick return, for the evidence discloses a statement by him to the defendant Foster that he had the property as good as sold, or already sold, at least as to one half of it, with a good prospect for the sale of the other half, within 30 or 60 days. This was partly the consideration that moved Foster to buy, or to enter into the deal. When the title passed out of Wessell to Foster, and the sale was not made, as King had represented would be done, and King had surrendered all his right, Foster carried the burden, and, in order to protect himself, had to mortgage other property of his own to prevent the loss of the \$5,000 that he had paid on the first installment. Foster's and Meredith's evidence discloses what was done so that Foster might hold the property until the final sale.

[1] There is little room for contention against the existence of a power of sale, residing in Foster, to sell the land he had bought at the Wessell sale. It is implied from the very language of the instrument itself, if not expressly given, and this is demonstrably so, without calling in aid any of the parol evidence. *Counsel v. Averett*, 95 N. C. 131; *Maxwell v. Barringer*, 110 N. C. 76, 14 S. E. 516, 28 Am. St. Rep. 668. But even if there was no express power contained in the writing, it could be shown by parol, either that there was such a power, or it could be implied from King's conduct, creating an estoppel upon him.

[2] We cannot imagine a case where the doctrine of equitable estoppel could more justly have been applied than to this one. Where a party who has or claims a right either openly and unequivocally abandons it or does not assert it when he should do so, and induces another by his silence or conduct to believe that the right does not exist, or that he makes no claim to it if he has it, and abandons and surrenders it, and the other party acts upon such conduct as it was intended that he should do, and is induced thereby to do something by which he will be

prejudiced if the party who so acted is permitted to recall what he has done, equity steps in and protects the party thus misled to his prejudice, and will forbid the other to speak and assert his former right, when every principle of good faith and fair dealing requires, and even demands, that he should be silent. *Faw v. Whittington*, 72 N. C. at page 324, where Justice Bynum says for the court:

"Such a renunciation, however, would seem to operate, not as passing an estate or interest in land, which cannot be done strictly under the act without writing, but to operate as an equitable estoppel on the vendee to assert a claim to specific performance, where his conduct has misled the vendor intentionally."

Let us a little more definitely state the real pith of the controversy, and incidentally the reasons advanced in support of B. F. King's position. It would seem that the pivotal question upon which this case must turn and be decided is stated in the latter part of the second assignment of error, appearing in our statement of the case, which is as follows:

"After the said agreement was entered into, the defendant B. F. King, Jr., could not convey his interest therein by parol, or oral statement, and without a valuable consideration."

This embraces fully all that can be said in his behalf, and his learned counsel have lost nothing of its strength by condensing it in the clear-cut paragraph of the assignment above quoted. If the court was correct in its rulings upon this question, then all of its rulings on testimony must necessarily be sound, because the testimony was offered and received to explain the circumstances of the original purchase and throw light upon the meaning of the declaration of trust, and, in addition to that, was offered and accepted for the purpose of showing that the defendant King had surrendered and abandoned all interest in the property and consented to its sale by Foster.

We will defer, for the moment, further discussion of the statute of frauds in its relation to this case. So the question comes back to this: What was the nature of the trust declared by Foster in favor of King, what was its purpose and how could it be executed?

As stated above, the defendant King contends that he could not divest himself of whatever interest he had in the property or its proceeds, save by a deed of conveyance. Is this so? The defendant Foster held the property upon trust to sell it and divide the proceeds equally between himself and King. It was not a naked trust, but a trust coupled with an express power to sell and an interest of his own; and, although it is admitted that the sale could not be made without the assent of King, expressed or implied, that as-

sent might be expressed orally or implied by conduct. As a matter of fact, it is a common transaction, and business men naturally assume that when property is conveyed to one person, on speculation, for resale for the benefit of himself and another, both can orally assent to the sale. Indeed this is the primary meaning of the words of the declaration:

"The property is to be sold by us, and after the above cash advances are repaid, the net profits shall be divided equally, loss and expense shall be borne equally."

This language clearly does not mean that King was to join in the deed with Foster, because Foster alone holds the legal title, and it was so intended. The contention of Foster then is that the sale to the plaintiff conveyed a good title, free from all equities, and whatever rights the defendant King had were transferred to the proceeds; and this for the following reasons:

First. The defendant Foster held the property in trust to be sold by himself and King, and when the sale was made by the consent or concurrence of King this was a strict performance of the trust and an execution of the power of sale therein contained.

Second. That even if the sale to the plaintiffs was a breach of trust—that is, was not a strict compliance with the declaration of trust by Foster—yet the assent, however, testified to by King, ratifies the breach and makes the transfer valid.

Third. That even if the trust was not a trust for sale, but an equitable estate in the property, which could not be transferred by parol, yet whatever interest King had might have been abandoned by him without a deed.

We will consider briefly each of these propositions because they seem to us to be almost self-evident, and if either one of them is sound the sale to the plaintiffs was valid, and the only claim arising from said sale in favor of the defendant King is to share whatever net profits or losses there may have been arising out of the original purchase for \$26,000 and the subsequent sale to plaintiffs for \$30,000 and the latter conclusion seems to be conceded by King.

[3] 1. It is elementary that property may be conveyed to a trustee in trust for sale, and that it is not only the right of the trustee, but his duty, to sell if and when the terms of the power authorize it. 19 Am. St. Rep. note, page 271, at bottom; 39 Cyc. 335; 28 Ency. of Law, p. 996; Flint's *Lewin on Trusts*, star page 424; In re *Bedingfeld & Herring's Contract* (1893), 2 Ch. 332; *Eakle v. Ingram*, 100 Am. St. Rep. note p. 102.

In this case, as we have said and reiterated, it is clear to our minds that the purpose was for Foster to sell the property whenever he and King found a purchaser, and indeed it was understood in the begin-

ning that King had already found a purchaser, and the sale to Foster was merely a means or process of transferring the property from the original vendor Wessell to the purchaser, by and with the consent of both Foster and King, and dividing the profits. This consent, the jury decided, after full hearing, King gave.

[4] 2. But even if the sale by Foster to the plaintiffs was not a strict performance of the trust and an execution of the power therein contained, he was justified in making the sale if the only other person having an interest in the property concurred with him in desiring it.

This proposition is clearly stated by Mr. Maitland, who is generally regarded as one of the great law-writers of the last quarter century, in his book on "Equity" (Ed. 1909), at page 106. The doctrine is well stated in *Butterfield v. Cowing*, 112 N. Y. 486, 20 N. E. 369, by Judge Danforth, as follows:

"The strength of the plaintiff's case is in the doctrine which governs the relation of trustee and cestui que trust. Assuming, as, in view of our former decision, we must, that there would have been responsibility on the part of the trustee in omitting to follow the terms of the mortgage by which he undertook to be bound, and that his dealing with the other defendant was a violation of those terms, it was possible for the plaintiff to absolve both the trustee and the other defendant from liability, either by acquiescing in the consummation of that transaction or by a positive adoption of it. Here there was both. * * * It is quite clear that no cestui que trust can allege that to be a breach of trust which has been done under his own sanction, whether by previous consent or subsequent ratification. The general rule is that, either concurrence in the act, or acquiescence without original concurrence, will release the trustees. And there are no circumstances to make the plaintiff's case an exception. Whatever the trustee did which might otherwise have been found the subject of just complaint was done by the assent and sanction of the plaintiff."

See, also, *Pomeroy, Equity Jurisprudence*, § 1083, last sentence. The jury, as we have before stated, have found that King authorized or concurred in Foster's act.

[5] 3. Whatever equitable interest King had in the property was given up, surrendered or abandoned by him when he refused or failed to help carry the property longer, and informed Foster that he could do nothing further, and that he could go on and sell the property, as testified by Foster and Meredith and found by the jury.

In *Gorrell v. Alspaugh*, 120 N. C. 362, 27 S. E. 85, Alspaugh sold land to Hine, and the latter then executed a bond for title to Alspaugh for the land, upon payment of certain loans evidenced by notes. Alspaugh could not pay these notes, and surrendered them to Hine. Subsequently Alspaugh's creditors sued him and attempted to reach

this property. It was claimed that Alspaugh had no interest in it, but the property belonged to Hine. It was held that:

"While an equitable interest in land may not be transferred by parol, it may be abandoned or released to the holder of the legal title by matter in pais, provided such intention is clearly shown; hence the settlement made in 1894 between H. and A., being in good faith, extinguished A.'s equitable right, and vested in H. a fee-simple title."

In *Lewis v. Gay*, 151 N. C. 168, 170, 65 S. E. 907, 908, the court says: "Parties . . . may by parol rescind, or by matter in pais abandon" rights in land. See, also, *May v. Getty*, 140 N. C. 310, 53 S. E. 75; *Burns v. McFarland*, 146 N. C. 382, 59 S. E. 1011; *Matthews v. Thompson*, 186 Mass. 14, 71 N. E. 93, 66 L. R. A. 421, 104 Am. St. Rep. 550; *Miller v. Pierce*, 104 N. C. 389, 10 S. E. 554; and *Faw v. Whittington*, 72 N. C. 321, where Justice Bynum explains this principle with great clearness and accuracy.

There was ample consideration, as we have above shown, for the abandonment or surrender of this contract or interest in the property by King. The situation was this: King had induced Foster to purchase this property for the purpose of being resold, and, relying upon King, Foster had done so; they were unable to sell, and it became an onerous burden to carry the property, and at the end of two years Wessell was pressing for the payment of his mortgage, and, although repeatedly requested, King would do nothing to help Foster. Wessell agreed, however, that if they would raise \$4,000 he would not foreclose, and Foster told King that if he would raise \$500 of this amount he would raise the balance, and they could carry the loan on the property until better times came. This King failed to do, and told Foster that he could do nothing further and to let it go. Then it was foreclosed, and Foster became the purchaser, and himself raised \$4,000 and gave a mortgage for \$18,000.

Foster again offered to recognize the trust and to let King have his original share in the profits, in the event anything was made on the sale of the land, if he would raise \$500, within six months, and this King thought he could do and promised to do. Foster, thinking it was necessary to put this agreement on the records, had it, by the consent of King, written on the margin of the records, and King promised to sign it, but failed to do so. Foster continued to press King to put up the \$500 to enable him to carry this loan from Wessell, which was secured by a mortgage on the property, and King kept promising, but finally told Foster that he could not raise any money to help, and that he could go on and dispose of the property as he saw fit, and that he hoped he would make something out of it. (This is

shown by Foster's testimony, to be found in the record).

In this connection, King also told Meredith, who was then working with Foster, that he (King), who had been and for some time theretofore ceased working with Foster, had left with Foster a souvenir in the shape of this purchase. Meredith also says that after King left Foster he often met King on the street, and he would ask if the Wessell property had been sold, and when he answered no, he would say, "I don't see why you don't sell it," and I suggested that he try to sell it himself, to which he replied something like this, that he had left a souvenir with Foster so that he could remember his days with him while he was there. King stated that he left a souvenir with Foster that would stay with him. King told me that he could not raise anything, and that he was out of it. (This appears by Meredith's testimony, in the record.) Foster was compelled to assume the burden and carry the property upon his own shoulders because King not only would not help, but left the country.

If we are correct in the foregoing view (and we undoubtedly believe it to be the true one), assignments of error, which challenge the correctness of the court's rulings upon evidence, both in admitting and rejecting it, are unsound because the evidence was offered and received merely for the purpose of showing what the actual situation was, and what the conduct of all the parties to it was. The law permits some latitude in such cases.

This includes all assignments of error down to the tenth. The tenth assignment is unsound for the same reason, as is also the eleventh.

The twelfth assignment cannot be sustained, because the proposition therein contained was admitted by the counsel for Foster and plaintiffs and adopted by the court, who charged the jury that Foster had not divested himself of the trust by his purchase at the foreclosure sale.

The thirteenth and fourteenth assignments were given in the general charge, so far as they were proper.

The fifteenth, sixteenth, and seventeenth assignments of error are untenable for the reasons we have already stated.

So far as the eighteenth assignment is concerned, it lays down a rule of law correctly, but it is inapplicable to the case. We believe, and the jury so found, that Foster and King did both assent to the sale by Foster to the plaintiffs.

As to the nineteenth assignment of error, the general charge of the court to the jury contained all on this subject to which the defendant King was entitled, because the court charged that the purchase by Foster at the foreclosure sale did not divest King

of his rights, and that he still had the right to share equally in whatever profits were made upon the sale, but was also under obligation to pay one-half of the expenses incurred in the maintenance of the property, and that the jury found upon sufficient testimony, in answer to the third issue, that there was nothing due to King under a just accounting because the maintenance, upkeep, taxes, etc., of the property exceeded the rents which could be, and were, obtained by Foster by more than \$2,000.

As to the twentieth assignment of error, in the statement of the record, it is manifest that the court could not have given this charge.

The twenty-first assignment of error. This assignment is a mere repetition of those discussed in the earlier portion of this opinion, and will not again be considered. The third paragraph of that assignment cannot be established as a matter of fact. We cannot agree that the court did what is stated in this assignment, but, on the contrary, the learned judge permitted the jury to find, not only from King's own language, but from his conduct, that he had abandoned whatever equity he might have had. The remaining part of this assignment is without merit, in law and in fact.

The twenty-second assignment of error is but a repetition of the same proposition, already fully discussed.

[6] We promised to revert to the question as to the statute of frauds. In this case there was no contract to convey land, or any interest therein, as between Foster and King, the precise agreement was (excluding all other questions which justify Foster's action) that the land should be sold to some third person, and the net proceeds divided. Foster had the legal title, which he held for the purpose of executing the trust imposed upon it by the written stipulation. It is spoken of therein as an undivided one-half interest in the property held in trust by Foster for King, and that "the property is to be sold by us" (them), that is, Foster and King; but it all plainly means, when the context is considered, that the property was bought at the sale on joint account, and solely for the purpose recited therein, which is, that it should be resold to make what profit there was in the venture, and sold too by Foster the trustee. It is again recited in the instrument that Foster had mortgaged the land, in his own name as mortgagor, for \$20,000, and advanced \$5,000 in cash, and King the balance of \$1,000, and that they were to divide equally the net profits of a resale. There was no objection by King to Foster's mortgaging the property in his own name. The entire instrument, when taken and considered within its four corners, shows conclusively what the parties meant, and that their only intention was that Foster should

hold the land in trust to carry out their design of selling the land for the profit that was in it, and there was no thought that Foster should even convey one-half of the estate to King, but that the latter should have one-half of the net profits, "loss and expense to be borne equally." Foster "held it in trust" for the consummation of the joint venture and for no other purpose, and no one of the interested persons was justified in thinking that King had any other right in the transaction. Deeds and other writings are to be construed so as to effectuate the intentions of the parties, as that is ascertained from the language of the instrument. *Gudger v. White*, 141 N. C. 507, 54 S. E. 386; *Triplett v. Williams*, 149 N. C. 394, 63 S. E. 79, 24 L. R. A. (N. S.) 514; *Kea v. Robeson*, 39 N. C. 427; and especially *Id.*, 40 N. C. 373. In *Gudger v. White*, supra, it was held, referring to what had been said in prior cases:

"Courts are always desirous of giving effect to instruments according to the intention of the parties, so far as the law will allow. It is so just and reasonable that it should be so, that it has long grown into a maxim that favorable constructions are put on deeds. * * * Words shall always operate according to the intention of the parties, if by law they may, and, if they cannot operate in one form, they shall operate in that which by law shall effectuate the intention. This is the more just and rational mode of expounding a deed, for, if the intention cannot be ascertained, the rigorous rule is resorted to, from the necessity of taking the deed most strongly against the grantor"—citing *Kea v. Robeson*, supra; *Rowland v. Rowland*, 93 N. C. 214; *Campbell v. McArthur*, 9 N. C. 38, 11 Am. Dec. 738; *Ritter v. Barrett*, 20 N. C. (Anno.) 286.

And Justice Ashe said for the court, in *Rowland v. Rowland*, supra, 93 N. C. at page 218:

"*Intentio inservire, debet legibus, non legis intentioni*," and as far as it may stand with the rule of law it is honorable for all judges to judge according to the intentions of the parties, and so they ought to do (1 Coke, p. 19), and Justice Blackstone in the rules of interpretation laid down by him (vol. 2, p. 286), says: "That the construction be made upon the entire deed, and not merely upon the disjointed parts of it. *Nam ex antecedentibus, et consequentibus fit optima interpretatio*, and therefore that every part of it (if possible) be made to take effect, and no word but what may operate in some shape or other. *Nam verba debent intelligi cum effectæ et res magis valeat quam pareat*." And in *Jackson v. Blodgett*, 16 Johnson, 172, the same rule is announced, "That the construction must be made on the entire instrument, after looking, as the phrase is, at the four corners of it." See, also, 2 Smith's Leading Cases, 466, where numerous authorities are cited upon the subject."

[7] So that upon this construction of the written trust, it is clear, as a conclusion,

that the case, so far as respects the statute of frauds, falls within the principle of *Michael v. Foil*, 100 N. C. 178, at page 188, 6 S. E. 264, at page 268 (6 Am. St. Rep. 577), where a similar agreement was made, and it was held that a contract to sell land and divide the profits was not within the statute. *Manning v. Jones*, 44 N. C. 368. Justice Davis says in *Michael v. Foil*, supra:

"In *Trowbridge v. Wetherbee*, 11 Allen's Mass. Rep. 361, it is said that a parol promise to pay to another a portion of the profits made by a promisor on the purchase and sale of real estate is not within the statute of frauds, and may be proved by parol. See, also, *Sherrill v. Hagan*, 92 N. C. 345."

We have, at this term, in *Newby and Weeks v. A. C. Realty Co.*, 182 N. C. —, 182 S. E. 323, discussed fully this question, as to the application of the statute of frauds to agreements of this kind, and we there held that the statute had no application whatever. Our language was this:

"The parties contracted with reference to the profits to be realized upon a resale of the land, and not with the view of acquiring title to any part of the land. They already had the title, and the land itself was to be held in trust, for the purpose of realizing the profits by another sale of it."

No further comment is required.

That King expected Foster to sell the land by himself, and without the joinder of Foster, can well be inferred from the last paragraph but one of the written agreement dated July 16, 1912, where Foster designates King to act if Foster should die before consummating the matter, or bringing it to a final conclusion. Besides, it appears, as we have already stated in a former part of this opinion, that King was willing to affirm the sale if he is allowed one-half of the net proceeds, and, whether he so expressly agreed or not, his words and conduct plainly demonstrate that it was all he expected to be done. There is no way of looking at the case that does not disclose that in any event the sale was to be valid, even if he had a legal or equitable estate in the land, and was legally entitled to join in the sale of it. Judged by his own conduct throughout the course of his dealing with Foster, as to the land and its sale, his case is cut up by the roots.

The defendant Foster agreed to let King come in and share in the net profits of sale, but the jury have found that upon a fair and just accounting, when he is charged with his part of the costs and expenses and what he agreed to contribute, there will be nothing left for him. Foster was generous towards him in agreeing to account to him, when he had clearly given up and abandoned his former right, but, however this may be, the jury have settled the matter against him

after he has had a fair opportunity to be heard, and has been fully heard upon all questions involved.

There is no reason for disturbing the verdict or judgment.

No error.

(182 N. C. 339)

LEFKOWITZ v. SILVER et al. (No. 361.)

(Supreme Court of North Carolina. Nov. 2, 1921.)

1. Trusts §111—Whether defendant purchased property for himself after agreeing with plaintiff that land should be bought for their joint benefit held for the jury.

In action to establish a parol trust, whether defendant secretly bought the property for himself and took deed to himself and his mother after making agreement with plaintiff that they should buy the land together for their joint benefit, and each contribute one-half of the purchase money, and while their agent was negotiating for the purchase, held for the jury.

2. Trusts §99—Purchaser of land in own name after making agreement with another that land be purchased for their joint benefit held land subject to parol trust in favor of the other.

Where plaintiff and defendant agreed that land be bought for their joint benefit, and that each contribute one-half of the purchase money, and where defendant, while their agent was negotiating for the purchase pursuant to such agreement, secretly bought the property for himself and took deed to himself and his mother, the defendant and his mother held the land subject to an enforceable parol trust in favor of plaintiff.

3. Trusts §91—"Trust ex maleficio" defined.

A trust ex maleficio is a trust growing out of fraud, misdoing, or tort, and is a constructive trust arising entirely by operation of law without reference to any actual or supposed intention of creating a trust, and often directly contrary to such intention.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Trust Ex Maleficio.]

4. Trusts §110—Evidence to establish parol trust must be strong, cogent, and convincing.

The evidence to establish a parol trust must be strong, cogent, and convincing, a mere preponderance being insufficient.

Appeal from Superior Court, Forsyth County; Webb, Judge.

Action by Abe Lefkowitz against Milton Silver and another. Judgment for plaintiff, and defendants appeal. New trial.

This action, in the nature of a suit in equity, was brought by the plaintiff to set up a parol trust in an undivided one-half of the tract of land described in the pleadings,

and in order to pass upon the motion of the defendants to nonsuit the plaintiff, it will be advisable to state the issues and the contentions of the parties, which will be done almost in their own language, and at least substantially so. There was evidence, we think, to support the respective claims of the parties. The verdict was as follows:

(1) Did the defendant, M. Silver, verbally agree with the plaintiff that they would purchase and hold jointly the premises described in the complaint at the price of \$40,000? Ans. Yes.

(2) Did the plaintiff, Lefkowitz, by any words or act on his part, or failure on his part to comply with the terms of his contract, waive or abandon his rights under the contract, if you find there was such a contract? Ans. No.

(3) If so, did the defendant, M. Silver, in violation of that agreement, purchase said premises and take title to himself and to his codefendant? Ans. Yes.

(4) Was the plaintiff ready, able, and willing to pay his part of the purchase price? Ans. Yes.

(5) Did the plaintiff demand of the defendant, M. Silver, that he convey, or cause to be conveyed to him, the one-half undivided interest in said premises? Ans. Yes.

(6) Did the defendant, M. Silver, acquire, and does he now hold title to one-half undivided interest in the premises described in the complaint, as a trustee for plaintiff as alleged in the complaint? Ans. Yes. (The court answered Yes.)

1. Plaintiff contended that the verdict of the jury establishes that the plaintiff and the defendants verbally agreed that they would purchase and hold jointly the premises described in the complaint at the price of \$40,000; that the plaintiff did not waive or abandon his rights under that agreement by any words or acts on his part, or by his failure to comply with the terms of the contract; that the defendant, in violation of the agreement, purchased the premises, took title to himself and to his codefendant; that the plaintiff made demand on the defendant to convey to him, in accordance with the original agreement, a one-half undivided interest in the premises; and that the plaintiff was ready, able, and willing at all times to pay his part of the purchase price. Upon the foregoing findings of fact by the jury, the court, as a matter of law, by answering the sixth issue, adjudged that the defendant acquired and held title to a one-half undivided interest in the premises described in the complaint as a trustee for plaintiff. In support of the allegations of the complaint, and as a basis of the foregoing findings of fact by the jury, the plaintiff offered evidence showing that the defendant, a resident of High Point, came to the plaintiff's place of business in Winston-Salem, seeking a business location in that city. After discussing the matter generally, and in answer to defendant's inquiry as to whether the plaintiff

knew of a piece of property in Winston-Salem that could be bought, the plaintiff told the defendant that he thought the property described in the complaint could be bought at \$40,000. As a result of this conversation, the defendant proposed that they buy it together—the property belonging to Mr. Harris, of Baltimore. Whereupon, the plaintiff and defendant went to the office of Mr. Fletcher and employed him to negotiate the purchase with Mr. Harris. This visit to Mr. Fletcher's office was on September 18th, and that afternoon Fletcher called in Mr. Hurdle, of the Hurdle Loan & Insurance Company, and in the presence of Mr. Hurdle, Mr. Fletcher dictated a letter to Mr. Harris, which will be found in the record, and had Mr. Hurdle to sign it. A reply to this letter was received from Mr. Harris in two or three days, which was shown to Fletcher and by him communicated to Lefkowitz. Another letter was written under similar conditions on September 22d, and Harris' reply to that letter was shown to Fletcher. While these negotiations were going on, the defendant, through his brother, who was in Baltimore, opened up direct negotiations with Harris, and on the 22d day of September, 1919, entered into a contract of purchase for the land in behalf of himself and his mother, which contract of purchase was later followed by a deed from Harris. Claiming that under the circumstances the defendant could not, without a breach of confidence and his agreement with the plaintiff, purchase the property for himself, plaintiff brought this suit, seeking to have the defendant declared a trustee to the extent of a one-half undivided interest and a conveyance from the defendant to the plaintiff for that interest in the land. Silver came to Lefkowitz, seeking information as to where he could buy a store in Winston-Salem. Lefkowitz informed him that he knew of such a store, and that he desired to become associated with Silver in his purchase. Upon Silver consenting to this, Lefkowitz disclosed to him the property in question. It was agreed that, if the property could be bought for \$40,000, or less, that a joint purchase of it should be made. The parties went to Mr. Fletcher and arranged with him to negotiate with the owner for the property upon the terms just stated. While these negotiations were under way, Silver buys the property for himself. Silver secured the information which enabled him to make the purchase by agreeing with Lefkowitz that he should become a joint owner.

2. The defendants' version of the case was, and they so contend, that the defendant Silver was a resident of High Point; he called on the plaintiff, Lefkowitz, in Winston-Salem the latter part of August, 1919, and asked him if he knew of a store for rent. The plaintiff suggested renting the Winston

Clothing Company's building, but the rent the defendant would have had to pay was considered too high. About the first week in September following, the defendant returned to Winston-Salem and again saw the plaintiff; he suggested to plaintiff that the best thing to do would be to buy the Winston Clothing Company's place, but that he could not do so alone, and suggested that they buy it together. Defendant asked plaintiff where they could get information about the building, and plaintiff suggested going to see Mr. J. H. Fletcher. They went together to see Mr. Fletcher, and secured from him the name of the owner, the size of the lot, and of the building, and such other information as Mr. Fletcher could give. Upon leaving Mr. Fletcher's office, defendant asked plaintiff if he meant business, and, if he did, that each would put up \$500 to pay cost of negotiating the trade, and they would get some one to go to Baltimore to see if they could buy the property. The plaintiff replied, according to the contention of the defendant, that he was not able to buy the building, and the plaintiff and defendant had no further transactions in regard to the purchase. Two days later, the defendant's brother went to a hospital at Baltimore, and the defendant had him to get in touch with the owner. After several interchanges of messages, terms were agreed to, and on September 22, 1919, the defendant went to Baltimore and bought the building for himself and mother at the price of \$40,000; but he concealed the fact from Lefkowitz.

The plaintiff contends, however, that no suggestion was made to him by the defendant to put up any money to negotiate the trade with the owner, and that he did not waive any of his rights to become the purchaser with the plaintiff under the original agreement.

The court charged the jury as follows:

"The first issue submitted for your consideration is this: Did the defendant, M. Silver, verbally agree with the plaintiff that they could purchase and hold jointly the premises described in the complaint at the price of \$40,000? How do you find that issue to be? The burden of that issue is on the plaintiff to satisfy you, by the greater weight of the evidence or by the preponderance of the evidence, that such an agreement was made by and between the plaintiff and defendant, and if the plaintiff has satisfied you by the greater weight of the evidence that such an agreement was made by and between the plaintiff and defendant—that is, that the plaintiff and defendant agreed between themselves that they would purchase the property in controversy, that they should be joint owners of it, that each one was to pay half of the purchase price and it was agreed between them that the deed should be made to them as tenants in common, made to both of them—if plaintiff has satisfied you by the greater weight of the evidence that such

a contract and agreement was made, though verbally, it would be your duty to answer the first issue 'Yes.'"

Judgment for plaintiff, and defendants appealed.

Carter Dalton, of High Point, Swink & Hutchins and O. O. Eford, all of Winston-Salem, for appellants.

Hastings & Whicker, Holton & Holton, and Manly, Hendren & Womble, all of Winston-Salem, for appellee.

WALKER, J. (after stating the facts as above). [1-2] The substance of the plaintiff's contention is that there was an agreement between him and Silver that they should buy the land together, for their joint benefit, each contributing one-half of the purchase money, the deed for the land to be made to them as tenants in common, or each to own an undivided one-half thereof, and that the defendant Milton Silver thwarted their plan, and the consummation of their purpose, while Fletcher, as their agent, was negotiating for the purchase, by circumventing Fletcher and the plaintiff and buying the property for himself, taking the deed from Harris to himself and his mother in equal moieties. Silver did not notify plaintiff of what he intended to do, and afterwards did not, but acted in that respect secretly and clandestinely, with a view of concealing his actions and enabling him thereby to secure the legal title before plaintiff was aware of what he was doing, or had done. If the plaintiff can establish these facts, and there are other pertinent ones of which there was evidence, he is entitled to go to the jury upon the allegation of his complaint as to the trust. Whether there was such fraud and circumvention, or evil practice on the part of Silver, as would constitute him a trustee ex malificio as to an undivided one-half of the land for the plaintiff, or not, we will discuss later in this opinion, as there is evidence of a parol trust created before the transmutation of the possession, or the conveyance of the legal title, to Silver and his mother, which will carry the case to the jury. *Sykes v. Boone*, 132 N. C. 199-202, 43 S. E. 645, 95 Am. St. Rep. 619. Why do not the facts thus appearing and found create a parol trust in favor of the plaintiff which is enforceable in a court of equity? We think they did. It is familiar learning that a trust may be created in any one of four modes:

(1) By transmission of the legal estate, when a single declaration will raise the use or trust.

(2) By a contract based upon valuable consideration, to stand seized to the use or in trust for another.

(3) By covenant to stand seized to the use of or in trust for another upon good consideration.

(4) When the court by its decree converts

a party into a trustee on the ground of fraud. *Wood v. Cherry*, 73 N. C. 110.

With reference to this classification by Chief Justice Pearson, we held in *Sykes v. Boone*, supra:

"The trust in this case comes within the first class, as a declaration of trust was made at the time of the execution of the deed and the conveyance of the legal estate. A trust when so declared is not within the state of frauds. * * * Nor does it require a consideration to support it. If the declaration is made at or before the legal estate passes, it will be valid even in favor of a mere volunteer"—citing *Blackburn v. Blackburn*, 109 N. C. 488, 13 S. E. 937; *Pittman v. Pittman*, 107 N. C. 159, 12 S. E. 61, 11 L. R. A. 456.

In the *Blackburn Case*, it was held:

"2. The grantor, before the delivery of a deed which he had signed conveying a tract of land to another, made, under seal, this indorsement: 'I, the said E. B., do hereby certify that S. B., a daughter of said E. B., doth hold a lifetime possession in the said deed.' Held, to amount to a declaration of a trust in favor of the said S. B., and that the grantee took the title subject thereto.

"3. An oral declaration of a trust, made contemporaneously with the transmission of the title, may be established, even without a consideration. No particular form of words is necessary."

Justice Shepherd says substantially in the opinion, and referring to *Pittman v. Pittman*, supra, as deciding the same thing:

"We think however (without passing upon the question whether the language used can be construed into a covenant to stand seized to uses) that the judgment of his honor may be sustained on the ground that the indorsement, made before or at the time of the delivery, amounted to a declaration of trust, to wit, that the grantee should hold the land for the use of the said Sarah for life. Even without consideration, an oral declaration of trust in favor of a third person, made contemporaneously with the transmission of the legal title will, when established by competent testimony, be recognized and enforced in a court of equity. *Pittman v. Pittman*, 107 N. C. 159.

"If this is so, a fortiori will the court give effect to such a contemporaneous declaration when made in writing under seal and for a good consideration. No particular form of words is necessary to establish such a trust. The intent is what the courts look to," citing *Fonblanque on Equity*, 36, note 3; *Vesey, Jr. 9*; *Bispham on Equity*, 98."

He then adds:

"The language in our case is very similar to that used in *Fisher v. Fields*, 10 Johns. 494, which was held to be sufficient, and, indeed, upon looking over the many cases in the reports, there can be no doubt upon the question. The grantee, then, taking the title accompanied with this contemporaneous declaration, must be declared seized of the land in trust for Sarah Blackburn for the term of her natural life."

It will be observed that the very able justice (who was profoundly learned both in the principles of equity, as well as in those of the common law) states that an oral declaration, under our statute of frauds, which does not include trusts, as does the English statute, is just as valid, and enforceable as one that it written, so that those cases are directly applicable here, and they may also be relied on as meeting fully another objection of the defendant that there was no consideration for the agreement upon which the trust is founded.

Justice Shepherd, who also spoke for the court in *Pittman v. Pittman*, supra, said in substance in that well-considered case:

"Trusts and uses were raised in the same manner, and if a feoffment was made without consideration, a use resulted to the feoffor, unless the use or trust was declared at the time of the conveyance. Now, it must be observed that no consideration was necessary to a feoffment. The conveyance itself raised the use and separated it from the legal estate. The use so raised would, however, as we have said, in the absence of a consideration, result to the feoffor, unless declared at [or before], the time of the feoffment, and this declaration might be voluntarily made by parol, either in favor of the feoffee or of a third person. But there was a great difference, in this respect, between a conveyance which operated by transmuting the possession, and the covenant to stand seized, which had no operation but by the creation of a new use; and, as this was raised by equity, and equity never acts without a consideration, [one] was always necessary to the transfer of the interest by this conveyance; whereas, in the case of a feoffment or fine, the use arises upon the conveyance itself. * * * It seems, therefore, that at common law, only the solemn conveyance, by livery or record, could raise the use by its own virtue, and dispense with the deed declaring it, as well as the consideration for raising it. *Roberts on Fraud*, 92. It appears, then, that at common law no use or trust can be raised in lands without a consideration, except in the single instance of a conveyance operating by transmutation of possession, the character of the conveyance alone being sufficient to raise the use, and to dispense with the necessity for a consideration."

There are numerous cases approving and affirming those we have cited.

The same justice in the *Pittman Case*, considers very fully the effect upon parol trusts in this state produced by our failure, or refusal, to adopt the seventh section of the English statute of frauds, and he argues on the assumption that the writings in that case contained no evidence of a declaration of trust contemporaneous with the transmission of the legal title, or of any other antecedent obligation. He then states that we are confronted with the interesting question whether the legal owner of land can be divested of his property by a simple voluntary parol declaration that he holds it in

trust for another (which, of course, means after the legal title has vested in him). The seventh section of the statute of 29 Charles II, requiring that "all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments shall be manifested and proved by some writing signed by the party," etc., has been very generally adopted in the United States, and the doctrine of the declaration of express trusts, as laid down by the various text-writers, is based almost entirely upon decisions of the courts since the enactment of the said statute. As the above provision is not embraced in our statute of frauds, it therefore becomes necessary that we should inquire into the manner in which express voluntary trusts in land could be created at common law. *Foy v. Foy*, 3 N. C. 131. Doubts were at one time entertained whether trusts could be created by parol, but it is well established that this could be done at common law, both as to real and personal property. A trust in reality, like a use, was, in technical language, averable; that is, could be created by word of mouth. The better opinion is, however, that this is only true of those cases in which the legal estate could be created by feoffment, where, of course, no writing was necessary. But where a deed was requisite for the conveyance of the legal estate (as in covenant to stand seized to uses), these uses and trusts were not averable, but could be created only in the same manner as legal estates. *Bispham's Pr. of Equity*, 95; *Hill on Trustees*, 86; *Gilbert on Uses*, 270. We must not overlook the fact that now, and for a long time past, registration operates in lieu of livery of seizin. *Pell's Revisal*, § 979, notes and cases.

The cases we have cited (*Sykes v. Boone* and others) as to parol trusts have since been specially approved by this court. *Avery v. Stewart*, 136 N. C. 426, 48 S. E. 775, 68 L. R. A. 776; *Gaylord v. Gaylord*, 150 N. C. 222, 63 S. E. 1028; *Harrell v. Hagen*, 150 N. C. 242, 63 S. E. 952, and other cases, some of them being cited in *Avery v. Stewart*, supra, 136 N. C. at pages 439-441, 48 S. E. 775, 68 L. R. A. 776. See, also, 39 *Oyc.* pp. 82-85, and notes where the cases in this and other jurisdictions are collected. Justice *Avery* said in *Cobb v. Edwards*, 117 N. C. 245, at page 251, 23 S. E. 241, 243:

"It is not material whether the proof in this case does or does not come up to the strict requirement in that class of cases [just considered], since a different rule is applicable where the plaintiff simply seeks by evidence of a previous or contemporaneous agreement to engraft upon the deed of a purchaser at a judicial sale a trust to hold the legal estate for others who are to repay the purchase money advanced by him. In such cases the proof of an agreement existing at the time of the sale that the purchaser was to buy for the benefit of the claimants must be strong, clear, and

convincing, and must be supported by evidence equally strong of facts or circumstances inconsistent with a purpose on the part of the purchaser to hold the land for himself, but the latter purpose may be manifested by conduct subsequent to the sale. As to the quantum of proof required, the rule is the same as where the equity grows out of furnishing the purchase-money to another who takes title to himself, though, as already stated [and as this forms a resulting trust], no agreement need be shown in the latter class of cases," citing *Williams v. Hodges*, 95 N. C. 32; *Ferguson v. Haas*, 64 N. C. 772; *Link v. Link*, 90 N. C. 235; *Mulholland v. York*, 82 N. C. 510; *Vestal v. Sloan*, 76 N. C. 127; *Vannoy v. Martin*, 41 N. C. 169, 51 *Am. Dec.* 418.

At page 253 of 117 N. C. (23 S. E. 244), it is added:

"The judge has no more right, when the testimony if believed is sufficient to be submitted to the jury, to determine in the trial of civil actions what is strong, clear, and convincing proof than he has in the trial of a criminal action to express an opinion as to whether guilt has been shown beyond a reasonable doubt."

The rule as to strong, cogent, and convincing evidence must be given to the jury, but they must say at least whether it is such.

[3] But whether we should hold this to be a parol trust, or a trust *ex maleficio* (that is, one growing out of fraud, misdoing, or tort), which perhaps it more strictly is, the rule of evidence, and intensity of proof, is the same, because in both cases there is parol evidence, or may be. The latter kind of trust, called a trust *ex maleficio*, or *ex delicto*, is also known as a constructive trust and arises entirely by operation of law without reference to any actual or supposed intention of creating a trust, and often directly contrary to such intention. It is entirely in invitum and is forced upon the conscience of the malefactor who will be declared a trustee because of his wrong or fraud, for the purpose of working out right and justice, or frustrating the fraud. It is otherwise defined as a trust not created by any words, either expressly or impliedly, evincing a direct intention to raise a trust, but by the construction of equity in order to satisfy the demands of justice; or a trust raised by construction of law, or arising by operation of law, as distinguished from an express trust; or one that arises when a person clothed with some fiduciary character, by fraud or otherwise, gains some advantage to himself; or is such as is raised by equity in respect to property which has been acquired by fraud, or where, though acquired originally without fraud, it is against equity that it should be retained by him who holds the legal title. 39 *Oyc.*, p. 27, and notes 86 and 87.

Whether a parol, express, resulting, or constructive trust, it is established by the

same kind of evidence, not in the deed, but extraneous thereto, or dehors the deed, as we say. But the result is the same. It is not an attempt to set aside the deed. That relief is not prayed, but plaintiff asks that defendant be declared to hold the legal title he has acquired by his fraud "in trust for the use and benefit of the plaintiff, as to one-half interest in the said property, and that he be ordered to convey one-half fee-simple interest in the same to him." If he had merely asked that the deed be set aside, for fraud practiced upon him, the case of *Harding v. Long*, 103 N. C. p. 1, 9 S. E. 445, 14 Am. St. Rep. 775, would apply, and the evidence of plaintiff would be required to preponderate only. Justice Avery said in the case of *Cobb v. Edwards*, supra, 117 N. C. p. 253, 23 S. E. 244.

"If, as counsel insisted, there is any language used in the obiter statement of the rule in *Harding v. Long* [supra], or in *Ely v. Early*, 94 N. C. 1, repugnant to what we have said, such expressions must be considered so far modified as to bring those cases into perfect harmony with the law as it has been formulated in this case."

Let us apply these principles. The plaintiff contends that Silver holds the legal estate in trust upon these grounds, because of his wrong or fraud in betraying the plaintiff's confidence in him:

"(1) There was an express agreement that the property should be purchased and held jointly.

"(2) Silver obtained the information that enabled him to make the purchase, as a result of the confidence Lefkowitz was induced to repose in him because of Silver's promise that the purchase should be joint.

"(3) Silver was the agent of Lefkowitz to buy one-half interest"—citing *Allen v. Gooding*, 173 N. C. 93, 91 S. E. 694; *Russell v. Wade*, 146 N. C. 116, 59 S. E. 345. See also 28 R. C. L. 1233 et seq; *Wilson v. Jones*, 176 N. C. 205, 97 S. E. 18; *Brogden v. Gibson*, 165 N. C. 16, 80 S. E. 966.

These positions may be well founded, and two of them perhaps are.

[4] But we think the judge committed an error as to the intensity of the proof when he charged that a mere preponderance was sufficient to set up a parol trust, as the evidence must be strong, cogent, and convincing. This has been thoroughly and finally established by our cases. *Cobb v. Edwards*, supra, and cases cited in the note to the annotated edition.

Justice Allen said in *Taylor v. Wahab*, 154 N. C. 219, at pages 223 and 224, 70 S. E. 173, 175:

"We also think there was no error in the charge of his honor and that the rule laid down for the guidance of the jury as stated in the part of the charge quoted follows the decisions of this Court. *McNair v. Pope*, 100 N. C. 408; *Hamilton v. Buchanan*, 112 N. C. 471; *Kelly v.*

McNeill, 118 N. C. 353; *Wilson v. Brown*, 134 N. C. 405. It is well settled in this state that, where competent evidence is introduced to establish a parol trust, it is the duty of the judge to submit it to the jury, and it is for the jury to say whether it is 'clear, strong, cogent, and convincing.' *Cobb v. Edwards*, [supra]; *Lehew v. Hewitt*, 130 N. C. 22; *Avery v. Stewart*, 136 N. C. 430. The enforcement of parol trusts is recognized in this state, but it is a jurisdiction in the exercise of which there is much danger. As said by Pearson, J., in *Kelly v. Bryan*, 41 N. C. 286: 'Courts of equity enforce parol trusts to prevent fraud, but the jurisdiction is exercised sparingly and, many think, with very doubtful policy.' The court, in *Avery v. Stewart*, supra, while discussing the rule as [the intensity of the] proof required, says: 'The security of titles required the adoption of this rule.' As a further safeguard, the law clothes the presiding judge with the power to supervise the verdict and to set it aside in proper cases.

"The doctrine is fully and clearly discussed in the case of *Avery v. Stewart*, cited above, and in the case of *Sykes v. Boone*, 132 N. C. 199, both of which are conclusively against the plaintiff."

And Cyc. vol. 39, at pp. 84, 85, thus summarizes the doctrine here and elsewhere:

"A higher degree of proof than a mere preponderance of evidence is required to establish an express trust. Some of the cases go to the extent of requiring the evidence to be so conclusive as to exclude all reasonable doubt; but the more common requirement is that the evidence be clear, explicit, and convincing, not only as to the existence of the trust, but as to its terms and conditions. The rule requiring the evidence to be clear and satisfactory is especially applicable where the trust is attempted to be proved by parol evidence, as well as where it is sought to convert into a trustee a person holding the legal title to property ostensibly as absolute owner."

—because, according to this view, it tends to alter, add to, or vary the deed. *Lehew v. Hewitt*, 138 N. C. 6, 50 S. E. 459, where the rule of evidence is stated to be that the trust must be shown by proof strong, cogent, and convincing, but after giving this rule to the jury, they must decide whether it measures up to the standard required, just as they decide in ordinary civil cases whether the proof of plaintiff preponderates, or in criminal cases whether the state has established the crime beyond a reasonable doubt. There are very many cases of this character, but we will cite only two more of them, *Lamm v. Lamm*, 163 N. C. 71, 79 S. E. 290, and *Boone v. Lee*, 175 N. C. 384, 95 S. E. 659, as the learned counsel for plaintiff supposed there was some inconsistency between the last two cases; but we are of the opinion that there is absolutely none, and that the supposition that there is must be more imaginary than real. The *Lamm Case* was cited in the *Boone Case*, as directly

sustaining the rule as we have herein stated it to be, and in the very opening of the opinion, the learned judge who delivered it so states the distinction most clearly between the two classes of cases just as it is stated in the Boone Case, and in all those cited by us, without any variableness or shadow of turning. Both the cases are in perfect line with our former decisions, without the least deviation therefrom.

The error of the court as to the intensity of the proof entitles the defendant to another trial, and it is so ordered.

New trial.

(182 N. C. 843)

STATE v. McCANLESS. (No. 350.)

(Supreme Court of North Carolina. Nov. 9, 1921.)

1. Larceny \S 68(1)—Receiving stolen goods \S 9(1)—Evidence sufficient for submission of case to jury in prosecution for larceny of automobile.

In a prosecution for larceny of automobile and for receiving the automobile knowing it to have been stolen, evidence held sufficient for submission of case to jury.

2. Criminal law \S 413(2)—Defendant's declaration that he had bought alleged stolen automobile inadmissible as self-serving declaration.

In prosecution for larceny of automobile, refusal to allow deputy sheriff to answer question whether when arrested defendant did not say that he had bought the automobile from a named person held proper, since such testimony would have been incompetent as a self-serving declaration.

3. Criminal law \S 1120(3)—Refusal to permit witness to answer question not considered in absence of record disclosing answer witness would have made.

Exception complaining of refusal to permit witness to answer question is not available, where record does not disclose what answer witness would have made.

Appeal from Superior Court, Rockingham County; Webb, Judge.

Roy McCanless was convicted of larceny of an automobile and of receiving it knowing it to have been stolen, and he appeals. Affirmed. No error.

The defendant was convicted of the larceny and receiving of a Ford car, the property of H. D. Winn.

Mr. Winn had his car stolen at the Leaksville Fair, September 28, 1920. It was a new 1920 model Ford car in excellent condition with a full complement of tires and many extras. Its engine number, when he bought it, was 4,100,416. When he got it back the number was changed to 4,101,027, and you

could see distinctly where the change had been made.

In the early part of January, 1921, he found this car in Greensboro. He details in his testimony the marks by which he identified it when discovered in Greensboro. There can be no doubt that the car found was the car which had been stolen from him. When he got the car back, all the extras and tools were gone.

The defendant, Roy McCanless, sold this car for \$300 to one Gardner, who lived at Proximity Mills, on December 8th. It had cost Winn with all its extras in July, 1920, \$908, and he testified that it was worth \$850 at the time it was stolen.

Hobbs, a deputy sheriff of Guilford, arrested the defendant, at his father's house.

"As I drove up, the front of the house fronts the road. Mr. Gardner was in the car and says, 'Yonder he is now,' and I saw somebody get up and start out of the back door. I went around the corner of the house and caught him in the back yard."

He found a lot of automobile tools, such as wrenches, etc., a large steering wheel at the grainhouse hanging under the shed, fenders, shock absorbers in the loft of the smokehouse. There was also a large box full of wrenches; there was no garage there.

The defendant himself testified that the tools, wrenches, belonged to his father. His father, O. L. McCanless, testified:

"There were no fenders on my place; there were some tools. I don't run a garage. * * * Tools did not belong to me, belong to Farley Lowe."

The defendant's object in saying that these things belonged to his father is apparent from what he said in that immediate connection, on top of page 11:

"My father had owned two cars, a Dodge and a Ford, about three weeks before they (officers) came down there."

The defendant himself testified that he bought this car from Percy Newman the second week in October, and paid \$500 for it. His father testified that as well as he remembered the time was October 8th, and Farley Lowe testifies to the same effect. The latter witness also claimed the chest of tools at McCanless'. Percy Newman lived about one mile from McCanless and defendant had known him all his life.

The latter seems to have been an intimate friend of Newman and visited Newman's sister. He borrowed a car from Newman, so he says, to take this girl to ride and was stopped by the officers and the car taken as the car of a Mr. Gentry of Rockingham county. Newman was convicted of automobile stealing and sentenced to the penitentiary. It does not appear exactly when, but

it was since Christmas, 1920, and since the Ford car was stolen.

Glidewell & Mayberry, of Reidsville, for appellant.

J. S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

HOKE, J. [1] We have given the cause most careful consideration and find no reversible error on the record. There was ample evidence for the state to carry the case to the jury, and the issue was submitted in a comprehensive charge by his honor in which every position favoring the defendant and arising on the testimony was sufficiently and fairly presented.

[2, 3] The objections to the rulings of the court on questions of evidence are without merit. The only one at all debatable—the refusal to allow Deputy Sheriff Hobbs to answer the question whether, when arrested, the defendant did not say he had bought the car from Percy Newman at the time asked—was incompetent as tending to draw out a self-serving declaration, and if it became so later in corroboration of defendant's direct testimony, it was not again offered. And in any event the exception is not available, as the record does not disclose what answer the witness Hobbs would have made.

There is no error, and the judgment below is affirmed.

No error.

(182 N. C. 822)

STATE v. DUDLEY. (No. 161.)

(Supreme Court of North Carolina. Oct. 26, 1921.)

1. Constitutional law §62—Power to establish facts on which statute depends may be delegated.

While legislative power may not be delegated, except in case of municipal corporations exercising governmental functions on local matters, the Legislature may delegate to an administrative board the power to establish the pertinent facts or conditions upon which a statute makes its own action depend.

2. Constitutional law §62—Statute empowering Fisheries Commission Board to regulate fishing not an unauthorized delegation of legislative power.

C. S. §§ 1865-2078, creating the Fisheries Commission Board, and giving it general control of fisheries, held not an unwarranted attempt to delegate legislative power.

3. Indictment and Information §32(4)—Indictment for violating rule of Fisheries Commission Board held sufficient, although not alleging that default was contrary to statute.

An indictment for violating a rule of the Fisheries Commission Board by taking escallops by drags in forbidden waters, held suffi-

cient, in view of the statute of Jeofails (C. S. § 4625), although it might have been better form to have added that the default was also contrary to the statute.

4. Fish §11—Jurisdiction of Fisheries Commission Board stated.

The jurisdiction of the Fisheries Commission Board created by C. S. §§ 1865-2078, extends to all the public waters of the state or over which it has control, notwithstanding that particular waters are also specified.

5. Fish §2—Escallops are "fish" within fisheries regulations.

Escallops are fish within the regulations of the State Fisheries Commission Board and of the statute creating it.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fish.]

Appeal from Superior Court, Carteret County; Horton, Judge.

Henry Dudley was convicted of violating the fishing laws, and he appeals. No error.

Defendant was convicted under the following bill of indictment:

"The jurors for the state upon their oath present: That Henry Dudley, late of the county of Carteret, on the 28th day of December, 1920, did willfully, unlawfully, and feloniously take escallops with drags or scrapes in that territory in Bogue Sound lying between Spooners Point and Brant Island, the same being that territory designated as unlawful or forbidden grounds, in violation of orders, rules, regulations, etc., of the Fisheries Commission Board, at meeting held October 7, 1919, and known as Regulation No. 13, contrary to the form of regulations of said commission board and against the peace and dignity of the state. And the jurors for the state upon their oaths aforesaid do further present did willfully, unlawfully, and feloniously violate Regulation 5 of the orders, rules, and regulations of the Fisheries Commission Board, passed at various meetings held from April 29, 1915, to July 5, 1920, contrary to the form of the regulations of said Fisheries Commission Board."

From judgment on the verdict, the defendant appealed, assigning for errors chiefly the refusal to quash the bill for that same did not state a criminal offense; refusal to instruct the jury that on the entire evidence, if accepted by the jury, no criminal offense has been established.

E. H. Gorham, of Morehead City, C. R. Wheatley, of Beaufort, and O. H. Gulon and Charles L. Abernathy, both of Newbern, for appellant.

Thomas W. Bickett, of Raleigh, James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

HOKE, J. In recognition of the great importance of fish and fishing industries con-

nected therewith in the public waters of the state as a source of food supply to the people and of the impelling necessity for authoritative and intelligent regulation concerning them, the General Assembly has made elaborate statutory provisions on these subjects, the same, general and special, appearing principally in Consolidated Statutes, chapter 37, §§ 1865 to 2078, inclusive, and, recognizing further that it is impossible in a fixed and formal statute to foresee and provide for all the administrative details sure to be required under such extended and ever-varying conditions, the Legislation referred to creates a commission to be termed the "Fisheries Commission Board," giving it the general control of the subject, and in addition to other special provisions conferring general powers in terms as follows:

"The Fisheries Commission Board is hereby authorized to regulate, prohibit, or restrict in time, place, character, or dimensions, the use of nets, appliances, apparatus or means employed in taking or killing fish; to regulate the seasons at which the various species of fish may be taken in the several waters of the state, and to prescribe the minimum sizes of fish which may be taken in the said several waters of the state, or which may be bought, sold, or held in possession by any person, firm, or corporation in the state; and such regulations, prohibitions, restrictions and prescriptions, after due publication, which shall be construed to be once a week for four consecutive weeks in some newspaper in North Carolina, shall be of equal force and effect with the provisions of this act; and any person violating the provisions of this section shall be guilty of a misdemeanor, and, upon conviction, shall be fined or imprisoned, at the discretion of the court." Section 1878.

And in further enforcement of the law, section 1901 makes provision as follows:

"Upon failure of any person, firm or corporation to comply with any of the provisions of this article, or any of the fisheries laws, any license issued to any such person, firm or corporation may be revoked by the Fisheries Commission, and upon satisfactory settlement may be reinstated, with the consent of the board. All such persons violating the provisions of this article or of the fisheries law shall be guilty of a misdemeanor."

Under the powers so conferred and in promotion of the general purposes of the statute, the Fisheries Commission Board made and established a formal rule or regulation, which prohibited the taking of scallops with drags, or scrapes in a certain portion of Bogue Sound between Spooner's Point and Brant Island, and designating such locality as unlawful and forbidden territory. And on the trial there was evidence of the state tending to show that at the time specified, the ground having been properly staked off as forbidden ground, defendant was employed in taking scallops in the

manner prohibited, and on this evidence, accepted by the jury, defendant was duly convicted of the offense charged in the bill, and from judgment on the verdict has appealed.

[1] It was chiefly and very earnestly contended before us that this conviction cannot be sustained because it presents an unwarranted attempt to delegate legislative power. It is well recognized that except in the case of municipal corporations when in the exercise of governmental functions on local matters, legislative power may not be delegated. But if it be conceded that the board in question here, the Fisheries Commission Board, as a mere administrative board, does not come within the exception stated, it is firmly established in this jurisdiction and fully recognized in authoritative cases elsewhere that, though legislative powers may not be in strictness delegated to a board of that character, it is fully competent for the Legislature to delegate to such a board the power to "establish the pertinent facts or conditions upon which a statute makes its own action depend." This statement of the principle taken from 8 Cyc. p. 830, was directly approved and applied in *State v. Railroad*, 141 N. C. 846-851, 54 S. E. 294, a decision upholding the conviction of defendant for violation of the administrative regulations of our Department of Agriculture. And a forcible and striking illustration in approval of the same position is presented in the recent case of *State v. Hodges*, 180 N. C. 751, 105 S. E. 417, sustaining regulations of the same department in reference to eradication of cattle ticks.

It has been applied also in reference to regulations of the Health Department, as in the case of compulsory vaccination. *Morgan v. Stewart*, 144 N. C. 424, 57 S. E. 149, citing *State v. Hay*, 126 N. C. 999, 35 S. E. 459, 49 L. R. A. 588, 78 Am. St. Rep. 691; *Hutchins v. Durham*, 137 N. C. 68, 49 S. E. 46, 2 Ann. Cas. 340; *Morris v. Columbus*, 102 Ga. 792, 30 S. E. 850, 42 L. R. A. 175, 66 Am. St. Rep. 243.

And in *Express Co. v. Railroad*, 141 N. C. 463, 16 S. E. 393, 18 L. R. A. 393, 32 Am. St. Rep. 805, it was fully recognized as justifying the Legislature in delegating to the Corporation Commission the power of establishing transportation rates, etc. Similar decisions resting upon the same principle appear in *U. S. v. Grimaud*, 220 U. S. 506, 31 S. Ct. 480, 55 L. Ed. 563; *Isenhour v. State*, 157 Ind. 517, 62 N. E. 40, 87 Am. St. Rep. 228, and in many other authoritative cases, and may be considered as the generally accepted rule on the subject.

[2] In the *Grimaud Case*, supra, it was held, among other things, that—

"Congress cannot delegate legislative power [citing *Field v. Clark*, 143 U. S. 692], but the authority to make administrative rules is not."

delegation of legislative power, and such rules do not become legislation because violation thereof are punished as public offenses."

And so it is here. The Commission, as stated, under authority conferred, have established the regulation that these escallops shall not be taken in drags in certain designated localities. And the statutes referred to enact that to take these fish or mollusks contrary to this administrative rule shall constitute a misdemeanor, and it is on this that the conviction is lawfully made to rest.

[3] It is argued in support of the defendant's position that the indictment is for violating the rule and not otherwise, but the suggestion is without merit. It may have been the better form to have added to the bill that the alleged default was also "contrary to the statute in such case made and provided," but this, if it be a defect, is one cured in express terms by our Statute of Jeofails, Consolidated Statutes, § 4625.

[4] It is further insisted for defendant that the locality to which this regulation applies is nowhere mentioned or designated in the law, and the same is not therefore included in the powers conferred upon the board. But a perusal of the statute, and more particularly section 1878, which appertains more directly to the question, will disclose that the jurisdiction of the board extends to all the public waters of the state, or over which it has control. "The several waters of the state" is the precise language of the section referred to and the numerous portions of the law in which places are expressly mentioned are not in restriction of the general words of the principal section, but these places are only mentioned because special provision is made as being desirable or necessary for those places, and this objection also must be overruled.

[5] It cannot for a moment be maintained that escallops, the subject-matter of the inquiry, are not within the powers conferred. In the portion of the statute defining the terms and subjects of the chapter in question, the word "fish" is made to include "porpoises, and other marine mammals, fishes, mollusca, and crustaceans." Not only do escallops come within this comprehensive definition, being a "mollusk of the species pectinidae," but in a later part of the chapter, they are expressly mentioned as being within its provisions. This objection therefore is overruled.

We have given the case most careful consideration, and, owing to the very great importance of this industry to the state and its people, it is gratifying that the conviction can be upheld in accord with accepted principles of constitutional and statutory construction. It is a subject that has deserved-

ly received the fullest consideration of our Legislatures, and under the capable, courageous, and impartial enforcement of the law that has prevailed for the past several years there is reason to believe that substantial and ever-increasing benefits may be expected.

There is no error, and the judgment below is affirmed.

No error.

(192 N. C. 831)

STATE v. VANHOOK. (No. 322.)

(Supreme Court of North Carolina. Nov. 2, 1921.)

1. Constitutional law §63(2)—When legislative power may be granted to municipal corporations stated.

The General Assembly may delegate legislative power to municipal corporations when the power granted is such as relates to the exercise of governmental functions of limited or local character, or to other legitimate and proper municipal purposes.

2. Municipal corporations §611—Dance hall ordinance held valid exercise of police power.

Municipal ordinance, forbidding operation of dance hall where admission fees were charged without a permit from the board of aldermen, held a valid exercise of the police power of the state, in view of C. S. c. 56, and of section 2787 thereof, giving cities power to license, regulate, or prohibit dance halls.

3. Municipal corporations §591—Municipal dance hall ordinance not invalid as conferring arbitrary power on aldermen.

A municipal ordinance forbidding the operation of dance halls where admission fees are charged, without a permit from the board of aldermen, held not invalid as conferring unlimited discretion upon the board in granting or refusing permits; the discretion of the board being a limited legal discretion, although not subject to control by the courts in the absence of abuse.

Appeal from Superior Court, Durham County; Horton, Judge.

James Vanhook was convicted of operating a dance hall without a permit and he appeals. No error.

The warrant issued by the recorder is as follows:

"G. W. Proctor, being duly sworn on information, says that James Vanhook, on or about the 26th day of May, 1919, with force and arms, acted in the county aforesaid, and within Durham township, did willfully, maliciously, and unlawfully conduct the business of dance hall, at which an admission fee was charged, he, the said James Vanhook, not having a permit for said dance from the board of aldermen against the statute in such cases made and pro-

vided, and against the peace and dignity of the state."

On May 7, 1919, the board of alderman of the city of Durham adopted the following ordinance:

"Be it ordained by the board of alderman of the city of Durham that no person, firm, corporation, club or organization shall give, conduct or hold any dance, or conduct or maintain any dance hall within the city of Durham for which a charge shall be made to those attending, which charge is either in the form of admission or entrance dues paid to the person, firm, corporation, club or organization giving or holding the said dance or conducting the said hall or clubroom, without first having obtained the consent of the board of alderman."

After this ordinance was adopted the defendant applied to the board for a license to conduct a dance hall in the city, and the license was refused. There was evidence for the defendant tending to show that he was "the social leader of the colored people of the city"; that he had "cultivated the fine art of dancing"; that he had "let them (aldermen) know he was a man of good character"; and that the board passed upon each application and granted or refused license in their discretion. There was evidence for the state tending to show that there had been "disturbing elements" in the defendant's dance hall, "fights and cursing," and that some arrests had been made there. The defendant kept the hall open without a license. On appeal from the recorder's court he was convicted in the superior court, and after judgment was pronounced he excepted and appealed. The only question presented is whether the ordinance is a valid exercise of the police power

R. O. Everett, of Durham, for appellant.
James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

ADAMS, J. It is conceded that the police power, regarded as an attribute of government, is inherent in the states, and is not a grant derived from the written organic law. The difficulty of drawing the boundary line which divides the police power from the other functions of government has often been recognized, but Judge Cooley's definition of the police power of a state has met the approval of many courts. He says that—

This expression "embraces the whole system of internal regulation, by which the state seeks, not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of right and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others."

The police power has been described as the law of necessity, and as the power of self-protection on the part of the community. 6 R. C. L. 186. Upon the proper exercise of this power depend the life, safety, health, morals, and comfort of the citizen, the enjoyment of private and social life, the beneficial use of property, and the security of social order. *Slaughterhouse Cases*, 16 Wall. 36, 21 L. Ed. 394. In *Pearsall v. Railway*, 161 U. S. 666, 16 Sup. Ct. 705, 40 L. Ed. 838, it is said:

"And so important is this power, and so necessary to the public safety and health, that it cannot be bargained away by the Legislature, and hence it has been held that charters for purposes inconsistent with a due regard for the public health or public morals may be abrogated in the interests of a more enlightened public opinion."

[1] The legal right of the General Assembly to delegate legislative power to municipal corporations is well settled, when the power granted is such as relates to the exercise of governmental functions of limited or local character, or to other legitimate and proper municipal purposes. *State v. Austin*, 114 N. C. 857, 19 S. E. 919, 25 L. R. A. 283, 41 Am. St. Rep. 817; *State v. Dudley*, 109 S. E. 63, at this term.

[2] Chapter 56 of the Consolidated Statute is divided into three subchapters. The first deals with regulations which are independent of the act of 1917, the second, with the Municipal Corporation Act of 1917, and the third with the Municipal Finance Act. By section 2623 (7), in the first subchapter, a city or town is authorized to provide for the municipal government of its inhabitants in the manner required by law, and by section 2673 the commissioners are empowered to make ordinances, rules, and regulations for the better government of the town, not inconsistent with the law of the land. By section 2786, which is in the second subchapter, the provisions of article 15 are made applicable to all cities and towns whether or not they have adopted the plan of government, and the powers therein granted are declared to be in addition to and not in substitution of the existing powers of cities and towns. Section 2787 provides that in addition to and co-ordinate with the power granted to cities in subchapter 1, and any acts affecting such cities, all cities shall have power "to license, prohibit, and regulate pool and billiard rooms and dance halls, and in the interest of public morals provide for the revocation of such licenses." The ordinance in question was enacted in pursuance of this authority, and is clearly a valid exercise of the police power of the state. Instances of a similar exercise of the police power may be found in ordinances which prohibit disorderly conduct, or abusive or indecent language, or the entrance of an unmarried mi-

(109 S.E.)

nor into a saloon, or the pursuit of one's ordinary business on Sunday; or which regulate the weighing of cotton, or the running at large of bird dogs during the closed season for quail, or vaccination for the public health, or which deal with various other situations affecting the health, comfort, morals, and safety of the people. *State v. Sherrard*, 117 N. C. 717, 23 S. E. 157; *State v. Earnhardt*, 107 N. C. 789, 12 S. E. 426; *State v. Austin*, 114 N. C. 855, 19 S. E. 919, 25 L. R. A. 283, 41 Am. St. Rep. 817; *State v. Tyson*, 111 N. C. 687, 16 S. E. 238; *State v. Hay*, 126 N. C. 999, 35 S. E. 459, 49 L. R. A. 588, 78 Am. St. Rep. 691; *State v. Blake*, 157 N. C. 609, 72 S. E. 1080; *State v. Burbage*, 172 N. C. 876, 89 S. E. 795.

[3] The counsel for the defendant contends that the ordinance confers upon the board of aldermen unlimited discretion in granting or refusing license, that it prescribes no uniform rule by which the board shall be guided, and that the aldermen consequently pass upon each application "according to their own pleasure." But the board is not clothed with arbitrary or unlimited discretion. Whether a license shall be granted upon application is a matter within the limited legal discretion of the board. It is true that in the absence of abuse such discretion cannot be controlled by the courts, but the ordinance is not for that reason void. *Brodnax v. Groom*, 64 N. C. 244, Key v. Board of Education, 170 N. C. 125, 86 S. E. 1002. Of course uniformity of operation upon all alike is essential, but this requirement is met by the express language of the ordinance.

In view of the evidence tending to show the "disturbing elements" in the defendant's hall, the "fighting and cursing" and the arrests that had been made there, we must assume that due regard for the public welfare impelled the aldermen in the exercise of their limited legal discretion to refuse the license.

The defendant's counsel relies chiefly on *State v. Tenant*, 110 N. C. 609, 14 S. E. 387, 15 L. R. A. 423, 28 Am. St. Rep. 715. In that case it appears that the city of Asheville had enacted the following ordinance:

"That no person, firm or corporation shall build or erect within the limits of the city any house or building of any kind or character, or otherwise add to, build upon or generally improve or change any house or building, without having first applied to the aldermen and obtained a permission for such purpose."

This ordinance was held void on the ground that it was an unwarranted interference with the ordinary incidents of ownership at the arbitrary will of the board of aldermen without valid reason, and that it had no reasonable relation to the exercise of the police powers vested in the board for

the well ordering of the city. This objection cannot avail the defendant in the case before this court. *Brunswick Co. v. Mecklenburg*, 181 N. C. 388, 107 S. E. 317.

No error.

(182 N. C. 408)

**MANUFACTURERS' FINANCE CO. et al.
v. AMAZON COTTON MILLS CO. et al.
(No. 388.)**

(Supreme Court of North Carolina. Nov. 9, 1921.)

1. Acknowledgment ¶30—Certificate omitting venue upheld where place ascertainable by inspection of whole instrument.

A certificate of acknowledgment of a sales contract was not insufficient because it did not state the venue, where the place was stated in the contract, the notary's seal showed him to be a notary public of the county therein stated, and the clerk of the superior court certified that he was such, a literal compliance with the statute not being required if the certificate substantially conforms to the statutory provisions as to the material facts, and, if the place can be ascertained with reasonable certainty by inspection of the whole instrument, the certificate will be upheld.

2. Acknowledgment ¶36(1)—Failure to name party sworn immaterial, where name appears on same paper and refers to instrument certified.

Failure to name the party sworn in a certificate of acknowledgment is immaterial when the name appears on the same paper and refers to the instrument certified by the notary to have been subscribed before him.

3. Acknowledgment ¶29—Certificate "subscribed and sworn to before me" held sufficient.

A notary's certificate that an instrument had been "subscribed and sworn to before me" was a sufficient acknowledgment, though in the form of an affidavit and the word "acknowledge" was not used, as suggested by C. S. § 3323, a certificate that the paper was subscribed in the officer's presence being sufficient, and the additional words "and sworn to" not invalidating it, being mere surplusage.

Appeal from Superior Court, Davidson County; Webb, Judge.

Action by the Manufacturers' Finance Company and another against the Amazon Cotton Mills Company and others to recover the balance due on sale of a motor truck, and for the possession of the truck, title to which was retained as security. The purchaser, who is insolvent, having sold the truck to his codefendant, the cotton mills, the only defense set up is by said cotton mills that the acknowledgment to the contract retaining title is insufficient. The court so held, and plaintiffs appealed. Reversed.

Brooks, Hines & Smith, of Greensboro, for appellants.

Raper & Raper, of Lexington, and H. R. Kyser, of Thomasville, for appellee cotton mills.

CLARK, C. J. The sufficiency of the acknowledgment to the conditional sale retaining the title to the truck is the sole question. The instrument is full and in regular form in all respects, and was registered at the time the sale was made, as was required. C. S. § 3312. Said contract begins with the heading "State of North Carolina, County of Davidson," and specifically stipulates, "The title to said property is to remain in the vendor until the notes are fully paid." It is signed by the purchaser under seal, and has this acknowledgment:

"Signed, sealed and delivered in the presence of ——. Subscribed and sworn to before me this April 17, 1920. In witness whereof I have hereunto set my hand and seal, this day and date above written. R. L. Pope, N. P."

Here follows the seal of the notary public, with the addition of the sentence, "My commission expires Oct. 13, 1921," and the following:

"North Carolina, Davidson County, in Superior Court. The foregoing certificate of R. L. Pope, N. P. of Davidson County, attested by his official seal is adjudged to be in due form, and according to law. Let the instrument and certificate be registered. Witness my hand this April 24, 1920. S. J. Smith, C. S. C."

The paper was filed for registration on that same day and duly recorded as certified by the register of deeds.

The defendants objected on the ground that said contract was improperly acknowledged and not entitled to registration. The court sustained the objection, to which the plaintiff excepted and submitted to a voluntary nonsuit, which ruling is assigned as error. The defendants contend that acknowledgment is insufficient in that the venue is not stated; that the name of the grantor does not appear in the body of the acknowledgment and the acknowledgment does not mention the instrument to which it relates; that the word "acknowledge" is not used; that the identical words used in the statute (C. S. § 3323) are not used in the acknowledgment which is in the form of an affidavit.

[1] The authorities are uniform that the certificate will be upheld if the place can be ascertained with reasonable certainty by an inspection of the whole instrument. 1 R. C. L. 283; 108 Am. St. Rep. 543, note.

"It is a rule of universal application that a literal compliance with the statute is not to be required of a certificate of acknowledgment, and that, if it substantially conforms to the statutory provisions as to the material facts to be embodied therein, it is sufficient." 1 Cyc. 582.

The venue is stated in the beginning of the contract as North Carolina, Davidson county; the seal of the notary shows him to be a notary public of that county, and the clerk of the superior court certifies that he is such.

[2, 3] The failure to name the party in the certificate of acknowledgment is not material when, as here, it appears on the same paper and refers to the instrument which is certified by the notary to be "subscribed before him." 1 R. C. L. 284; *Frederick v. Wilcox*, 119 Ala. 355, 24 South. 582, 72 Am. St. Rep. 927. The use of the word "acknowledge" is not essential if its equivalent is used. The officer certifies that this paper was subscribed in his presence, which is a sufficient acknowledgment, and the fact that it is sworn to in no wise detracts from the sufficiency. This was unnecessary and surplusage.

In this state we have cases exactly in point. In *Starke v. Etheridge*, 71 N. C. 240, where a deed was proven before the clerk of the court who wrote opposite the witness' name the word "jurat" and the clerk testified that the witness did in fact acknowledge the deed, this was held sufficient. This case was cited and approved in *Quinnerly v. Quinnerly*, 114 N. C. 147, 19 S. E. 99, which held that the recital in the probate that the mortgagees "had procured the [paper] to be proved" was sufficient. In *Devereux v. McMahon*, 102 N. C. 287, 9 S. E. 636, where the certificate was simply that "the execution of the * * * deed was this day proven," it was held sufficient; the court saying that, if the essential elements appear, the certificate will be upheld regardless of mere form. In *Moore v. Quickle*, 159 N. C. 130, 74 S. E. 927, the court approved the above authorities and held that a presumption arises from the registration of the deed that the probate was by the proper officer, and was properly proven by him. The same authorities are cited and approved in *Power Corp. v. Power & Light Co.*, 168 N. C. 221, 84 S. E. 398.

The simple question therefore is whether the above certificate of the notary public, who was certified to be such by the clerk of the superior court (and which was on the instrument duly admitted to registration by the register of deeds, on the adjudication of the clerk), that the instrument had been "subscribed and sworn to" before him, was equivalent to its being acknowledged. It certainly amounted to this, and even more; but, like the young lawyer who swore to his demurrer, this did not invalidate it.

Sir Jonah Barrington (Judge), in his "Irish Sketches," says that an affidavit before him for resisting an officer in serving a writ, in the wilds of Connemara, averred that—

"The defendant poked his gun at the affiant through a crack in the door, and with an oath said that if the affiant did not leave there immediately the defendant would send the affiant's

soul to hell, which the affiant *verily believes he would have done.*"

The judge did not quash the warrant on account of the surplusage.

The paper, being duly certified by the notary as "subscribed" before him, was a plenary acknowledgment, and the additional words "and sworn to" certainly could not make it invalid.

Reversed.

(182 N. C. 778)

FELLOWS v. DOWD et al. (No. 420.)

(Supreme Court of North Carolina. Nov. 16, 1921.)

1. Appeal and error §701(1)—Objection to charge not available in view of record.

An objection to a charge that maintaining a boiler on land and pumping water therefrom was not sufficiently notorious to constitute adverse possession was not available to defendant on appeal, where it did not appear when such occupation commenced nor how long it continued.

2. Appeal and error §900—Presumption against error.

There is a presumption against error.

3. Appeal and error §692(1)—Objections to rulings on questions not considered where witness' answer not shown.

Error in ruling on objection to question cannot be considered, where the witness' answer is not suggested nor made to appear.

Appeal from Superior Court, Moore County; Ray, Judge.

Action by B. M. Fellows against J. L. Dowd and another. Judgment for plaintiff, and defendants appeal. Affirmed.

L. B. Clegg, of Carthage, for appellants.

H. F. Seawell, of Carthage, for appellee.

PER CURIAM. We have carefully considered the record and find no valid reason for disturbing the results of the trial. On the issue as to title, plaintiff offered in evidence a grant to Lewis Grimm of date December 16, 1881, and mesne conveyances from the grantee to plaintiff with evidence tending to show that the grant included the land in controversy and continuous possession of plaintiff and those under whom he claimed, with assertion of ownership under his deed, etc., and deeds to the time of trial.

Defendant claiming title offered evidence tending to show that the land granted to said Grimm in 1881 was included in an older grant to David Allison of date in 1796 and also a deed from one John McLeod to Josiah Wallace of date November 26, 1852, registered on August 26, 1886, covering 10 acres of land, lying within the boundaries of plaintiff's deeds, and mesne conveyances from Josiah Wallace to defendants. Defendant showed no deed connecting his claim with the Allison grant. There was evidence tending to show possession of defendants, or those under whom they claimed, of this 10 acres, asserting ownership under these deeds from January, 1903, to January, 1906. There was also evidence to show that defendant or his predecessors at some time prior to this period had a boiler and engine on this 10 acres for the purpose of pumping water through pipes to a sawmill situated on an adjoining tract, but neither the time nor the duration of this last occupation is disclosed in the record.

Upon this, the testimony chiefly pertinent, his honor without objection noted, submitted the issue of plaintiff's title on the evidence and charged the jury that if this were established, evidence of adverse occupation by defendant from 1903 to 1906 was not sufficient to mature title in defendant's favor, the law requiring seven years under color for that result.

[1, 2] Objection is also made for that his honor charged the jury that maintaining a boiler on the land and pumping water therefrom would not constitute adverse possession of a kind to mature title, same not being sufficiently notorious. On the record, the objection as stated is not available to appellant, as it is nowhere made to appear when this occupation commenced nor how long continued. There is a presumption against error, and if this instruction is erroneous, the evidence concerning it is too indefinite to enable the court to say that any harm has been wrought by the ruling.

[3] The objections to the decisions of the court on questions of evidence are without merit. Some of them could have had no possible effect on the results of the trial, and in others the objection is to the question, and the answer of the witness not being suggested or made to appear, the court is unable to determine the significance of his honor's ruling or allow the same for error. On the record the judgment for plaintiff is affirmed.

No error.

(182 N. C. 405)

In re NEAL'S WILL. (No. 363.)

(Supreme Court of North Carolina. Nov. 9, 1921.)

Wills 6220—Public administrator not entitled to file caveat to will until he has qualified as administrator of particular estate.

Under C. S. §§ 17, 29, 30, the public administrator is not sufficiently interested in the estate of a decedent to file caveat to alleged will of a nullius filius, under section 4158, until he has been appointed and has qualified as administrator of the particular estate, under section 20; the right to represent the public interest, if there is a default of heirs and distributees, being in the University of North Carolina, under sections 6, 5784-5786, and Const. art. 9, § 7.

Appeal from Superior Court, Forsyth County; Long, Judge.

In the matter of the Will of John Neal, deceased. A caveat to an alleged will was filed by Charles E. Hamilton, public administrator, and from judgment of dismissal he appeals. Affirmed.

John Neal, born in Winston, N. C., a nullius filius, died in Omaha, Neb., leaving an estate estimated to be of the value of \$800,000 or over. On October 19, 1920, what was claimed to be a copy of a lost or destroyed will, disposing of his property and appointing the Wachovia Bank & Trust Company executor and trustee, was admitted to probate in the superior court of Forsyth.

The caveat was duly filed to said will by Jenny Beckerdite, of Washington, D. C., claiming to be the mother of said John Neal, and by one Mary Harbin McCoy and her son, Tharry McCoy, of Okmulgee, Okl., claiming to be the wife and son of said John Neal, and in addition, on April 19, 1921, the appellant, Charles E. Hamilton, public administrator of Forsyth, filed his petition for caveat, upon the ground that he was entitled to qualify and that his interest in the commissions which would accrue was such "interest in the estate" as would entitle him to maintain a caveat to contest the validity of the copy of the alleged will, and also to contest the claim of Jenny Beckerdite to be the mother of the deceased and of Mary Harbin McCoy and her son to be the wife and son of the deceased. The court dismissed the petition of said Charles E. Hamilton, public administrator, and he appealed.

Lindsay Patterson and H. G. Hudson, both of Winston-Salem, for appellant.

Manly, Hendren & Womble, of Winston-Salem, for Wachovia Bank & Trust Co.

L. M. Swink, of Winston-Salem, and B. S. Royster, of Oxford, for residuary legatees.

M. L. Learned, of Omaha, Neb., and Craige & Vogler, of Winston-Salem, for special legatees.

CLARK, C. J. The petition was properly dismissed. A party entitled to file a caveat under C. S. 4158 must be some one "entitled under such will, or interested in the estate." It being admitted that the deceased was nullius filius, there could be no one coming within that designation except (1) his mother, if living; (2) his wife and child, if proven to be such; and (3) the University of North Carolina, should it be found that the deceased left neither mother nor wife nor children.

A public administrator is a position created by chapter 113, Laws 1868-69, now C. S. 17. He has no interest in or control over any estate until appointed thereto by the clerk and qualified. C. S. 20. It is not necessary to discuss whether his prospective commissions are such an interest as would entitle him to caveat the will, for he has not been appointed administrator of this estate, and has no interest whatever therein.

Under C. S. 20, the public administrator can apply for letters of administration "when the period of six months has elapsed from the death of any decedent, and no letters testamentary, or letters of administration or collection, have been applied for and issued to any person," and even then such public administrator is not entitled in all cases to be appointed. See citations under that section.

In this case the Wachovia Bank & Trust Company has already been appointed, and there is no ground upon which the public administrator can be entitled to qualify unless such administration is set aside upon a caveat of the will or by order of the clerk for other sufficient cause.

In the trial of the caveat now pending, it must be determined whether the mother is living, or whether the deceased left a wife and child, as alleged, and in the trial of such caveat the University of North Carolina is a proper party, as, in view of the claims of the first two parties being negated, the University would be entitled to the property, if the will is set aside, by the terms of the charter of that institution in 1789 (chapter 305), which conferred upon it all property escheating for lack of heirs and distributees, or otherwise. If the contest should be decided in favor of either of these three parties and the alleged will should be set aside, the administration would be conferred upon the successful contestant, or some one selected at the request of such party. In no event has the public administrator any right to be appointed to administer until the successful party has waived its right to do so, C. S. 29 and 30. The position of public administrator confers no right to administration until the parties having the prior right to qualify have waived their right or been adjudged unfit by the clerk. He has no interest in the estate and no right to

qualify unless and until appointed to the particular estate by the clerk. Until so appointed he is simply an "eligible" for appointment upon the default of the parties who have a prior right to appointment. 24 Corpus Juris, p. 1201, § 2873, note (a).

The right of succeeding by escheat to all property, when there is no wife or parties entitled under the statutes of descent and distribution, was conferred upon the University by its charter in 1789 (chapter 306, § 2), and has been confirmed since by the state Constitution (article 9, § 7), and has been extended by several statutes, which are now C. S. 5784, 5785, and 5786. This is a most valuable right, which will become more and more a source of revenue to the University as the state grows in wealth and population. One of the first cases in which the matter was presented is *University v. Johnston*, 2 N. C. 373, and among those since have been two recent cases, one from Wilmington and the other from Goldsboro (*Grantham v. Jinnette*, 177 N. C. 229, 98 S. E. 724), out of which the University became entitled, under decisions of this court, to receive very considerable sums.

The University therefore is the proper, if not necessary, party to represent the public interest, if there is a default of heirs and distributees; but the public administrator is not when he has not been appointed and qualified upon the estate in question. C. S. 6.

This contest turns upon the validity of the alleged will, a copy of which has been probated in common form in lieu of the alleged original will. The parties who are entitled to urge the caveat to set aside this probate are, as already stated, the alleged mother, the alleged wife and son, and the University of North Carolina.

The judgment dismissing the petition of the public administrator is affirmed.

STACY, J., concurs in result.

(182 N. C. 844)

STATE v. SKEEN. (No. 381.)

(Supreme Court of North Carolina. Nov. 9, 1921.)

1. Criminal law § 448(11)—Testimony as to appearance of defendant held admissible.

In prosecution for larceny of automobile in which defendant claimed an alibi, testimony of witness who had tracked the stolen automobile to defendant's house eleven or twelve miles, that defendant's clothes were damp, that his shoes were muddy and looked as if they had not been unlaced in several days, held admissible as against contention that testimony should have been confined to a statement of facts without witness giving any opinion or stating impression gathered from the circumstances as they appeared to him at the time.

2. Larceny § 70(3)—Receiving stolen goods § 9(2)—Instruction that defendant was guilty if he had aided and abetted others held warranted by evidence.

In prosecution for larceny of automobile and receiving same knowing it to be stolen, where defendant claimed some one else had stolen the car and left it in his yard, evidence held to warrant instruction authorizing conviction if defendant aided or abetted others in stealing the automobile.

3. Criminal law § 56(5)—Persons who aided and abetted each other and are present during commission of crime are "principals."

Where two persons aid and abet each other in the commission of a crime and are both present when crime was committed, they are both principals and are equally guilty.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Principal.]

Appeal from Superior Court, Davidson County; Finley, Judge.

Harrison Skeen was convicted on an indictment charging larceny and receiving stolen property knowing it to have been stolen, and he appeals. No error.

The indictment charged the defendant with the larceny of a Ford automobile, with a count in the bill charging him with receiving same, knowing it to have been stolen. The defendant entered a plea of not guilty and offered evidence tending to establish an alibi, or that, at the time in question, he was some 12 or 15 miles from the scene of the crime. Upon the traverse, thus joined, there was a verdict and judgment against the defendant, from which he appealed.

Raper & Raper, of Lexington, and Hastings & Whicker and McMichael & Johnson, all of Winston-Salem, for appellant.

J. S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

STACY, J. [1] The defendant's first exception is to the admission, over his objection, of the following evidence:

T. A. Sink testified:

"Am a neighbor of Mr. Stuart—not related to him. Heard about stolen car about 20 minutes after one. Got up and dressed. Met them and got in car. Tracked car to Skeen's house, 11 or 12 miles. Skeen's in Abbott's Creek township. Got out of Nifong's car and tracked car to house. Skeen came out; clothes damp; shoes muddy; looked like. Didn't look like they had been unlaced in several days."

Defendant bases his objection to this evidence upon the ground that the witness should have been confined to a statement of the facts without giving any opinion, or stating what impressions he gathered from the circumstances as they appeared to him at the time. We do not think the testimony of this witness is objectionable as incompetent opin-

ion evidence. He stated the facts leading up to the meeting, and then undertook to describe the defendant's appearance:

"His clothes were damp; shoes muddy; looked like. Didn't look like they had been unlaced in several days."

This was only a shorthand method of giving the facts as they appeared to the witness. It was proper for him to state "the instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time." McKelvey, Ev. 174; Hudson v. R. R., 176 N. C. 488, 97 S. E. 388.

"It would be a hopeless task for the most gifted person to clothe in language all the minute particulars, with their necessary accompaniments and qualifications, which have led to the conclusion which he has formed." Dewitt v. Barley, 9 N. Y. 371; 22 O. J. 551; State v. Spencer, 176 N. C. 709, 97 S. E. 155.

[2] The second exception is to the following portion of his honor's charge:

"If you are satisfied from this testimony beyond a reasonable doubt that the defendant is guilty of stealing the car, either by stealing it himself (or aiding and abetting others in stealing it) you will find him guilty; if not so satisfied, you will find him not guilty."

[3] The defendant objects to the expression in parenthesis, "or aiding and abetting others in stealing it"; but we are unable to see any error in this statement. The defendant contended that some one else had stolen the car and left it in his yard. This was entirely sufficient to support the charge, especially when coupled with evidence of the defendant's damp clothes and muddy shoes, from which it could reasonably be inferred that he too had been riding. The law is well settled that where two persons aid and abet each other in the commission of a crime, both being present, both are principals and equally guilty. State v. Jarrell, 141 N. C. 722, 53 S. E. 127, 8 Ann. Cas. 438; State v. Fox, 94 N. C. 928.

The other exceptions are without merit; and, upon consideration of the whole case, we conclude that the trial in the superior court must be upheld.

No error.

(182 N. C. 369)

BLACKNALL v. HANCOCK et al. (No. 98.)

(Supreme Court of North Carolina. Nov. 9, 1921.)

1. Mortgages \S 176—Deed of trust valid as against others only from date of registration, notwithstanding their knowledge thereof.

Under C. S. \S 3311, providing that no deed of trust or mortgage on real estate shall be

valid to pass any property as against creditors or purchasers for value from the mortgagor, but from the registration thereof in the county where the land lies, no notice, however full or formal, shall avail to defeat a prior registration.

2. Mortgages \S 163(2)—Priority of mortgage liens determined by dates of registration.

Plaintiff's trust deed, executed March 24, 1920, proved and filed for registration March 26, 1920, indexed in March, but date not given, but appearing on the index docket after the deed under which the defendant claims, which latter deed was executed March 23, 1920, proved and filed for registration March 23, 1920, appearing on the index docket above plaintiff's deed, defendant has the prior lien on the face of the record, prevailing by reference to time of filing March 23, 1920, as against March 26, 1920, the date when plaintiff's deed was filed, C. S. \S 3311, providing that the date of registration determines priority.

3. Subrogation \S 26 — Subrogation does not prevail in favor of volunteer.

The principle of subrogation does not prevail in favor of a mere volunteer.

4. Subrogation \S 33(2)—Party substituted acquires only rights of person for whom substituted.

In a suit to have plaintiff's deed of trust declared a prior lien to defendant's, the latter deed having been first registered, plaintiff's claim of subrogation to the rights of a creditor whose claim plaintiff's money had paid off could not prevail against the duly registered deed of defendant, the claim paid never having been a lien to which plaintiff could be substituted.

5. Mortgages \S 183—Reference to lien of prior deed not a recognition of prior lien to defeat registration laws.

As respects right to have plaintiff's deed declared a prior lien to defendant's, the latter's deed first having been registered, reference in the latter deed to the incumbrance of plaintiff's deed does not recognize the validity of a superior lien, except it comply with the registration laws.

Appeal from Superior Court, Vance County; Cranmer, Judge.

Suit by C. L. Blacknall against F. W. Hancock and others, to restrain sale under deed of trust. On motion to dissolve restraining order and counter motion to make same permanent. Restraining order dissolved, and plaintiff appeals. Affirmed.

Civil action heard on motion to dissolve a restraining order, and counter motion by plaintiff to make same permanent, and by consent, before his honor E. H. Cranmer, judge, at chambers in Henderson, N. C., on March 17, 1921. Plaintiff, holding a debt of \$1,579.87, secured by a deed of trust on realty in said county, brings the action to restrain the sale by defendant Hancock under a deed of trust on same property, to secure two notes of \$850 each, and have the latter

deed declared a lien subsequent to that of plaintiff and to remove same as a cloud to plaintiff's claim and interest under his deed. The facts more directly pertinent and the ruling of the court thereon are embodied in the judgment as follows:

"This action coming on to be heard before Hon. E. H. Cranmer, judge, at Chambers, in Henderson, N. C., on the 17th day of March, 1921, and the same being heard on the motion of the plaintiff for a permanent injunction against defendants foreclosing a trust deed executed by J. H. Harvey and wife on the 20th day of March, 1920, to F. W. Hancock, trustee, which trust deed was filed for registration on March 23, 1920, unless or until the said trustee or Harvey shall pay to plaintiff the sum of \$1,579.87, with interest from March 24, 1920; the court, having heard the evidence and arguments of counsel, doth find the following facts:

"That J. H. Harvey contracted to buy 64 acres of land from Miss Martha Edwards, and paid the purchase money thereof, except the sum of \$1,075 as of March 8, 1920; before the transaction was closed, Miss Edwards died, and after her death her heirs executed a deed in fee for said land, which deed was dated March 8, 1920; upon the execution of the said deed to said Harvey he at once executed and delivered to T. T. Hicks a deed in trust upon said land to secure the balance of the purchase money, \$1,075, with 6 per cent. interest thereon, said trust deed bearing date March 8, 1920; the said deed and trust deed were both duly probated, the registration fees paid, and they were filed for registration contemporaneously in the office of the register of deeds for Vance county on the 10th day of March, 1920; the trust deed was never actually recorded upon the books, and no index thereof was made.

"On the 20th day of March, 1920, the said J. H. Harvey and wife executed and delivered to F. W. Hancock a deed in trust upon the said land to secure the payment of two notes for \$850 each, due November 1, 1920, and November 1, 1921, being the balance purchase price due for one Kline automobile. The said trust deed was duly probated and filed for registration in the office of the register of deeds for Vance county on the 23d day of March, 1920, at 5 o'clock p. m., and appears of record in said county in Book 99, at page 317; the date of actual registration on the book is not given, but it is indexed, and the word 'March' is written on the line of its index at the beginning of the line. A deed in trust filed April 8, 1920, is recorded, on the page next before it. The Hancock trust deed is indexed three lines above the \$1,579.87 trust deed, which also has the word 'March' at the beginning of its line. On the 24th day of March, 1920, the said J. H. Harvey and wife executed and delivered to T. T. Hicks a deed in trust upon the same above-mentioned land to secure the payment of the sum of \$1,579.87. This trust deed was duly probated and filed for registration in the office of the register of deeds for Vance county on the 26th day of March, 1920, at 4:30 o'clock p. m. and appears of record in said county in Book 95, p. 415; the date of actual registration on the book is not given, but it is indexed

in March, 1920, after the trust deed to F. W. Hancock.

"The plaintiff paid off the amount of balance due for purchase money on said land out of the \$1,579.87 loaned said Harvey, and on March 28, 1920, the date the trust deed securing said \$1,579.87 was filed for registration, and after its filing, the trustee, finding the \$1,075.00 trust deed was not recorded, withdrew it from the office of the register of deeds; that is the one which had been filed for registration March 10, 1920, but which had never been actually registered or indexed upon the record. The debt secured in the trust deed to Hancock has not been satisfied.

"Upon the foregoing findings of fact the court doth adjudge that the restraining order issued in this action by Hon. John Kerr, judge, be, and the same is hereby, dissolved, the court being of opinion that the trust deed executed by said J. H. Harvey and wife to F. W. Hancock on the 20th day of March, 1920, and filed for registration on 23d day of March, 1920, is a first and prior lien on the land described in the complaint herein, and that plaintiff is not entitled to be subrogated to the rights of Edwards under the \$1,075 trust deed.

"The plaintiff is taxed with the costs of the action."

Plaintiff excepted and appealed.

T. T. Hicks & Son, of Henderson, for appellant.

F. W. Hancock, Jr., of Oxford, and A. C. & J. P. Zollcoffer, of Henderson, for appellees.

HOKE, J. [1] The statute applicable (section 3311, Consolidated Statutes) provides in effect that no deed of trust or mortgage on real estate, etc., shall be valid to pass any property as against creditors or purchasers for value from the donor, bargainor, or mortgagor, but from the registration thereof in the county where the land lies, and the court decisions in this state construing the law have insistently held that no notice, however full or formal, shall avail to defeat a prior registration. *Fertilizer Co. v. Lane*, 173 N. C. 184, 91 S. E. 953; *Blalock v. Strain*, 122 N. C. 283, 29 S. E. 408; *Quinerly v. Quinerly*, 114 N. C. 145, 19 S. E. 99.

[2] From a perusal of the facts stated in the judgment it appears that the deed of trust under which plaintiff directly claims, being the deed to secure \$1,579.87 from Harvey and wife to T. T. Hicks, trustee, was executed March 24, 1920, proven and filed for registration March 26, indexed in March, 1920, exact date not given, but appearing on the index docket after the deed under which defendant claims. That the deed of trust to defendant, F. W. Hancock, trustee, to secure the \$850 notes, executed March 23, 1920, was duly proven and filed for registration March 23, 1920, appearing on the index docket of the county registry as of March, 1920, above the deed to T. T. Hicks, trustee, and presumably prior thereto.

From these findings, therefore, and by ex-

press provision of the statute, as between the two, the deed of defendant has the prior lien, and in any event, on the facts of this record, the priority of defendant's deed should prevail by reference to the time of filing, March 23, 1920, as against March 26, the date when plaintiff's deed was filed. *Power Co. v. Power Co.*, 175 N. C. 668, 96 S. E. 99; *Glanton & Cotton v. Jacobs*, 117 N. C. 427, 23 S. E. 335.

[3, 4] It is urged on behalf of plaintiff that, inasmuch as a portion of the money advanced on the security of plaintiff's present deed of trust to the amount of \$1,075 was used in payment of the original purchase money to the Edwards heirs, and that a deed of trust to secure the same had been proved and filed for registration March 10, 1920, to that extent plaintiff should of right be subrogated to this claim as a prior lien on the property; but in our opinion the position cannot be maintained. It is recognized that the principle of subrogation does not prevail in favor of a mere volunteer, but if it be conceded that the position might arise to plaintiff by reason of a permissible inference that he paid off the Edwards debt at the request of the debtor, and under an implied agreement that he might thus acquire the benefits of the lien (see *Liles v. Rodgers*, 113 N. C. 190, 18 S. E. 104, 37 Am. St. Rep. 627, citing 2 Beach on Modern Equity Jurisprudence, § 801) the position would not avail plaintiff on the facts of this record, for, as against defendant, holding under a duly registered instrument, the Edwards heirs never acquired any lien, and there is none to which plaintiff can be substituted. The facts showing that, before same was ever put on the registry, or indexed, the deed securing the Edwards debt was withdrawn from the files and the purchase money paid in full.

The position referred to is very well stated in 27 American Encyclopedia of Law (2d Ed.) at page 206, as follows:

"The rights acquired by a party entitled to subrogation cannot be extended beyond the rights of the party under whom subrogation is claimed, subrogation contemplating some original privilege on the part of him to whose place substitution is claimed, and where no such privilege exists, or where it has been waived by the creditor, there is nothing on which the right can be based."

[5] Again, it is insisted that plaintiff's claim to the extent of the purchase money debt paid to the Edwards heirs should be held superior because the deed of trust under which defendant claims is in recognition of the Edwards lien, and under the principle approved in *Hinton v. Leigh*, 102 N. C. 28, 8 S. E. 890, but on the facts presented, this exception also must be overruled. In *Hinton v. Leigh*, the court held that the claim under a later registered mortgage should be preferred to claims secured by a subsequent

deed of trust, but which had been first registered, but this was on the ground that, by correct interpretation, the deed of trust fully recognized the validity of the mortgage and conveyed the land to the trustee only as subject to the mortgage lien. But the position does not prevail from the fact that in the instant case the deed of trust to defendant in the covenant against incumbrances merely excepts the claim then existent in favor of the Edwards heirs. The present comes clearly within *Piano Co. v. Spruill*, 150 N. C. 166, 63 S. E. 723, and that class of cases which hold that a mere reference to the existence of a prior incumbrance does not recognize its validity as a superior lien except as it may comply with requirements of our registration laws.

We deem it not improper to refer to a statute of the recent session of the Legislature (Pub. Laws 1921, c. 114), amending 3553 of Consolidated Statutes, and which may have an important bearing on the priority of liens as determined by the date of filing in connection with the indexing and cross-indexing of instruments. The matter is not further pursued as the law does not seem to affect the rights of the parties to this controversy. We deem it desirable, however, that the attention of the profession and officials shall be called to the existence of the statute.

We find no error in the present record, and the judgment for defendant is affirmed.

Affirmed.

(182 N. C. 846)

STATE v. MARTIN. (No. 352.)

(Supreme Court of North Carolina. Nov. 9, 1921.)

1. Criminal law §752½—In motion to dismiss for insufficient evidence, only evidence favorable to state considered.

On motion to dismiss a prosecution because the evidence taken as a whole was not sufficient to sustain a conviction, only such evidence as was favorable to the state is considered.

2. Abortion §11—Evidence held sufficient to sustain conviction for procuring.

In prosecution for procuring an abortion, evidence of defendant's acts, statements, and communications held sufficient to sustain a conviction.

3. Witnesses §211(4)—Presiding judge may compel testimony of physician as to statements of defendant if necessary to administration of justice.

C. S. § 1798, providing that no physician shall be required to disclose information acquired in his professional character unless in the opinion of the presiding judge such disclosure is necessary to the administration of justice, the testimony of a physician, attend-

ing a patient for whom an alleged abortion has been procured, of the statements and admissions of the defendant are admissible.

4. Criminal law \S 407(1), 736(2)—Statements of woman on whom abortion was performed, made in defendant's presence, admissible, and question whether defendant heard her is for jury.

In prosecution for procuring an abortion testimony of the physician as to statements made by the woman in the presence of defendant are properly admitted, it being in the province of the jury to determine from the evidence whether the woman's statements were made in the presence and hearing of defendant, whether they were understood by him, and whether he denied them or remained silent.

Appeal from Superior Court, Forsyth County; Long, Judge.

Robert Martin was convicted of procuring an abortion, and he appeals. No error.

The defendant was prosecuted for a breach of sections 4226 and 4227 of the Consolidated Statutes upon the following bill of indictment:

"The jurors for the state upon their oath present: That Robert L. Martin, late of the county of Forsyth, on the 28th day of June, in the year of our Lord 1921, with force and arms, at and in the county aforesaid, unlawfully and willfully and feloniously did administer to Rosa Yow, a woman pregnant and quick with child, and did prescribe for said Rosa Yow and advised and procured said Rosa Yow to take certain medicines, drugs, and other substances, and used and employed other instruments and money with intent to destroy said child, the same not being necessary to preserve the life of the mother, contrary to form of the statute in such case made and provided, and against the peace and dignity of the state.

"And the jurors aforesaid, upon their oath, do further present that Robert L. Martin, at time aforesaid, with force and arms, at and in county aforesaid, unlawfully, willfully, and feloniously did administer to Rosa Yow, a pregnant woman, and prescribe for said pregnant woman, and advise and procure said Rosa Yow to take medicine, drugs, and other things, with intent thereby to procure the miscarriage of said Rosa Yow, against the form of the statute in such case made and provided, and against the peace and dignity of the state."

The jury convicted the defendant, who, after judgment was pronounced, appealed. He has assigned several errors, among them the refusal of his honor to dismiss the action as in case of nonsuit. The state introduced only two witnesses, Dr. Mimms and W. P. Yow, a brother of Rosa. The defendant offered no evidence. The evidence most favorable to the state tended to show the facts to be as herein stated. Rosa Yow was 18 or 19 years of age. Several months before the indictment she had married a man named Howard Daye, with whom she lived only a short

time. On Saturday she went to her brother's house, which was 4 or 5 miles from Winston-Salem, and on the next Monday at 3 o'clock in the afternoon, suffered an abortion, or miscarriage. On Monday night Dr. Mimms was called to see her, and found her in bed slightly bleeding. At the time of the abortion, or miscarriage, she was advanced in pregnancy from two to four months. The defendant accompanied Dr. Mimms on this visit, and told him that another doctor had charged \$200 for the operation, one-half of which the defendant had paid by a check which he had destroyed after it was cashed. On this visit Dr. Mimms and the defendant went into Rosa's bedroom, the defendant seating himself on a sofa in one corner of the room. The defendant was drinking, and occasionally "opened up and said something," and Dr. Mimms, while not positive, thought the defendant was awake, and, if awake, could hear Rosa's conversation with the witness. In the presence of the defendant Rosa told Dr. Mimms that since becoming pregnant she had desired a miscarriage, and had called on a physician, who charged her \$200; that the defendant had given her a check for \$100, which, with \$100 of her own money, she had paid this physician; that the physician when the money was paid took her into a room, laid her on a table, used some kind of instrument in packing something in her womb, and gave her medicine to take. She said this doctor, after getting his money, refused to visit her, and the defendant said he had phoned him to go, and he ought to have gone. At one time the defendant paid Dr. Mimms \$60. Defendant made another visit with Dr. Mimms. On the second Saturday night next preceding the first visit, the defendant and Rosa called at Dr. Mimms' office, but left there while he was attending a call; and five or six days before this visit Rosa had come to his office alone. In the presence of others she addressed the defendant in endearing terms, and they were very affectionate. There were other circumstances tending to show their intimate relation.

Wallace & Cohen, and Hastings & Whicker, all of Winston-Salem, for appellant.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

ADAMS, J. [1, 2] The defendant's motion to dismiss the action was based on the conception that the evidence taken as a whole was not sufficient to sustain a conviction; but in deciding this motion we need consider only such evidence as was favorable to the state, without special regard to that on which the defendant relied. The immediate question is whether the evidence, when given a liberal yet reasonable construction, had legal sufficiency to convict. If it was sufficient to

support the charge in either count, it was not permissible to withdraw it from the jury. Considering the evidence as correctly portraying the circumstances under which the abortion or miscarriage was accomplished, we are of opinion that the verdict of the jury was amply justified, and that his honor properly denied the defendant's motion. The association of the defendant and the woman, their call at Dr. Mimms' office a week before she went to her brother's home; the defendant's payment of one-half the fee charged by the physician who "packed something in her womb," and prescribed the "black medicine," and his subsequent solicitude in urging this physician to attend her; the defendant's visits to her in company with Dr. Mimms, together with various other circumstances, were sufficiently convincing to warrant the jury in connecting the defendant with the unfortunate occurrence. *State v. Carlson*, 171 N. C. 818, 89 S. E. 80; *State v. Clark*, 173 N. C. 745, 91 S. E. 872; *State v. Bridgers*, 172 N. C. 882, 89 S. E. 804.

[3] Dr. Mimms related the circumstances attending his first visit to Rosa Yow, described her physical condition, and testified to certain statements made by her in the defendant's presence tending to implicate the defendant in the commission of the crime. To this evidence the defendant excepted, on the ground that it divulged information which the witness had confidentially acquired in his professional capacity.

At common law no privilege existed as to communications between physician and patient. The physician, when called upon to testify, had no right to decline or refuse to disclose information on the ground that such information had been communicated to him confidentially in the course of his attendance upon or treatment of his patient in a professional capacity. The public interest in the disclosure of all facts relevant to a litigated issue was deemed to be superior to the policy of recognizing, for the benefit of the patient, the inviolability of confidential communications. Hence, statutes have been enacted in practically every jurisdiction making communications between physician and patient privileged from compulsory disclosure. *Fuller v. Knights of Pythias*, 129 N. C. 323, 40 S. E. 65, 85 Am. St. Rep. 744; *Smith v. Lumber Co.*, 147 N. C. 63, 60 S. E. 717, 125 Am. St. Rep. 535, 15 Ann. Cas. 580; 28 R. O. L. 517. In some jurisdictions the privilege is absolute, and in others qualified. Our statute is in the latter class.

"No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon: Provided, that the presiding judge of a superior court may compel such disclosure, if

in his opinion the same is necessary to a proper administration of justice." C. S. § 1798.

In *Smith v. Lumber Co.*, *supra*, this statute has been construed as extending not only to information orally communicated by the patient, but to knowledge obtained by the physician or surgeon through his own observation or examination while attending the patient in a professional capacity, and which was necessary to enable him to prescribe. In that opinion Justice Hoke further said:

"And it is further held, uniformly, so far as we have examined, that the privilege established is for the benefit of the patient alone, and that same may be insisted on or waived by him in his discretion, subject to the limitations provided by the statute itself:

"(1) That the matter is placed entirely in the control of the presiding judge, who may always direct an answer, when in his opinion same is necessary to a proper administration of justice.

"(2) That the privilege only extends to information acquired while attending as physician in a professional capacity, and which information is necessary to enable him to prescribe for such patient as a physician. 4 Wigmore, § 2286c."

If the privilege is for the benefit of the patient alone, how can the defendant invoke its aid? Even if it be contended that the privilege was available to him on the ground that some of the communications were made in his presence, that Rosa became a party to the crime by consenting to the abortion, that she is living, and that the physician's testimony would tend not only to convict him but to discredit her, and that the evidence objected to was for these reasons incompetent, a complete answer is found in the proviso of the statute, and in his honor's statement that in his discretion he not only permitted but required Dr. Mimms to testify when called as a witness for the state. His honor no doubt did so because in his opinion the testimony of Dr. Mimms was necessary to a proper administration of justice.

[4] The testimony of this witness as to statements made by the woman in the presence of the defendant was properly admitted. True, the witness said that the defendant had been drinking, and was sitting in a corner of the room when the statements were made; but he testified also that the defendant, while near enough the woman to hear her remarks, occasionally said something himself, and that the witness, although not positive, thought the defendant was awake. It was the province of the jury to determine from the evidence whether the woman's statements were made in the hearing as well as in the presence of the defendant, whether they were understood by him, and whether he denied them or remained silent. *State v. Bowman*, 80 N. C. 437; *State v. Crockett*, 82 N. C. 599; *State v. Burton*, 94 N. C. 948; *State v. Raudall*,

(109 S.E.)

170 N. C. 762, 87 S. E. 227, Ann. Cas. 1918A, 438.

We have given due consideration to the remaining exceptions, and find them to be without merit. His honor presented both the law and the evidence in such manner as to enlighten the jury concerning the nature, scope, and merits of all matters in controversy between the state and the defendant. We find no error, and this will be certified to the superior court of Forsyth county.

No error.

(182 N. C. 414)

**BOARD OF COM'RS OF STOKES COUNTY
v. GEORGE. (No. 395.)**

(Supreme Court of North Carolina. Nov. 9, 1921.)

**1. Jury ⇨10—Provision as to inviolability of
"trial by jury" in all "controversies at law"
respecting property construed; "trial."**

Const. art. 1, § 19, providing, "In all controversies at law respecting property, * * * trial by jury * * * ought to remain sacred and inviolable," guarantees such trial only as to every issue of fact properly raised by the pleadings in a civil action, "controversies at law" including all such actions in which facts involving either legal or equitable elements are pleaded, but not questions of fact or proceedings which are purely equitable, "trial" referring to a dispute and issue of fact, and "trial by jury" not necessarily signifying that every legal controversy is to be determined by a jury.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Controversy; Trial; Trial by Jury.]

2. Jury ⇨19(1)—Act requiring ascertainment of damages to personalty by freeholders held not to abridge right of trial by jury.

C. S. § 1681, requiring the county commissioners, on complaint of injury to or destruction of property by a dog, to appoint three freeholders to ascertain the amount of damages and reasonable expenses, and to order payment of the same from the dog tax, requiring the owner of the dog to "reimburse the county to the amount paid out," and authorizing the commissioners to sue therefor, is not in violation of Const. art. 1, § 19, guaranteeing trial by jury in all controversies at law respecting property, the dog owner's right to such trial being protected by the provision empowering the commissioners to bring suit, and the requirement as to reimbursement importing, not that he is bound by the freeholders' award, but that the commissioners shall not recover more than the amount paid.

3. Animals ⇨88—Costs payable by dog owner reimbursing county for "amount paid out for injury."

Under C. S. § 1681, requiring county commissioners, on complaint of injury to property by a dog, to appoint freeholders to ascertain

damages, including reasonable expenses, and to order payment thereof from the dog tax, requiring the dog owner to reimburse the county to the "amount paid out for such injury," and authorizing the commissioners to sue therefor, the commissioners may recover not only the amount of damages assessed by the freeholders, but the reasonable costs incurred; the "amount paid out for such injury" importing the amount paid out on account thereof.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Amount.]

4. Evidence ⇨320, 501(8)—Testimony of nonexpert witness based on personal observation admissible, and not hearsay.

In county commissioners' action to recover amount paid by county, pursuant to C. S. § 1681, for the death of sheep killed by defendant's dog, testimony of a nonexpert witness based on personal observation of the carcasses as to the time that had elapsed since the death of the sheep was admissible, and not hearsay, and was not an expression of a theoretic or scientific opinion or a deduction from the testimony of others.

Appeal from Superior Court, Stokes County; Finley, Judge.

Action by Board of County Commissioners of Stokes County against Walter W. George. Judgment for plaintiff, and defendant appeals. No error.

Section 1681 of Consolidated Statutes is as follows:

"The money arising under the provisions of this article shall be applied to the school funds of the county in which said tax is collected: Provided, it shall be the duty of the county commissioners, upon complaint made to them of injury to person or injury to or destruction of property by any dog, upon satisfactory proof of such injury or destruction, to appoint three freeholders to ascertain the amount of damages done, including necessary treatment, if any, and all reasonable expenses incurred, and upon the coming in of the report of such jury of the damage as aforesaid, the said county commissioners shall order the same paid out of any moneys arising from the tax on dogs as provided for in this article. And in cases where the owner of such dog or dogs is known or can be ascertained, he shall reimburse the county to the amount paid out for such injury or destruction. To enforce collection of this amount the county commissioners are hereby authorized and empowered to sue for the same."

C. H. Lunsford made complaint that certain of his sheep had been killed by dogs, and the board of commissioners appointed three freeholders to ascertain the amount of his damages. These freeholders made the following report:

"To the Board of County Commissioners of Stokes County, North Carolina: Jurors appointed by the board in the above-entitled matter to make inquiry into and assess the dam-

ages of C. H. Lunsford most respectfully report to the board:

"That in obedience to the order, and after due notice to the claimant, and also to Walter George, the alleged owner of the dogs, they met at Capella, in Stokes county, N. C., on the 31st day of January, 1920, and proceeded to hear the evidence offered, and find the said claimant lost four sheep killed by dogs, and had one other sheep injured, and upon the evidence we find that Walter W. George's dogs were in the sheep pasture, but no evidence that they killed the sheep, and they assess the damages sustained by the claimant at \$43.

"Respectfully reported this, the 31st day of January, 1920.

"R. B. Tuttle.

"D. F. Tillotson.

"J. H. Covington.

"Fees for services:

J. H. Covington.....	\$4.00
D. F. Tillotson.....	4.00
R. B. Tuttle.....	4.00"

In May, 1920, the plaintiff brought suit against the defendant before a justice of the peace to reimburse the county to the amount paid out on account of the sheep killed and injured. On appeal the case was tried in the superior court, the issue and the answer being as follows:

"Is the defendant indebted to the plaintiff, and, if so, in what amount? A. \$55."

Judgment was entered, and the defendant, having noted exceptions, appealed to this court.

McMichael & Johnson, of Winston-Salem, for appellant.

N. O. Petree, of Danbury, for appellee.

ADAMS, J. The defendant's counsel denounces the validity of the statute in question on the ground that it deprives his client of rights and privileges guaranteed by the organic law. His chief objection is based on the proposition that the statutory provision for the assessment of damages by three freeholders is an express denial of the right of trial by jury. We do not understand the defendant's counsel to contend that the provision is in conflict with the "due process clause" of the federal Constitution, for the Supreme Court of the United States has held that the Seventh Amendment relates only to trials in the federal courts, and that trial by jury in suits at common law in the state courts, is not a privilege or immunity of national citizenship which the states are forbidden by the Fourteenth Amendment to abridge. *Walker v. Sauvinet*, 92 U. S. 90, 23 L. Ed. 678; *Montana Co. v. Mining Co.*, 152 U. S. 171, 14 Sup. Ct. 506, 38 L. Ed. 398; *Marvin v. Trout*, 199 U. S. 212, 26 Sup. Ct. 81, 50 L. Ed. 157. But he insists that the statute conflicts with article 1, § 19, of the Constitution of North Carolina, which is as follows:

"In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable."

[1] The words "controversies at law" include all civil actions in which facts, involving either legal or equitable elements, are put in issue by the pleadings, but they do not include questions of fact, or proceedings which are purely equitable. *Porter v. Armstrong*, 134 N. C. 447, 46 S. E. 997; *Caldwell v. Wilson*, 121 N. C. 425, 28 S. E. 554; *Worthy v. Shields*, 90 N. C. 192.

[2] "Trial" refers to a dispute and issue of fact, and the expression "trial by jury" as used in the statute does not necessarily signify that every legal controversy is to be determined by a jury. The section under consideration guarantees to the citizen the right to have submitted to and determined by a jury every issue of fact properly and legally raised by the pleadings in a civil action. If the statute before us were in conflict with such constitutional provision, it could not be sustained. But it does not purport to abridge the defendant's right. Conceding that the defendant, although duly notified, was not required to attend the hearing before the freeholders, and therefore was not barred by their award, still it does not necessarily follow that the provision for the assessment of damages is for this reason in conflict with the Constitution. The statute is a police regulation evidently designed as between the claimant and the county to fix a limitation upon the demand of the former and upon the liability of the latter. When the claimant invokes the aid of the statute and elects to abide by the method therein prescribed, he cannot thereafter claim either from the county or from the owner of the animal any damages in excess of the amount awarded by the freeholders. But the amount awarded the claimant is not an estoppel upon the owner of the dog. The latter's right of trial by jury is not denied, but is amply protected by the provision which empowers the commissioners to bring suit. When such suit is brought, the owner of the dog may submit to the jury any issues joined upon the pleadings, and by this means preserve his constitutional right. The sentence, "He shall reimburse the county to the amount paid out for such injury or destruction," imports, not that the defendant is bound by the freeholders' award, but that the commissioners shall not in any event recover more than the amount paid to the claimant.

Upon the trial it would be incumbent upon the commissioners to show by the preponderance of the evidence that the defendant was the owner of the dog, as well as the amount of the damage; and it would be open to the defendant to rely upon failure of the plaintiff's proof, and, if necessary, upon evi-

dence offered in rebuttal. This construction of the statute affords the owner of the dog the opportunity to present every defense he would be entitled to in case of suit brought by the owner of the injured or destroyed sheep.

[3] The freeholders assessed the claimant's damages at \$43; the fees of the freeholders were \$12. His honor instructed the jury that they might award damages "not exceeding the \$43 and the \$12 cost." The defendant excepted to this instruction on the ground that the statute provides for reimbursement to the extent of the amount paid by the county "for such injury or destruction," and not for cost. The expression "amount paid out for such injury or destruction," construed in connection with other provisions in the statute, imports the amount paid out on account of such injury or destruction. If the defendant had insisted on his right to have the jury find whether the cost was reasonable, we should have been inclined to sustain his exception; but his proposition is that the plaintiff as a matter of law cannot recover the cost which is properly incurred.

[4] Testimony as to the length of time that had elapsed between the death and the discovery of the sheep was properly admitted. It was not hearsay evidence; it was an expression of the judgment or estimate of a nonexpert witness based upon personal observation of the carcass, and not an expression of a theoretical or scientific opinion, or a deduction from the testimony of others. *Ives v. Lumber Co.*, 147 N. C. 307, 61 S. E. 70; *Bennett v. Carolina Mfg. Co.*, 147 N. C. 621, 61 S. E. 463; *Britt v. Railroad*, 148 N. C. 37, 61 S. E. 601; *Murdock v. Railroad*, 159 N. C. 131, 74 S. E. 887; *Barnes v. Railroad*, 178 N. C. 268, 100 S. E. 519; *Hassell v. Daniels*, 180 N. C. 38, 103 S. E. 897.

We have examined and duly considered all the exceptions, and in the record we find no error.

No error.

(182 N. C. 422)

STERN & SWIFT v. HYMAN BROS. (No. 389.)

(Supreme Court of North Carolina. Nov. 16, 1921.)

Attorney and client — 143—Contract for compensation during existence of relations void.

A contract for compensation made by attorney and client during the existence of the relation is void, as against public policy; and unless a contract for amount of compensation was made before entering into the relation, the amount is to be assessed on the basis of a reasonable compensation for the services rendered and the benefits received.

Appeal from Superior Court, Guilford County; Finley, Judge.

Action by S. J. Stern and another, law partners as Stern & Swift, against A. L. Hyman and others, partners as Hyman Bros. Judgment for plaintiffs, and defendants appeal. Error.

This is an action by the plaintiffs, attorneys at law, to recover \$5,050 as a fee for services claimed to have been rendered in adjusting the loss by fire on a stock of goods with certain fire insurance companies. The complaint alleges that the defendants employed the plaintiffs to adjust said losses with the insurance companies, and that afterwards, pending the said adjustment, the defendants agreed to pay the plaintiffs 20 per cent. on the amount recovered, which the plaintiffs claim was \$25,250, on which they seek to recover a fee of \$5,050. The defendants deny the making of such contract, and allege that the only contract ever made with the plaintiffs was to pay them \$200 for their services in making proofs of loss and in assisting in adjusting the same, which was all the service the plaintiffs rendered. The defendants further allege that the basis of \$25,250 on which the plaintiffs demand \$5,050 as 20 per cent. fee was never recovered; that in fact the insurance companies took over \$15,000 of goods and \$550 for fixtures, and agreed to pay \$9,700 in cash loss by fire, of which \$3,250 has not been paid, and allege not only that there was no contract for 20 per cent., and that if there was it should be computed only on the cash actually recovered, but they contend further that, if there were any contract for 20 per cent., it was made during the time the plaintiffs were acting in pursuance of their employment, and was void, and the plaintiffs are entitled only to reasonable compensation for their services to be assessed by the jury.

W. P. Bynum and R. C. Strudwick, both of Greensboro, for appellants.

Wilson & Frazier, of Greensboro, for appellees.

CLARK, C. J. The record is voluminous, and there are many exceptions, but we need consider but one, which we think entitles the defendants to a new trial, for the others may not arise on another trial.

The defendants except and assign for error the refusal of his honor to give the third instruction requested by the defendants, to wit:

"It being admitted that at the time of the alleged contract between the plaintiff Stern and the defendants (as claimed by plaintiffs) the relation of attorney and client existed between them, the plaintiffs would not be entitled to recover from the defendants any sum for their services which was not fair and rea-

sonable under all the circumstances of the case, no matter what sum was mentioned in the said contract."

This prayer should have been granted. It is, and should be, well settled that, where the relation of attorney and client exists, and the contract sued upon by the attorney is made during the existence of the relationship, and more especially when the contract is for a portion of the subject-matter contended for, as here, the attorney can recover no more than a reasonable compensation for his services, no matter what kind of a contract he has made with his client or induced him to enter into. This rule is based upon the confidential relations existing between attorney and client, and is enforced, not upon the ground that there was fraud, but in order to prevent fraud, and as a matter of sound public policy.

While the relationship exists an attorney cannot bind his client in any manner to make him greater compensation for his services than he would have the right to demand if no contract had been made during the existence of the relationship. *Weeks on Attorneys* (2d Ed.) § 368; *Elmore v. Johnson*, 143 Ill. 513, 32 N. E. 413, 21 L. R. A. 366, 36 Am. St. Rep. 401. His honor disregarded this principle as pointed out by exceptions 5, 7, 9, and 16 in the record.

In a contract of this kind, the burden is on the plaintiff to show that it was fair and reasonable and not upon the defendant to show to the contrary. *Lee v. Pearce*, 68 N. C. 81, 87; *McLeod v. Bullard*, 84 N. C. 516; *Pritchard v. Smith*, 160 N. C. 84, 75 S. E. 803; 2 R. O. L. p. 966, § 42, and page 1038; *Shirk v. Neible*, 83 Am. St. Rep., note on pages 161, 162, and cases there cited.

According to the complaint and the testimony of the plaintiff, Stern himself, the contract he sets up was entered into after the establishment of the relation of attorney and client between the parties and during the continuance of this relationship. Under such circumstances, the client would be at a serious disadvantage if the attorney should throw up the case after acquiring knowledge of his plaintiff's case, and while the conduct of the case was in *medias res*. The parties did not stand upon an equal footing. 2 Thornton on Attorneys, §§ 428, 432.

This wholesome principle is that the parties to a contract must stand on an equal footing, and that therefore, as a matter of law—

"Certain known and definite fiduciary relations, that, for instance, of trustee and cestui que trust, attorney and client, guardian and ward, and general agent, having the entire management of the business of the principal, are sufficient under our present judiciary system to raise a presumption of fraud as a matter of law, to be laid down by the judge as

decisive of the issue, unless rebutted. Other presumptions of fraud are matters of fact to be passed upon by a jury." *Lee v. Pearce*, 68 N. C. 76.

The able opinion in this case by Chief Justice Pearson laid down the eternal principle of equity and fair dealings from which this court has never deviated. On page 87 of 68 N. C., in that opinion the court instances other fiduciary relations which do not amount to a presumption of fraud as a matter of law, but merely raise a presumption of fraud as a matter of fact to be passed upon by a jury.

That case has been cited and affirmed by this court in a long line of cases cited in the *Anno. Ed.*, and the principle is universally recognized. The fact of the existence of the relationship of attorney and client at the time the contract is alleged by the plaintiffs to have been made appears from the complaint, and by the evidence of the plaintiff himself, Stern, and the judge should have held the alleged contract, if made, to have been void, as a matter of law. And unless the jury rejected, as it would seem that they did, the defendants' allegation that there was a contract made prior to entering into the relationship for \$200, then the case should have been submitted to the jury upon the third prayer of the defendants as above set out, and the jury should have assessed the plaintiffs' recovery upon the basis of a reasonable compensation for the services rendered by the plaintiffs and the benefits received by the defendants.

The verdict and judgment must be set aside, and a new trial is granted for this error.

(182 N. C. 452)

YORK & FENDERSON v. Z. M. L. JEFFREYS & SONS. (No. 102.)

(Supreme Court of North Carolina. Nov. 16, 1921.)

Sales @81(4)—**Delay in shipment because of war conditions no defense where contract exonerated sellers from responsibility for delays beyond control.**

Although potatoes sold were shipped, not by open bill of lading, which would have vested title in the buyers and thereby have imposed the risk of delay upon them, but by bill of lading to the sellers' order, "notify" the buyers, the sellers did not lose their right to sue for the purchase price of the potatoes because of the fact that they were delayed by war conditions of shipping, where the sales contract agreed that the sellers should not be held "liable or responsible" for any delay over which they had no control.

Appeal from Superior Court, Wayne County; Lyon, Judge.

Action by York & Fenderson against Z. M. L. Jeffreys & Sons. From judgment for plaintiffs, defendants appeal. No error.

During the month of January, 1918, Messrs. Maley & Carolin, brokers, of New York, negotiated a contract between the plaintiffs and defendants as follows:

"Agreement between York & Fenderson, of Mars Hill, Me., and Jeffries & Sons, Goldsboro, N. C., as to one car of potatoes, as follows: 150 10-peck sacks red Bliss seed potatoes, balance of car consisting of about 150 sacks seed Cobblers at the following prices: Three dollars and fifty cents per cwt. for the red Bliss and three dollars and ten cents per cwt. for the Cobblers, shipment to be made about the 1st of February and delivered Goldsboro, N. C., at above-mentioned prices. The said Jeffries & Sons agree to pay \$3.50 per cwt. for the red Bliss and \$3.10 per cwt. for the Cobblers in the following manner: Amount draft and bill lading attached.

"It is further agreed that the said York & Fenderson will load and ship the potatoes, using all possible means available to get them out on time, but will not be held liable or responsible for delays occasioned by the railroads being unable to furnish cars for the transportation of said potatoes or for other delays over which said York & Fenderson have no control.

"In witness whereof the parties hereto have hereunto subscribed their names the day and year above written. York & Fenderson.
"Jeffries & Sons."

The above contract is dated January 23, 1918, but was not forwarded to the defendants until January 31, 1918, as will appear by letter. The contract was thereupon returned to Maley & Carolin, brokers, by the defendants, and on February 4, 1918, mailed to these plaintiffs by said Maley & Carolin. While it is true that the contract provides for shipment about February 1, it is admitted by the defendant Z. M. L. Jeffreys that he did not actually sign the contract until February 1st, at which time he attached thereto an additional order for 200 bags of Cobblers to be shipped in the same car. He knew at the time that the contract was to be mailed from Goldsboro, N. C., to Maley & Carolin, New York City, thence by Maley & Carolin to these plaintiffs at Mars Hill, Me., and the defendant Z. M. L. Jeffreys further admitted that plaintiffs could not possibly have shipped any potatoes under this contract, even if there had been no embargoes, before February 6th or 7th.

Immediately upon receipt of the contract, plaintiffs wrote to the defendants that their favor of the 30th to Maley & Carolin had been forwarded to them for attention, and in reply they begged to advise that just at that time there was an embargo on the M. & M. T. Co. from Boston to Norfolk, and, as this was the route that their shipment had to take, they were unable to move it just then; besides the weather was extremely cold, and plaintiffs

did not believe that defendants would want them moved under such conditions; that plaintiffs had the matter before them, and would move defendants' car just as soon as conditions would permit, which they trusted would be satisfactory, and that the potatoes would reach defendants in plenty of time for their requirements. To the above letter the defendants made no reply.

On February 15th, the plaintiffs, in accordance with said contract, shipped to the defendants one carload of potatoes and advised the defendants by letter of some date in substance as follows:

"We hand you herewith the invoice for your first car of potatoes and are pleased to advise, as you will see, that we were able to get a large car and have given you the 200 bags of Cobblers which you asked for. We used the freight rate as given us by the transportation people, but, if there is any difference from what we have allowed, if you will send paid freight bill we will send you check to cover. We trust that the stock will arrive in good season and be satisfactory, as we feel sure it will."

It appears by the undisputed testimony that plaintiffs made application for car immediately upon receipt of the contract and shipped the potatoes in the first available car, and that the potatoes were U. S. grade No. 1. There was delay in transit, and the potatoes did not arrive in Goldsboro until about the 23d day of March, 1918. On March 9, 1918, and before the potatoes arrived, the defendants wrote the plaintiffs that they had asked the A. C. L. Ry. to trace the car of potatoes (M. O. E. 65030), and had been informed that the car left Boston on Clyde Line via Charleston, S. C., on March 4th. "Why did you ship this car via Clyde line? It seems to us that we are entitled to damages. Planting season is virtually over with us, and no probability of getting potatoes in some time. We had sold these potatoes before we gave orders for same. All our orders have been canceled. Am satisfied charges will be much more than you deducted."

Again, on March 19th, defendants wrote the plaintiffs that, should the car of potatoes arrive, they would notify plaintiffs by wire; that Mr. D. H. Dixon, broker, was a good man to turn them over to; he had handled 50 cars that season; that defendants were turning car down upon the ground that planting season was over and the people they had sold to had bought elsewhere; that defendants had lost their profit, and plaintiffs could look to transportation company. And on March 23d, when the potatoes arrived, the defendants wired the plaintiffs as follows: "We are not going to accept potatoes."

It appears from the evidence that the normal time for delivery of potatoes from Mars Hill, Me., to Goldsboro, N. C., is 14 days, and if the delivery had been made within the usual time, the potatoes would have reached

Goldsboro in ample time for the planting season. The plaintiffs contend that at the time this contract was entered into both parties knew that the world war was being waged, and both knew that embargoes were frequent, and that delays were the rule rather than the exception, and, under such conditions, it was but natural and prudent that every shipper should safeguard himself against delays by railroads that were engaged primarily and preferentially in the transportation of soldiers. The defendants testified that the potatoes lay on the docks in Boston for three weeks, and that, if the potatoes had arrived three weeks earlier, they would have been in time for planting season. Examination of the record will disclose that the potatoes were refused because they did not arrive in time for the planting season, and it will appear, and it does appear, that if the potatoes had been transported within the usual time that they would have arrived in ample time for the planting season in Eastern North Carolina.

The judge charged the jury as follows:

"If you find from this evidence, the burden being on the plaintiffs so to satisfy you, that the plaintiffs shipped the potatoes according to its contract, that there was no unreasonable delay in the shipment, and that they shipped by the route that at that time was open and available, and that the delay in the arrival at Goldsboro was no fault on the part of the plaintiffs, why then it would be your duty to answer this issue whatever you may find the amount to be according to the contract. Plaintiffs contend that the amount is \$1,508.84."

Defendants excepted.

Verdict for plaintiffs assessing damages at \$1,508.83. Judgment thereon, and appeal by defendants.

Teague & Dees, of Goldsboro, for appellants.

Langston, Allen & Taylor, of Goldsboro, for appellees.

WALKER, J. (after stating the facts as above). This is a case of great apparent hardship, as will appear from our recital of the facts, but it is a misfortune which has come to the defendants through no legal fault of the plaintiffs, and therefore must be borne with patience and patriotic resignation, as it was caused by the pressing needs of our government for immediate and rapid transportation in the movement of men and materials for war purposes. This alone would not exonerate the plaintiffs, but defendants entered into a contract with them which appears in the statement, by which they agreed that the plaintiffs should not be held "liable, or responsible" for any delay over which they had no control, and occasioned by the railroads' being unable to furnish cars, because of prior government demands upon them to supply transportation for war purposes.

The defendants asked for two instructions

(which were practically identical) to the effect that, as the potatoes were shipped, not by open bill of lading, which would have vested the title to them in the defendants and thereby imposed the risk of delay upon them, but by bill of lading "to their own order, notify Jeffreys & Sons," the risk of any delay was assumed by the plaintiffs, because they retained the title to the potatoes during the course of transportation and until delivery to the defendants upon payment of the draft, which was drawn to order with bill of lading attached. But this view leaves out of consideration the important and very essential fact that this shipment moved under special contract excluding the ordinary liability of a shipper by a carrier, and containing a clause therein which protects them from delay in transportation in certain circumstances, which have already been stated. It appears first that the defendants agreed that the shipment should be made as it was—that is, "Amount draft and bill of lading attached"—and specially stipulated that the plaintiffs should not be considered in fault when any delay was caused by conditions and circumstances beyond their control, such as the preferential right of the government to all means and methods of transportation. The ordinary rules of law do not prevail in such instances, for "inter arma leges silent." Where the preservation of the government is at stake, all private rights must give way and be subordinate to it. This is not only the law of war, but the call of patriotism. Ordinarily the maxim is that "private good yields to public," and the interest of an individual should give place to the public good ("privatum commodum publica cudit," Jenk. Cent. p. 223, case 80); and the other version of it is that private inconvenience is made up, or compensated for, by public benefit ("privatum incommodum publico bono pensatur"). But on another ground, which is somewhat related to those we have stated, the safety of the people is the supreme law, and as such entitled to the first consideration, and it is the inexorable law that regard be had to the public welfare, and, in times of war and peril, to the public safety, for in such instances an interference with private rights is obviously dictated and justified by the immediate urgency of the occasion and the highest necessity. Broom's Legal Maxims (8th Ed.) pp. 2 to 5. The rights and supreme power of the government in times of war, which may be exercised for its own safety and the protection of its people, must be conceded, and among those rights is the one which permitted it to commandeer the existing means of transportation for its own purposes in prosecuting the war which it had declared against the Central Empires, and to the extent of seizing the railroads or subjecting them to its use and control for war purposes, and the exercise of this power was the reason for inserting the special clause in

this contract exempting the plaintiff from liability or responsibility for delays in transportation beyond its control. It was a valid stipulation, and must be enforced, and, if any losses have been sustained by the defendants because the goods could not be shipped with the usual and customary expedition, by reason of such delays, the defendants must submit to them, for there is no measure of redress, as they came within the class of losses where there is no technical injury, and within the designation of the contract of shipment—that is, “delays beyond plaintiffs’ control.” If there had been no such provision in the contract, the plaintiffs might not have been protected against recovery of damages by the defendants, and perhaps could not have themselves recovered for the price of the potatoes. But the government, under its war power and the “National Defense Act” of the Congress, had the right to take over all transportation facilities and thereby prevent or obstruct the regular and usual course of carriage by rail and water. If the plaintiff had exempted itself from “liability” only, the result might have been different, but it was relieved from “responsibility” as well, and the parties meant by the use of this word something more than mere “liability,” or exposure to a suit, or counterclaim for damages. They intended to relieve the plaintiffs of all fault whatever when the shipment was delayed by an embargo on transportation caused by the necessities of the government in the exercise of its war powers as authorized by Congress.

This subject is fully discussed in *Roxford Knitting Co. v. Moore & Tierney* (C. C. A.) 285 Fed. 177, 11 A. L. R. 1415; *Kneeland-Bigelow Co. v. Michigan C. R. Co.*, 207 Mich. 546, 174 N. W. 605; *Primos Chemical Co. v. Fulton Steel Corp.* (D. C.) 266 Fed. 945; *Bernhardt L. Co. v. Metzloff*, 113 Misc. Rep. 288, 184 N. Y. Supp. 289; *Prescott & Co. v. Powles & Co.*, 193 Pac. (Wash.) 680. The question is also considered in an elaborate note to *Roxford Knitting Mill v. Moore & Tierney*, supra, as reported in 11 A. L. R., at page 1429, to which we refer. It was held in *Chemical Co. v. Steel Corp.*, supra, that a vendor of a crane, to be manufactured under a contract calling for delivery at a specified time, and providing that the vendor did not assume liability for loss from any cause beyond its control was held not entitled to recover for the crane, which was not delivered at the time agreed, although the delay might have been due to orders before contracted for, as to which priority certificates had been issued by the government. The court recognized, however, that such a cause would constitute a defense to an action by the vendee for damage due to the delay. And in *Prescott & Co. v. Powles & Co.*, supra, the court stated that, had the vendor been sued for

damages for failure to ship the full order, the government’s act might have afforded a defense, but that, having sued on the contract, it was essential to a recovery that a full performance be shown, and that no excuse not provided for in the contract would justify a recovery where the performance was partial only, save an act of the vendee rendering performance impossible, or a waiver by it.

I forbear to further pursue this part of the discussion, as in this case there is a clause in the contract which, in our opinion, exempts and exonerates the plaintiffs from all blame and required the defendant to pay for the potatoes. They cannot object that the plaintiffs retained the title to the potatoes under the terms of the draft and bill of lading annexed, for they deliberately consented to this form of shipment, and their real promise, therefore, was to pay the draft when the potatoes arrived, take up the bill of lading, and receive the potatoes, and, even if they had not so promised, the clause of exemption in the contract would require them to do so, as by its terms, and the finding of the jury as to the embargo preventing an earlier delivery, the plaintiffs were in no fault, having delivered the potatoes as soon as they could do so, and the contract exempted them not only from liability, but also from “responsibility,” for not delivering before the end of the planting season.

The jury’s verdict has disposed of all other questions concerning defendants’ liability for the price of the goods, as, for one example, the shipment by the Clyde Line to Charleston, S. C., it appearing that the Merchants’ & Miners’ Tr. Line, the usual one, had been closed by the government to private transportation.

There is no contention, as we understand the case, that the potatoes were of inferior quality when they were delivered to the carrier for shipment, and there does not appear to be any ground upon which to hold the plaintiffs “responsible” for dilatory conduct on their part. There seems to be no negligence legally imputable to them. *Waddell v. Reddick*, 24 N. C. 424.

Whether the defendants have any right over against the carriers, or any one of them, is a question not now pertinent. As to their rights under the contract of purchase and the other facts, not now necessary for us to consider, see *Richardson v. Woodruff*, 178 N. C. 46, 100 S. E. 173, and *Gwyn v. R.*, 85 N. C. 429, 39 Am. Rep. 708, where there is a general discussion of the matter.

The other exceptions are either merely formal, or devoid of any genuine merit. Upon the whole, we conclude that the case was correctly tried below, and the result is in accordance with the relevant and controlling principles of law.

No error.

(182 N. C. 855)

STATE v. McNEILL. (No. 401.)

(Supreme Court of North Carolina. Nov. 16, 1921.)

Intoxicating liquors \Leftrightarrow 227, 238(4)—Evidence of general reputation of defendant's place admissible, and weight of testimony was for jury.

In a prosecution for possessing liquors for sale, where defendant's witnesses testified he was away from home when whisky and jugs were found on his premises, and that they had been brought there without his connivance, evidence as to general reputation of defendant's house as a place for illicit sale of whisky, though incompetent to establish defendant's reputation, was a circumstance which, under O. S. § 3383, authorizing proof of violations of section 3378, relative to handling liquor for gain, by circumstantial evidence, was admissible in corroboration of inference arising from the finding of the liquor, and the weight of the testimony was for the jury.

Hoke and Stacy, JJ., dissenting.

Appeal from Superior Court, Scotland County; Ray, Judge.

Nathan McNeill was convicted of having in his possession spirituous and intoxicating liquors for sale, and he appeals. No error.

Walter H. Neal, of Laurinburg, for appellant.

J. S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

CLARK, C. J. The indictment charged that the defendant "unlawfully and willfully did have and keep in his possession, for the purposes of sale, certain spirituous and intoxicating liquors." The evidence for the state was as follows:

Lamar P. Smith, deputy sheriff, testified for the state:

"I went up to the defendant's house and I drove up in the yard. There was a man there; there were several in the yard; Lee McNeill and two other fellows and one woman, I believe; and I noticed one of those fellows go over to some bushes like they wanted to hide something, and I asked him what he hid, and then I walked to where he went and found two quarts of whisky there where he had stuck it down in the broom straw, and I brought it back and went in the house and found in the kitchen two jugs.

"I believe that the man who walked out there to the bushes said his name was McLean, and I went in the house, and there was two jugs in there that smelled strong with whisky sitting in a little kitchen. They were gallon jugs, and under the table I found a quart pot and funnel that was wet with whisky, looked like it had just been poured out, and that smelled strong with whisky, and right outside the kitchen door at the bottom of the steps I found a 10-gallon keg, and it was also strong with whisky, and while I was in the

yard I saw a fellow leave the yard and go behind the garden toward the little ditch, and I went around there and found a gallon jug full of whisky, and I brought it back, and there was about a quart of whisky out of the jug. I was by myself. This was at the defendant's house. I searched his house one other time and found a quart of blockade whisky in a jug.

"Q. Look over these items and jugs and things here and state how much of it you found at Nathan McNeill's house. A. I found it all there. I found these two bottles, and this jug is the one I found in the ditch. These other two jugs were in the kitchen, and this funnel and the measuring cups were on the table.

"Q. Is that liquor in there? It looks like kerosene. A. It smells like whisky. This is the jug I found, and it smelled high with whisky."

The state then introduced in evidence the jugs, bottles, measuring cups, funnel, and other articles and exhibited before the jury.

Cross-examination:

This defendant then testified that the diagram then submitted to him was a reasonably correct diagram of the premises and surroundings starting up at Mr. Fairley Patterson's.

"I found a part of the liquor in the house. I found in the house, what is in these two jugs. They smelled strong of whisky.

"Q. How much is there of it? A. A quart, maybe.

"Q. Between a quart and a pint in both of them. Is there a ditch that runs sorter catty-cornered from Nathan's house? Now will you please indicate on the plat about where the garden is? A. Right along there (pointing out the ditch on the diagram). I found the glass jug of liquor in the ditch right back of the garden. The whisky which I found in the briars or bushes was not in that direction at all. It was back on the opposite side of the house. The man who had it was standing in the yard when I drove up and he walked to the bushes. I think he said his name was McLean. I do not remember. He was the one who had the two pints of whisky. I think it was 10 or 15 steps in the briars and about that far from the road where I found the two pints of whisky. I found it in the briars. I saw him go down there like he wanted to hide something, and when he came back I went to see what he had hid, and that is what I found. Nathan McNeill was not at home. I do not know who carried these receptacles and jug and the measuring pot and other things to the house, and I do not know who was in charge of the keys of this house. I found these things in the kitchen, and just outside the kitchen there was a wagon standing next to the garage, which had some household goods on it. * * * (State rested.)"

The evidence for the defendant was an attempt to show that the whisky found in the ditch was not on the defendant's land, but just over the line, and that the whisky

and vessels were carried to the defendant's house that day while he was away.

In rebuttal, the deputy sheriff was asked:

"State, if you know, what the general reputation of Nathan McNeill's place is relative to selling whisky."

Over the defendant's objection, the sheriff was allowed to testify, the court adding, "If it has such a general reputation," and the sheriff responded:

"Yes; it is bad; it has been bad for several years."

On this the court said:

"Gentlemen, that is allowed, not as primary or substantive evidence, but merely to corroborate, if it does corroborate or tend to corroborate, this witness in that he found the articles which the state has introduced in evidence here, consisting of two or three bottles of whisky, jugs, and a keg and measuring pot and funnel, which the state contends, and the witness testifies, smelled of whisky, if it tends to corroborate him, and is allowed for that purpose only."

The court refused a motion to strike out the above question and answer thereto, and defendant excepted.

Another witness, Manly Russell, testified to the same effect that he "knew the general character of Nathan McNeill's place as to the sale of whisky, that is, what the people say about his place, and that it was bad." The defendant objected to the question and moved to strike it out, and excepted from the refusal to do so, the court saying to the jury:

"Gentlemen, this evidence is allowed to corroborate the witness Smith, who went on the stand and testified that he found the liquor offered in evidence here and is allowed for the purpose of corroborating, if it corroborates or tends to corroborate, and for that purpose only."

These questions were not asked as to the general reputation of the defendant, and would have been incompetent for that purpose, for he had refrained from going upon the stand, but they were admitted in corroboration of the state's evidence, which tended to prove that the whisky and the vessels, being found on the premises of the defendant, were in his possession, and the evidence was pertinent and important for that purpose, as tending to show that this place was in effect a well-known illicit place for the sale of liquor, and was competent like evidence of previous transactions of the same kind in corroboration.

C. S. 3378, under which the defendant was indicted, is as follows:

"3378. *Handling Liquor for Gain.*—It is unlawful for any person, firm, corporation, or association, by whatever name called, to engage in the business of selling, exchanging, bartering, giving away for the purpose of direct or indirect gain, or otherwise handling spir-

ituous, vinous or malt liquors in the state of North Carolina."

The illicit sale of liquor being done usually clandestinely, secretly, and by resort to many evasions and ingenious devices, the lawmaking power found it necessary to enact C. S. § 3383, referring to above section 3378, as follows:

"3383. *Indictment and Proof.*—In indictments for violating the first section of this article [C. S. 3378] it shall not be necessary to allege a sale to a particular person, and the violation of law may be proved by a circumstantial evidence as well as by direct evidence."

The evidence introduced by the defendant was an attempt to prove that the liquor found at that place was not the property or under the control of the defendant. The evidence of the general reputation that it was a notorious place used by him for that purpose was therefore properly admitted as "a circumstance" tending to corroborate the inference to be drawn from the testimony of the officer that the defendant is responsible. There was no attempt to convict the defendant by showing the bad reputation of his place as a whisky resort, but merely to corroborate the inference which would naturally arise that the defendant was responsible for the liquor found on his premises, which inference the defendant had attempted to rebut by evidence tending to show that he was away that day and that the whisky and the jugs and vessels had been brought there without his connivance. The general reputation of the defendant's house as a notorious place for the illicit sale of whisky was "circumstantial evidence" to corroborate the inference arising upon the testimony of the officer of finding the whisky and vessels at the defendant's house.

Four other witnesses, Mack Patterson, S. H. Dunlap, C. C. Sneed, and E. P. Covington, also testified that they "knew the general reputation of Nathan McNeill's place as to the sale of whisky, and it was bad, and had the reputation of being a notorious liquor place." The testimony of each of these, when offered, the court admitted over the defendant's exception, but cautioned the jury in each instance:

"This evidence is allowed to go to you for the purpose, as I have explained before, of corroborating the witness Smith and the exhibits offered, if it does corroborate or tend to corroborate them, and is allowed for your consideration for that purpose only."

The court further in the charge charged the jury fully as to reasonable doubt and the burden of proof. He stated fully the defendant's contention that he had no whisky there, that he was absent from home at work at the time, and only returned afterwards, and added that by reason of the rule laid down

in *State v. Ingram*, 180 N. C. 672, 105 S. E. 3, he had—

"allowed the state to offer for consideration of the jury the reputation of the home of the defendant as to keeping liquor for sale—the general reputation. This testimony is allowed, not to prove its character other than the day in question, but to corroborate the witness Smith, and to corroborate the amount of whisky which the state alleges and contends was found at his place. It is not direct or substantive evidence, but is allowed for the purpose of corroborating, if it does corroborate or tends to corroborate, the witness Smith, and to strengthen his testimony, and to corroborate by the amount of whisky that was found there that day, and in evidence as an exhibit, and it is allowed to the jury solely for that purpose and predicated upon the doctrine laid down in *State v. Ingram*, and to be considered by the jury in that light."

In *State v. Ingram*, 180 N. C. 673, 105 S. E. 3, on an indictment for the sale of intoxicating liquors, the state was allowed to introduce such testimony as the learned judge admitted in this case, this court saying:

"The evidence of drinking in the crowds frequenting the place of business of the defendant was competent in corroboration of the witness Norton, who testified to the sale, and whose testimony was impeached. In *State v. Mostella*, 159 N. C. 459, one of the questions asked the witness was, 'State the character of the people that usually frequent this pool-room.' This was asked to show drunkenness about the premises, and was admitted and affirmed on appeal."

In the present case the whisky and jugs and other vessels found on the premises were in proof in corroboration of the testimony of the deputy sheriff and to rebut the defense set up by the defendant's witnesses (the character of some of whom was shown to be bad) that the defendant was absent that day, and that hence there was no presumption against him of possession or responsibility. The state was allowed to show, on the above authority, by at least six witnesses, that the defendant's place had the general reputation of being used by him for the sale of whisky. This was as pertinent as testimony of defendant's absence that day, from which he sought to draw an inference that he was not responsible.

In *State v. Price*, 175 N. C. at page 807, 95 S. E. 480, Walker, J., in a very learned opinion, with full citation of authorities, showed that the reputation of a house is competent on indictments for keeping a house of ill fame, independent of our statute to that effect, saying:

"It is only a circumstance which the jury are permitted to consider in passing upon the defendant's guilt."

Neither in that case nor in this would the reputation be sufficient for conviction, and the judge in this case was careful to caution

the jury on the admission of the evidence of each of the six witnesses who testified to the bad reputation of this place for the sale of whisky, and again repeated the caution in his charge that it could be only considered as a circumstance in corroboration of the inference arising from the evidence of the sheriff as to the whisky and vessels being found at the defendant's home, which it was sought to contradict by the testimony that others than the defendant owned the whisky.

The same principle seems to be universally recognized. In 16 Cyc. 1209, it is said:

"Reputation is relevant when it arises in a community acquainted with the facts upon subjects in which the general community is interested, and concerning which it has no motive to misrepresent. Where these two conditions are fulfilled, reputation may be more probative than a mere unsworn statement. The fact that the statements on a matter of general interest have been so uniform, reiterated, and dominant against all counter statements as to create a general reputation through the community may well give rise to an inference"—enumerating as "among them" a long list of subjects concerning which reputation has been held admissible.

The scope of the subjects as to which reputation has been held admissible will certainly embrace the general reputation that a place was known generally as one at which liquor was habitually sold upon the circumstances of this case. 16 Cyc. 1209, 1210, quotes in the notes authority that—

"General reputation is not a form of hearsay, but in itself a relevant circumstance in many instances."

On page 1211 it is pointed out that—

"The elements of relevancy and necessity are prerequisites to the admissibility of reputation as evidence, and hence specific facts of limited general interest cannot be established in that way."

In this case, where the defendant sought to show by the testimony offered that he was away from home when the whisky and jugs were found there, and by the testimony of other parties to rebut the inference of his ownership or control of the whisky and jugs, it was competent, as corroborating testimony, to show as a circumstance the general reputation that the house was "notorious" as a place for the illegal sale of whisky. The weight of all the testimony was for the jury.

In McKelvey on Evidence (2d Ed.) § 126, it is stated that, while reputation for a particular act is not general reputation, and such evidence not admissible on the question of the truth of the charge, general reputation would be legitimate to establish many matters of public interest or notoriety.

On the disputed question at issue, upon the evidence as above stated, the general

(109 S.E.)

reputation of the defendant's house as a place notorious for the illicit sale of whisky was a "circumstance" which under C. S. § 3383, the jury were entitled to consider in corroboration of the state's evidence, it having been restricted by the judge to be strictly in corroboration only, if the jury believed it, of the inference the jury could draw from the testimony of the deputy sheriff as to the finding of the liquor, jugs, and other vessels upon the defendant's premises.

No error.

HOKE and STACY, JJ., dissenting.

(182 N. C. 774)

LANE v. SOUTHERN RY. CO. (No. 390.)

(Supreme Court of North Carolina. Nov. 9, 1921.)

Railroads \Leftarrow 5½, New, vol. 6A Key-No. Series
—Company not liable for injuries during federal control.

Under Federal Control Act March 21, 1918 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 3115¼a-3115¼p), a railroad company is not liable for injuries to an employé sustained during operation of the road by the Director General.

Appeal from Superior Court, Guilford County; Finley, Judge.

Action by E. L. Lane against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Action dismissed.

It appeared from the plaintiff's evidence that, at the time of the accident and injury complained of, the plaintiff and those in charge of the train upon which the injury occurred were employed by and working for the Director General of Railroads under the United States Railroad Administration. The Director General has not been made a party to this action, and the Southern Railway Company is the only defendant.

There was a motion to dismiss upon the ground that the Federal Control Act 1918 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 3115¼a-3115¼p) did not impose any liability upon the defendant on any cause of action arising out of the operation of its system of transportation by the United States government, and that therefore a suit for such an injury could not be maintained as against it. This motion was overruled; and upon the usual issues of negligence, con-

tributory negligence, and damages being answered by the jury in favor of the plaintiff, and from a judgment rendered thereon, the defendant, Southern Railway Company, appealed.

Wilson & Frazier, of Greensboro, for appellant.

John A. Barringer, of Greensboro, for appellee.

PER CURIAM. Upon authority of the recent decision of the United States Supreme Court in Mo. Pac. R. R. Co. v. Ault, 258 U. S. —, 41 Sup. Ct. 593, 65 L. Ed. —, decided June 1, 1921 (since the case at bar was tried in the superior court), the present action will be dismissed without prejudice to the rights of the plaintiff to proceed hereafter against the Director General of Railroads.

Action dismissed.

(182 N. C. 775)

BARBEE v. NORTH CAROLINA R. CO.
(No. 391.)

(Supreme Court of North Carolina. Nov. 9, 1921.)

Railroads \Leftarrow 5½, New, vol. 6A Key-No. Series
—Company not liable for injuries during federal control.

A railroad company is not liable to an employee for injuries sustained during operation of the road by the Director General of Railroads.

Appeal from Superior Court, Guilford County; Finley, Judge.

Action by John P. Barbee against the North Carolina Railroad Company. Judgment for plaintiff, and defendant appeals. Action dismissed.

Wilson & Frazier, of Greensboro, for appellant.

John A. Barringer, of Greensboro, for appellee.

PER CURIAM. The question raised on this appeal, being identical with that presented in the case of Lane v. Southern Railway Co., 109 S. E. 87, just decided, and for the reasons assigned in that case the action will be dismissed without prejudice to the rights of the plaintiff to proceed hereafter against the Director General of Railroads.

Action dismissed.

(182 N. C. 442)

**BOARD OF DRAINAGE COM'RS OF MAT-
TAMUSKEET DIST. v. CREDLE, County
Treasurer. (No. 24.)**

(Supreme Court of North Carolina. Nov. 9,
1921.)

1. Counties \Rightarrow 74(3)—Commissions for handling drainage district funds not recoverable without allowance thereof by county commissioners.

In absence of a showing that the board of county commissioners allowed him amount sought to be recovered, a county treasurer could not recover commissions for handling drainage district funds on the theory that he was entitled thereto under C. S. § 3910, providing that county treasurer shall receive as compensation such a sum not exceeding specified percentages on moneys received and disbursed as the commissioners may allow.

2. Counties \Rightarrow 74(3)—Statute held not to entitle county treasurer to commissions for handling drainage district funds.

C. S. § 3910, fixing county treasurer's compensation as such a sum not exceeding specified percentages on moneys received and disbursed by him as the county board of commissioners may allow, did not entitle a county treasurer to commissions for handling drainage district funds prior to repeal of Pub. Laws 1909, c. 442, § 36, by Pub. Laws 1917, c. 152, § 2, though such section 36, after fixing compensation of named persons, not including treasurer, provided that "all other fees and costs incurred under the provision of this act shall be the same as provided by law, for like services in other cases," and that "the board of drainage commissioners shall issue warrants therefor," since county commissioners had no authority to allow treasurer commissions for such services under such section 36, and since Pub. Laws 1911, c. 67, § 13, fixes his compensation for services rendered a drainage district.

Appeal from Superior Court, Hyde County;
Bond, Judge.

Controversy submitted without action by the Board of Drainage Commissioners of Mattamuskeet District against Jeff Credle, County Treasurer. Judgment for defendant, and plaintiff excepts and appeals. Reversed.

This action was brought to ascertain and declare by our judgment the commissions which the defendant, as treasurer of the county, is entitled to receive for collecting and disbursing what are known in the drainage law of the district (Acts 1909, c. 442; Acts 1911, c. 67; Acts 1917, c. 152) as assessments for maintenance, etc. The claims of the respective parties are set out in the case agreed, this being a controversy submitted without action, the plaintiff's contention being: (1) That the treasurer is not authorized to receive or disburse any of the funds of the said district, and he assumed this charge upon his own responsibility; and (2)

if he is entitled to receive and disburse said funds by virtue of his office as treasurer of Hyde county, he is entitled to receive only such commissions as are specifically provided for by the general and special drainage laws. While the defendant contends that the treasurer (defendant in this case) is entitled to one-half of 1 per cent. for receiving the funds raised by the taxes or assessments levied for the payment of construction bonds of said district, and to one-half of 1 per cent. for receiving taxes or assessments levied for maintenance purposes, and 2½ per cent. for disbursing taxes or assessments levied in the district, and to one-half of 1 per cent. for disbursing any money that may have been borrowed by the said district and repaid out of funds provided for maintenance purposes by the collection of maintenance taxes or assessments, or to the same commission provided by law for receiving and disbursing other public or general taxes that come into the hands by virtue or color of his office.

The court was of the opinion, and so adjudged, upon the case agreed:

"That the defendant, treasurer of Hyde county, is entitled to one-half of one per cent. for his services in receiving the funds raised by the taxes levied and collected for payment of construction bonds of said district, and to one-half of one per cent. for receiving and two and one-half per cent. for disbursing the maintenance taxes or assessments levied and collected for said district, or the same commissions provided by law for receiving or disbursing other public or general taxes that came into his hands by virtue or color of his office as treasurer of Hyde County."

It will be necessary to a full understanding of the matter to set out the terms of two statutes supposed to be applicable to the case: The first is Acts 1909, c. 577, §§ 1 and 2, which amended Revisal 1905, § 2778, and which, as thus amended, is section 3910, Consol. Statutes. We will state it in the terms of the latter section, as follows:

"The county treasurer shall receive as compensation in full for all services required of him such a sum, not exceeding one-half of one per cent. on moneys received and not exceeding two and a half per cent. on moneys disbursed by him, as the board of commissioners of the county may allow. * * * In counties where the treasurer's total compensation cannot exceed two hundred and fifty dollars per annum the treasurer may be allowed, in the discretion of the board of county commissioners, and of the board of education, as to the school fund, a sum not exceeding two and one-half per cent. on his receipts and not exceeding two and one-half per cent. on his disbursements of all funds handled by him; but the compensation allowed by virtue of the provisions of this last proviso shall not be operative to give a total compensation in excess of two hundred and fifty dollars per annum to such treasurers."

The other statute is section 13 of chapter 67 of the Public Laws of 1911, which is really the only provision in the drainage laws dealing with the treasurer's compensation, and is as follows:

"That the fee allowed the sheriff or other county tax collector for collecting the drainage tax [or assessments], as prescribed in section thirty-four of chapter four hundred and forty-two of the Public Laws of one thousand nine hundred and nine [the same being for construction of drainage canals, etc.], shall be two per cent. of the amount collected, and the fee allowed the county treasurer for disbursing the revenue obtained from the sale of the drainage bonds shall be one per cent. of the amount disbursed: Provided, no fee shall be allowed the sheriff or other county tax collector or county treasurer for collecting or receiving the revenue obtained from the sale of the bonds provided for in section thirty-four of chapter four hundred and forty-two of the Public Laws of one thousand nine hundred and nine, nor for disbursing the revenue raised for paying off the said bonds: Provided further, that in those counties where the sheriff or tax collector and treasurer are on a salary basis, no fees whatever shall be allowed for collecting or disbursing the funds of the drainage district."

Plaintiff excepted and appealed.

Spencer & Spencer, of Swan Quarter, and Small, MacLean, Bragaw & Rodman, of Washington, N. C., for appellant.

Mann & Mann, of Swan Quarter, and Manning, Bickett & Ferguson, of Raleigh, for appellee.

WALKER, J. (after stating the facts as above). [1] It is well to notice and clearly understand in the beginning the defendant's contention. His first proposition is this, that under Acts 1909, c. 442, § 36, after fixing, in that section, the compensation of the engineer, and the various rodmen, axmen, chainmen, and other laborers, it is provided as follows:

"All other fees and costs incurred under the provisions of this act shall be the same as provided by law for like services in other cases. Said costs and expenses shall be paid, by the order of the court, out of the drainage fund provided for that purpose, and the board of drainage commissioners shall issue warrants therefor when funds shall be in the hands of the treasurer."

That section (36), it is admitted, was repealed by Acts 1917, c. 152, § 2. It is deduced from the provisions of section 36, c. 442, of the Laws of 1909, that the defendant, so far at least as services already rendered by him before the repeal of that section are concerned, is entitled to compensation for such services as provided by Revisal, § 2778, as amended by Acts 1909, c. 577, it being section 3910, Consol. Statutes of 1919, all of which is recited fully in the statement of the case. But we find ourselves unable

to agree with this view of the matter. The precise contention is that, as section 36, c. 442, of the Acts of 1909 (the drainage act) provides for compensation as for like services where no special provision is made in the drainage act for the particular service, it necessarily refers to the kind of services the compensation of which is provided for in Consol. Statutes § 3910 (which we will hereafter refer to, for the sake of brevity and convenience, by the number of the section only). But that section (3910) is placed under the title of "Salaries and Fees" where the compensation of county treasurers for their ordinary services is fixed, and not for any special service rendered under the drainage act, which was something apart from their ordinary duties and stood in a class to themselves, as contended by the plaintiff, and we are strongly inclined to accept this interpretation of the statutes when considered together, though we do not decide the question, as it is not essential that we should do so, for, even if section 3910, Consol. Statutes, applies, and should receive the construction advanced by the defendant, we yet are of the opinion that he has not brought his case within the provision of that section or the laws from which it was compiled, for the reason that it provides that the amount of the compensation to be allowed shall be "in the discretion of the county commissioners" or "as said commissioners may allow" (the maximum only being fixed), and the language, therefore, being thus substantially the same.

[2] There is no admission in the case, or even allegation by the defendant, that the board of county commissioners, even if they had the power, had declared what the compensation should be. Besides the language quoted above from section 3910, Consol. Statutes, shows, we think, clearly that section 36 of Laws of 1909 did not refer to services provided for in section 3910, as the county commissioners have no power or authority in the premises given by the drainage act, and the compensation, under section 36, is payable "out of the drainage fund provided for that purpose [by order of the court], and the board of drainage commissioners shall issue warrants therefor when funds shall be in the hands of the treasurer." It appears to be manifest from this language that the provision in section 36 does not refer to section 3910, Consol. Statutes. So that it comes to this, that the special ground upon which the defendant relies is not at all tenable, even if he be entitled to any compensation for the special services he claims to have rendered, as stated in his cause of action, and we conclude that he is not, upon a careful consideration of Acts 1911, c. 67, § 13, which is copied in our statement. That section provides but one compensation for all services, and expressly denies compensation for certain services therein enumerated.

The defendant's counsel inquire as to why the Legislature mentioned only two instances where compensation is denied, and not all of them; the answer being that no express provision is made for compensation in any other case where the treasurer handles drainage funds, and we are not at liberty to supply the omission. The general rule is, "expressio unius, est exclusio alterius," and when the Legislature explicitly provides that only one "fee" shall be paid, we have no right to say or to imply—that is, infer—that more was intended than what is expressly given.

The case of *Koonce v. Com'rs*, 108 N. C. 192, 10 S. E. 1038, has no application to this case, but referred to a different class of services rendered by the treasurer, and was decided long before this drainage act was passed. It is true, as said in *Koonce's Case*, that the policy of this state has been to compensate its officers fairly and justly for their services, and it may be well inferred that the Legislature thought it had done so in this instance, by allowing 1 per cent. on the amount realized from the sale of the drainage bonds, and it is to be noted in this connection that section 3910, on which defendant relies, sets a limit to his compensation for such services rendered by him as are described in that section. The fact, if it be true, that the county treasurer may also be ex officio treasurer of the drainage district, is not at all important in the discussion, as we have assumed, for the sake of argument, that he is, and *Carter v. Com'rs*, 156 N. C. 183, 72 S. E. 380, and *Com'rs v. Lewis*, 174 N. C. 528, 94 S. E. 8, are therefore irrelevant. Plaintiff contends that the State Treasurer is treasurer of this district. But we need not decide how this is, as it is immaterial in our view.

Even though it should be true that the maximum prescribed by the act has in fact been allowed by the commissioners of Hyde county as compensation to the treasurer (which does not appear and is not admitted), yet this would not give the defendant a right to commissions for handling drainage district funds.

This case is not like *Drainage Commissioners v. Davis, Sheriff*, 108 S. E. 506, decided at this term, upon a somewhat similar question, though the cases are not alike. We held there that the sheriff was entitled to commissions of 2 per cent. on collections of assessments for maintenance purposes, because such an inference as to the intention of the Legislature to that effect was clearly to be drawn from the drainage act of 1909 itself for the reasons stated in the opinion of the court, which are not applicable here. There we held the sheriff to be entitled to commissions of 2 per cent. on collections for maintenance of the district, because there was some ambiguity in the laws, and there

was a legislative construction of them which extends the right to commissions beyond collections for organization, etc., to such collections for maintenance, and there seemed to be no disposition of the Legislature to limit this compensation, as in the case of the treasurer, by section 3910 of Consol. Statutes, because, as we presume, the sheriff's duties are more onerous. He must collect and pay out to the treasurer, while the latter merely receives the money and pays it out, taking receipts for the same, and making proper entries on his books—a much less difficult and responsible service. There were some other considerations which moved us there which are not present in this case.

It may be that the defendant should have more compensation, and, if so, the Legislature will hear him, as he has a strong equity upon which to base his appeal to it for relief. But such relief we cannot grant, as we have no power of legislation.

The judgment below will be reversed, as defendant is not entitled to recover anything upon the case agreed, and it will be so certified.

Reversed.

(182 N. C. 447)

BOARD OF DRAINAGE COM'RS OF MATTAMUSKEET DIST. v. BRINN, County Treasurer, et al. (No. 26.)

(Supreme Court of North Carolina. Nov. 9, 1921.)

Appeal from Superior Court, Hyde County; Bond, Judge.

Controversy submitted without action by the Board of Drainage Commissioners of Mattamuskeet District against Charles Brinn, Treasurer of Hyde County, and another. Judgment for defendants, and plaintiff appeals. Reversed.

This is a controversy between the board of drainage commissioners of Mattamuskeet district in Hyde county and Charles Brinn, treasurer of Hyde county prior to the first Monday in December, 1916, and S. S. Mann, receiver, submitted without action upon agreed facts.

It is admitted that plaintiff is a duly constituted drainage corporation created under the general drainage law (chapter 442, Public laws of North Carolina Session of 1909), and that prior to the first Monday in December, 1916, defendant Brinn was treasurer of Hyde county.

The only questions for the court's consideration are:

(1) Was defendant, as treasurer of Hyde county, entitled to commissions of one-half of 1 per cent. for receiving \$84,970.03, derived from assessments levied in Mattamuskeet drainage district for payment of bonds issued for construction work?

(2) Was defendant, as treasurer of Hyde county, entitled to commissions of one-half of 1 per cent. for receiving \$14,997.14, derived from assessments levied in said district for maintenance, and commissions of 2½ per cent.

for disbursing \$8,066.84 of such maintenance assessments?

(3) Was defendant, as treasurer of Hyde county, entitled to commissions of one-half of 1 per cent. for receiving and commissions of 2½ per cent. for disbursing \$305.48 of canal tolls collected in said district?

The plaintiff board of drainage commissioners contends that the defendant treasurer was not entitled to such commissions. The defendant treasurer contends that he was thereto entitled.

The court below held with defendant, and plaintiff appealed.

Spencer & Spencer, of Swan Quarter, and Small, MacLean, Bragaw & Rodman, of Washington, N. C., for appellant.

Mann & Mann, of Swan Quarter, and Daniel & Carter, of Washington, N. C., for appellees.

WALKER, J. (after stating the facts as above). It will be perceived on a perusal of this case that it is not substantially unlike Board of Drainage Commissioners v. Credle, 109 S. E. 88, at this term. The questions involved are the same, except as to the canal tolls, and that one is fully covered by what is said in the opinion filed in Credle's Case. This being so, it is unnecessary to discuss the matter further, as it would be a mere repetition of what has already been said in that case.

It would serve no useful purpose to go over in detail the excellent briefs filed by the counsel in these cases, as what we have said in the opinions filed by us at this term in the above case and Drainage Comm'rs, v. Davis, 108 S. E. 506, covers fully the entire ground of inquiry and investigation.

The judgment is therefore reversed, as the defendant is not entitled to the commissions or compensation he claims, and it will be so certified.

Reversed.

(192 N. C. 419)

FORD v. McANALLY. (No. 387.)

(Supreme Court of North Carolina. Nov. 16, 1921.)

1. False imprisonment §31—Evidence held sufficient.

In action for false imprisonment, evidence held to support finding that defendant caused the arrest and prosecution of plaintiff.

2. False imprisonment §39—Issues of malice and amount of damages held for jury.

In action for false imprisonment, the issues whether the arrest of plaintiff was malicious and the amount of damages to which he was entitled held for the jury.

3. Damages §91(1)—"Punitive damages" denied.

"Punitive damages," sometimes called smart money, are allowed in cases where the injury

is inflicted in a malicious, wanton, and reckless manner.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Punitive Damages.]

4. Damages §91(1)—When punitive damages authorized stated.

For punitive damages to be awarded, defendant's conduct must have been actually malicious or wanton, displaying a spirit of mischief towards plaintiff, or of reckless and criminal indifference to his rights.

5. Damages §94—Punitive damages largely discretionary with jury.

Both the awarding of punitive damages and the amount to be allowed, if any, rest in the sound discretion of the jury, although the amount may not be excessively disproportionate to the circumstances of contumely and indignity in the particular case.

6. False imprisonment §36—Damages not excessive.

Where defendant, a physician, admitted that he was angry and knew that plaintiff was a feeble man, and defendant caused plaintiff's arrest and imprisonment in jail from about 9 a. m. until approximately 7 p. m., and plaintiff was thereafter acquitted, an award of \$3,079 as damages did not indicate that the amount allowed as punitive damages was disproportionately excessive or arbitrary.

Appeal from Superior Court, Guilford County; Finley, Judge.

Action by L. S. Ford against Dr. W. J. McAnally. From judgment for plaintiff, defendant appeals. No error.

Upon denial of liability and issues joined, the jury returned the following verdict:

"(1) Did the defendant assault the plaintiff as alleged in the complaint? A. Yes.

"(2) If so, what damage is the plaintiff entitled to recover of the defendant? A. \$25.

"(3) Did the defendant cause the arrest and prosecution of the plaintiff as alleged? A. Yes.

"(4) If so, was the arrest without probable cause? A. Yes.

"(5) If so, was the arrest malicious? A. Yes.

"(6) What amount, if any, is the plaintiff entitled to recover of the defendant? A. \$3,079."

There was a judgment entered on the verdict in favor of the plaintiff, from which the defendant appealed.

W. P. Bynum and S. S. Alderman, both of Greensboro, and O. C. Barnhart, of High Point, for appellant.

J. Allen Austin and John A. Barringer, of Greensboro, for appellee.

STACY, J. There is no exception or question presented on the initial cause of action arising out of the alleged assault. Defendant concedes that the plaintiff is entitled to

judgment on the first two issues, but contends that the allegations of the complaint and the evidence adduced on the hearing were not sufficient to warrant the verdict on the remaining issues, or those relating to the second cause of action.

Giving the complaint a liberal construction, as we are required to do under C. S. 535, and considering the evidence in its most favorable light for the plaintiff, the accepted position on a motion to nonsuit, we think the verdict and judgment should be upheld.

[1] There is evidence on the record tending to show that after the assault, and without any warrant or other legal process, the plaintiff was arrested at the instance of the defendant and taken by two policemen to the police station in the city of High Point. The defendant followed the officers and made application, at the police station, for a peace warrant, and left instructions that the plaintiff be locked up which was done, and he remained in jail from about 9:00 a. m. until approximately 7:00 p. m., or practically the entire day. The evidence also discloses that the defendant signed the warrant in blank, which was afterwards filled out by one of the officers, charging L. S. Ford, plaintiff herein, with an assault with a deadly weapon, to wit, a pistol. At the trial, on the following morning in the recorder's court, Ford was acquitted and the prosecuting witness, defendant herein, was taxed with the cost.

The defendant denied that the arrest was made at his instance, or that he gave any instructions to have the plaintiff committed to jail under the warrant; but, during the course of his examination, he testified as follows:

"At the trial I asked the court to tax me with the costs. I did that because I was sorry for the man. The reason for my sympathy was just because I thought that he was feeble, hardly a responsible man. It was after I made the request that the court released him. I was the least bit angry, when I was down there at the gallery. Yes, sir; I will say I was angry. I was angry enough to fight, but I didn't propose to fight him."

It is further contended by the defendant that, under authority of *Oakley v. Tate*, 118 N. C. 361, 24 S. E. 806, he should not be held responsible for the prosecution because of the officer's error in filling out the blank warrant charging the present plaintiff with an assault, when application had been made for a peace warrant only. But it appears unmistakably that the plaintiff was arrested without any warrant at all; that Dr. McAnally was present at the trial on the following morning; and the jury have found that he was there aiding in the prosecution. It could hardly be said that he was ignorant of what was going on. At any rate, there was no request to correct the error and change the warrant. Indeed, it would seem that by

conduct, at least, the defendant adopted the warrant and ratified what the officer had done. The jury evidently took this view of the matter, as it was submitted to them by the court, and they have found, in answer to the third issue, that the defendant caused the arrest and prosecution of the plaintiff.

[2] The defendant objected to the submission of the fifth and sixth issues, and contended that there was no evidence in the case to justify an award of punitive damages, citing *Lewis v. Clegg*, 120 N. C. 292, 26 S. E. 772. But upon the attendant facts and surrounding circumstances the jury have found that the defendant acted wrongfully and that he was actuated by malice. Indeed, he himself testified:

"As to Mr. Ford's statement on the witness-stand that I told the officers to arrest him, what was said was that I told them I wanted a peace warrant for him. I did as he stated—asked the officers at the gallery and at the lockup to lock him up; that he was crazy. I believe I did say that the man was crazy. I think that to-day. I didn't curse him. I expressed an opinion. I said, 'Get out of the way, you damned fool.' That is the only thing I said, or any kind of profanity."

We think, upon the whole case, his honor correctly submitted the issues to the jury.

[3-5] Punitive damages, sometimes called smart money, are allowed in cases where the injury is inflicted in a malicious, wanton, and reckless manner. The defendant's conduct must have been actually malicious or wanton, displaying a spirit of mischief towards the plaintiff, or of reckless and criminal indifference to his rights. When these elements are present, damages commensurate with the injury may be allowed by way of punishment to the defendant. But these damages are awarded on the grounds of public policy, for example's sake, and not because the plaintiff has a right to the money, but it goes to him merely because it is assessed in his suit. Both the awarding of punitive damages and the amount to be allowed, if any, rest in the sound discretion of the jury. *Cobb v. Railway*, 175 N. C. 132, 95 S. E. 92; *Fields v. Bynum*, 156 N. C. 413, 72 S. E. 449; *Hayes v. Railway*, 141 N. C. 199, 53 S. E. 847; *Smithwick v. Ward*, 52 N. C. 64, 75 Am. Dec. 453. However, the amount of punitive damages, while resting in the sound discretion of the jury, may not be excessively disproportionate to the circumstances of contumely and indignity present in each particular case. *Gilreath v. Allen*, 32 N. C. 67; *Sloan v. Edwards*, 61 Md. 100; *Bernheimer v. Becker*, 102 Md. 250, 62 Atl. 526, 3 L. R. A. (N. S.) 221, 111 Am. St. Rep. 356.

[6] In the case before us, it would seem that the jury have been liberal in their award, but we cannot say the amount is disproportionately excessive. The defendant is a physician, and he admitted that he was

(199 S.E.)

angry and knew the plaintiff was a feeble man. In fact, he stated that he thought he was crazy. The jury evidently concluded that, under these circumstances, the defendant, with his superior advantages, should have been more charitable in his conduct toward the plaintiff, a man in an unequal and less fortunate condition. It is unbecoming in the strong to deal oppressively with the weak; and the jury evidently thought the present defendant should be taxed with a substantial sum in the form of punitive damages, or smart money. We cannot say they have acted arbitrarily or harshly. It does not so appear on the record.

The remaining exceptions are apparently without special merit; and, upon a careful consideration of the whole case, we have found no sufficient reason for disturbing the result of the trial.

No error.

(117 S. C. 327)

FALLS v. PALMETTO POWER & LIGHT CO. et al. (No. 10743.)

(Supreme Court of South Carolina. Oct. 10, 1921.)

1. Appeal and error ⇐853—Charge not appealed from law of case.

A charge, not appealed from, is the law of the case.

2. False Imprisonment ⇐13—Arrest held unlawful.

Information given concerning plaintiff, as one who had committed a felony, and who was arrested on a warrant against John Doe, *held* not sufficient to warrant a man of ordinary reason to come to the conclusion that plaintiff was the man who committed the crime.

3. False Imprisonment ⇐31—Evidence held to show participation in unlawful arrest.

In an action for false imprisonment growing out of an arrest under information that plaintiff had sold property similar to that stolen, evidence *held* to show that the arrest was procured, instigated, and participated in by the general superintendent of the company from which the property was stolen.

4. Corporations ⇐433(1)—Responsibility for unlawful arrest held for jury.

Whether a power and light company was responsible for wrongful arrest of plaintiff for an alleged breaking, entering, and stealing of electric fans *held* for the jury, there being evidence that the person procuring the arrest was the general manager of all the company's business, and that the arrest was on account of its business.

5. False Imprisonment ⇐31—Willfulness warranting punitive damages shown.

In action against a power and light company, and its general superintendent, for unlawful arrest, evidence *held* such as to warrant

a finding of willfulness or wantonness which would support punitive damages.

6. False Imprisonment ⇐36—\$2,000 not excessive punitive damages.

A verdict for \$2,000 punitive damages for willful unlawful arrest, causing plaintiff to miss a train, *held* not excessive or unreasonable.

Cothran, J., dissenting.

Appeal from Common Pleas Circuit Court of Florence County; Thomas S. Sease, Judge.

Action by J. F. Falls against the Palmetto Power & Light Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Willcox & Willcox, Henry E. Davis, and James M. Lynch, all of Florence, for appellants.

Royall & Fulton and Whiting & Baker, all of Florence, for respondent.

FRASER, J. The case contains this statement:

"This was an action for damages, for an alleged false imprisonment of the respondent, arising out of the following facts: On the night of June 5, 1919, the storehouse of Palmetto Power & Light Company, a corporation engaged in the sale of electric current, and of electrical appliances in Florence, was broken into and an electric fan stolen therefrom. When discovered on the following morning the robbery was reported to the city police department. Upon investigation, it was discovered that upon the night of the robbery electric fans had been offered for sale in the city, to various persons, among others, to one J. W. Howard, proprietor of a restaurant, who described the person who had offered him the fan. It further developed that a fan had been purchased on that night by one Allowas, and upon examination the fan purchased by him was identified as that stolen from the electric company, and it was forthwith restored to that company by the police authorities."

"Thereafter, on the evening of June 8, 1919, Howard, seeing at the railroad station one whom he believed to have been the party who had offered to sell him two fans on the night of the robbery, telephoned the office of the company, and advised the general superintendent, the defendant Hodges, that the man who had tried to sell him a fan was at the depot, and if they would secure an officer they would get him. Thereupon Hodges had the police station telephoned, and upon being advised that the officer on duty then had no way of getting to the depot quickly, he offered the use of his personal automobile to carry him. Accordingly Hodges, the officer, and two others proceeded in Hodges' car to the depot. Upon arrival there, they were met by Howard, who advised them that the man had gone off, but that his baggage was there indicating the same. Whereupon Hodges walked over and kicked the bag, and, hearing a jingling sound, made some remark as to the bag containing tools. The officer went off in search of the party to be apprehended, and, up-

on his being pointed out by Howard, arrested the plaintiff, Falls."

"Falls, after some dispute, submitted to the arrest, and the officer started towards a taxicab. At this point Hodges against volunteered the use of his car. Falls, the officer, and the two who had accompanied Hodges to the depot got into the car with Hodges and he drove off. They went through the streets of the city to the place where they were informed Allowas lives, but upon arrival there ascertained that he was not the man who had purchased the fan. They accordingly drove to another part of the city, where the right man was located. Upon Falls being presented to him, he failed to identify him as the party who had sold to him the stolen fan. Whereupon the officer released Falls and left the car. Falls and Hodges had some words over what had taken place, but Hodges drove him back to the station, and there left him."

"The plaintiff brought suit for \$5,000 against Hodges personally and against Palmetto Power & Light Company. The case came on to be heard before his honor, Judge Thomas S. Sease, and a jury at the November, 1920, term of the court of common pleas for Florence county. At the conclusion of the testimony the defendants submitted a motion for a directed verdict, which was refused. The jury found for the plaintiff \$500 actual, and \$2,000 punitive, damages. A motion for a new trial was made and refused. The defendants thereupon gave notice of an appeal to this court."

The appellant's argument says:

"The exceptions present for determination these questions:

"(1) Was the arrest unlawful?

"(2) If unlawful, was it procured, instigated, or participated in by Hodges?

"(3) If unlawful and procured, instigated or participated in by Hodges, was the appellant Palmetto Power & Light Company responsible for his acts in connection therewith?

"(4) Was there any testimony tending to show willfulness or wantonness upon which the jury could base a verdict for punitive damages?

"(5) Was the verdict for punitive damages excessive and unreasonable?"

I. Was the arrest unlawful?

His honor, Judge Sease, charged the jury as follows:

"Now what is a lawful arrest? I will first charge you that the breaking and entering of a house in the daytime or nighttime with intent to steal or commit some other felony is a felony, and any citizen may arrest a thief upon information, provided the information is sufficient to warrant a man of ordinary reason to come to the conclusion that the man sought to be arrested is the thief or felon. An officer or citizen may not arrest simply because a felony has been committed, but they may arrest the thief or felon, that is, the person who commits the felony or commits the theft, upon information that is reasonably calculated to satisfy a man of ordinary prudence and reason that the party sought to be arrested is guilty of a felony. I charge you that is applicable to an officer or a private citizen, and arrest may be made in these circumstances without a warrant."

[1,2] This charge, not being appealed from, is the law of this case. There was evidence that some fans had been stolen from the defendants' corporation, but no evidence that the fans offered for sale to the defendants' witness Howard were stolen fans. Whatever may be said as to the sufficiency of the evidence of identification of the plaintiff by the witness Howard, yet, as a matter of fact, the parties who made the arrest were not satisfied, and went off to find the purchaser of the fan. The warrant named the person to be arrested as "John Doe." That means that the person who made the affidavit and the officer who issued the warrant were uncertain as to the person to be arrested. The warrant itself bespoke caution. The plaintiff offered to prove his identity by citizens of Florence, easier of access than the purchaser of the fan, but his entreaties were ignored. His honor charged the jury that the arrest must be "upon information that is reasonably calculated to satisfy a man of ordinary prudence and reason that the party sought to be arrested is guilty of a felony." The information did not even satisfy the parties who made the arrest. Under the charge, therefore, the arrest was unlawful. This assignment of error cannot be sustained.

[3] II. If unlawful, was it procured, instigated or participated in by Hodges?

There was abundant evidence to show that the arrest was procured, instigated, and participated in by Hodges. The defendants' witness Howard stated:

"I had done what I promised to do, and that was all the interest I took in it. I had promised Mr. Hodges to telephone him. It was at his request and on account of the company's business I was to phone down there."

Mr Hodges directed the sending of the phone message to police headquarters. He went in his own car for the officer, took him to the place of arrest; watched the plaintiff's baggage for plaintiff's return; took the prisoner and officer to look for the purchaser of the stolen fan. There was abundant evidence from which the jury might have inferred that Mr. Hodges was the effective manager of the entire proceedings. This assignment of error cannot be sustained.

[4] III. If unlawful and procured, instigated, and participated in by Hodges, was the appellant Palmetto Power & Light Company responsible for his acts in connection therewith?

Here again the evidence was abundant. The evidence showed that Mr. Hodges was the general manager of all the company's business, and direct evidence, unobjected to, and by defendants' witness, that it was "on account of the company's business." It is true that Mr. Hodges, denied this, but that made it a question for the jury. This assignment of error cannot be sustained.

[5] IV. Was there any testimony tending to show willfulness or wantonness upon which the jury could base a verdict for punitive damages?

The plaintiff was arrested while his identity was uncertain. He was not informed of the cause of his arrest. His request that he be allowed to show who he was by business people of Florence was ignored. He was taken from a station where his train was about to depart, kept until it had gone; no apology for the injury done, and even though it suggested itself to Mr. Hodges that the plaintiff might be short of money, not only was there no offer of assistance, but it was made a matter of jest.

[6] V. Was the verdict for punitive damages excessive and unreasonable?

The answer is No.

The judgment appealed from is affirmed.

GARY, C. J., and WATTS, J., concur.

COTHRAN, J. (dissenting). The plaintiff recovered a verdict of \$500 actual damages and \$2,000 punitive damages, against both of the defendants, the one a corporation and the other its general superintendent, on account of an alleged false imprisonment, which arose out of the facts, a statement of which from the agreed case is reproduced in the leading opinion.

It may not always be so, but in this particular case the charge of false imprisonment (more accurately denominated wrongful or unlawful imprisonment) depends primarily upon the lawfulness of the plaintiff's arrest, and that must be determined by the statute and the decisions construing it. There is a conflict of testimony as to whether or not the police officer who actually made the arrest had in his possession at the time the arrest warrant which had been issued at the instance of the police department, charging the felony to have been committed by one "John Doe." The plaintiff testified that he asked for it, and was told that the officer did not have one; one of his witnesses testified that Bryant, the police officer who made the arrest, had the warrant in his pocket. In this conflict, I will consider the case as an arrest made without a warrant.

Under section 1 of the Criminal Code an arrest may be made by an officer or by a private citizen, for a felony not committed in his view, "upon certain information that a felony had been committed." This statute was passed, as this court has very clearly shown in the case of *State v. Griffin*, 74 S. C. 412, 54 S. E. 603, to remedy a situation disclosed by the previous case of *State v. Anderson*, 1 Hill, 327. In the latter case the right to arrest without a warrant for a felony not committed in the view of the person (officer or private citizen) making the arrest was declared to be dependent upon the fact that a felony had been committed. The

statute corrected the rigor of this interpretation, and conferred the right where the person making the arrest had "certain information that a felony had been committed." The *Griffin* Case holds that:

"The word 'certain' is used in the sense of trustworthy, capable of being depended upon, credible, positive, or reliable, and has reference to the evidence or information upon which the person making the arrest is allowed to act, and not to the actual fact that a felony has been committed;" that the statute must be "construed as enabling the party making the arrest to act upon information although it might not be true, provided it was of such a nature as to convince a reasonable man that the act had been committed from which the law presumed the felony by the person arrested."

It will be noted that the statute makes no reference to the information relating to the identity of the person arrested, with the criminal, upon which the officer or private citizen is authorized to act; but, in view of the purpose of the act as above explained and the improbability that the exclusion of this matter was intended to permit the person making the arrest to act simply upon information that a crime had been committed, without reference to the connection of the person arrested with it, we must assume that the common-law rule in reference to this excluded or omitted matter remained unaffected. That principle is thus expressed in the *Anderson* Case:

"In treason and felony within the jurisdiction of a state, the regular mode of arrest is by warrant, but from necessity as well as sound policy, private persons are permitted to arrest, where a felony has been committed and there are reasonable grounds to suspect the party arrested to be the felon."

This of course refers to officers as well as private citizens, in fact with greater reason, naturally.

In the determination of the question at issue, two apparently antipodal interests must be harmonized if possible, the liberty of a private citizen, and the interest of the public in punishing and preventing crime; and before extreme penalties may be visited upon one who has made a mistake the latter interest should be carefully guarded; as is declared by the Supreme Court of Louisiana in the case of *Lyons v. Carroll*, 107 La. 471, 31 South. 760:

"Those who honestly seek the enforcement of the law, * * * and who are supported by circumstances sufficiently strong to warrant a cautious man in the belief that the party suspected may be guilty of the offense charged should not be made unduly apprehensive that they will be held answerable in damages."

That is the reason of the rule, also clearly expressed by Judge Pearson of the Supreme Court of North Carolina, in the case of

Brockway v. Crawford, 48 N. C. 433, 67 Am. Dec. 250. The plaintiff was arrested by the defendant, a constable, without a warrant, at the instigation of a brother of the man whose horse had been stolen, charged with larceny of the horse. The constable acted upon a description of the thief, given to him by said brother, corroborated by another:

"The description of the clothes and the personal appearance resembled Clarey [the thief] very closely."

The plaintiff had a verdict which was reversed on appeal, the court holding:

"The law encourages every one, as well private citizens as officers, to keep a sharp lookout for the apprehension of felons, by holding them exempt from responsibility for an arrest or prosecution, although the party charged turns out not to be guilty, unless the arrest is made or the prosecution is instituted without probable cause and from malice."

The opinion further states:

"What has the plaintiff (if he be a good citizen) to complain of? A felony is committed, and the felon escapes; he is advertised, and a reward of \$100 is offered for his apprehension. The plaintiff bears a close resemblance both in dress and personal appearance to the suspected person; his associations and fixedness in his position as a member of the community do not place him above the marks of honest suspicion which attach to him because of the close resemblance to the man who figures under the reward of \$100 as a fugitive from justice. Has he cause to complain? Ought he not rather to congratulate himself that he lives in a land where justice is administered with a steady hand? And if occasionally 'the wrong passenger is waked up,' every good citizen should bear in mind that it was meant for the best, and will work around for the good of the whole."

"Probable cause for an arrest has been defined to be a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty." 2 R. C. L. 451, citing *People v. Klivington*, 104 Cal. 86, 37 Pac. 799, 43 Am. St. Rep. 73; *Diers v. Mallon*, 48 Neb. 121, 64 N. W. 722, 50 Am. St. Rep. 596; *Burk v. Howley*, 179 Pa. 539, 36 Atl. 327, 57 Am. St. Rep. 607.

"Yet probable cause does not depend on the actual state of the case in point of fact, as it may turn out upon legal investigation, but on knowledge of facts and circumstances, which would be sufficient to induce a reasonable belief of the truth of the accusation." 2 R. C. L. 451.

"But since in such a case [arrest without warrant] the person to be arrested is not specifically indicated by a written warrant, and the officer must necessarily act on his own reasonable judgment, and often in haste to prevent the escape of the criminal, he is protected if he acts in good faith and on reasonable grounds of suspicion, though the person proves not to have been the felon, or no felony was in fact committed." 11 R. C. L. 801.

In *Pinkerton v. Martin*, 82 Ill. App. 589, it was held that detention by the officer in

a county where the offence was not committed for a justifiable time for purposes of identification is not false imprisonment.

"A peace officer may also arrest without a warrant one whom he has reasonable or probable grounds to suspect of having committed a felony, even though the person suspected is innocent, and generally though no felony has in fact been committed by any one." 3 Cyc. 878.

"The reasonable and probable grounds that will justify an officer in arresting without a warrant one whom he suspects of felony must be such as would actuate a reasonable man, acting in good faith." 3 Cyc. 887.

In *Eanes v. State*, 6 Humph. (Tenn.) 53, 44 Am. Dec. 289, the defendant was a peace officer, and was indicted for assault and battery for the arrest without warrant of one Martin. A murder had been committed and the murderer had escaped; the defendant, a constable in another county, acting upon the Governor's proclamation, which contained a description of the fugitive. The coroner of the county had also written a letter containing a description of the person. The defendant, acting upon both, arrested Martin for the fugitive. He was convicted, but on appeal the judgment was reversed, the court holding:

"The liberty of the citizen is so highly regarded that the officer arresting a supposed felon, without warrant, must act in good faith, and upon grounds of probable suspicion that the person to be arrested is the actual felon. If he may not, under such circumstances, make an arrest, the escape of criminals would be but little obstructed by the official proclamation of the Governor, and the police of the state, instead of being, as public policy urgently requires, vigilant and effective, would be altogether the contrary."

In *Reuck v. McGregor*, 32 N. J. Law, 70, the plaintiff came into the defendant's store with a piece of cloth for sale. The defendant pronounced it a piece that had been stolen from his store. Angry words followed, and the defendant called a policeman, who put the plaintiff under arrest. It was not in fact the defendant's cloth, though similar to a piece he had had misplaced or stolen. The plaintiff had a verdict of \$3,000. Upon this appeal the court said:

"We cannot fail to pronounce this a very striking instance of mistaken identity, without any evil design against the plaintiff, and founded upon such reasonable grounds of belief as would be sufficient, at least, to relieve the defendant from any charge of malicious prosecution, had he made complaint to the magistrate before the arrest, and quite sufficient to authorize the defendant to arrest the plaintiff, without warrant, if the proof that a felony had been committed had been complete. The proof is not clear that a larceny of McGregor's cloth had been committed, yet he never found it, and there is nothing in the case to induce us to think that he feigned it, or that he did not believe it, but, on the contrary, the circum-

stances would reasonably create the belief in the mind of McGregor that his cloth had been stolen."

And they held that, considering these circumstances, the verdict was excessive, and granted a new trial.

In *Samuel v. Payne*, Doug. Rep. 359, Lord Mansfield laid down the law that if a felony has been committed any man, upon reasonable, probable ground of suspicion, may justly apprehending the suspected person.

In *Holley v. Mix*, 3 Wend. (N. Y.) 350, 20 Am. Dec. 702, it is said:

"If an innocent person is arrested upon suspicion by a private individual, such individual is excused if a felony was in fact committed and there was a reasonable ground to suspect the person arrested."

In a note to 55 Am. Dec. 104, Judge Freeman says, citing *Bail Cr. L. 543*:

"Probable suspicion of who the offending party is will justify the arrest by an officer; and probable suspicion will be a justification when it transpires that no felony had in fact been committed, provided that the officer had reasonable grounds to suspect the arrested party."

In *Carr v. State*, 43 Ark. 99, it is held:

"Where a felony has in fact been committed, either an officer or a private citizen, who has reasonable ground to suspect a particular person, may, if acting in good faith, arrest such person without a warrant."

A peace officer may arrest without a warrant if he has reasonable ground to suspect that defendant is guilty of a felony. *Johnson v. State*, 30 Ga. 426; *Harris v. Bennet*, 1 Phila. (Pa.) 175; *Lewis v. State*, 3 Head (Tenn.) 127.

"An officer may arrest without a warrant a person accused of a felony, where there are circumstances showing a probability that the accused committed the crime, and it is necessary to make the arrest in order to prevent him from escaping." *Dodds v. Board*, 43 Ill. 96.

"A public officer, if he knows a felony has been committed in his jurisdiction, and has good reason to suspect a particular person as the guilty party, should, without a warrant, arrest such person." *Marsh v. Smith*, 49 Ill. 396.

"A peace officer, having reasonable grounds to suspect one of crime, * * * may without warrant arrest the supposed offender." *Rohan v. Sawin*, 5 Cush. (Mass.) 281.

"A peace officer may arrest without a warrant, on information that a felony has been committed, when he has reasonable or probable cause to believe that it has been committed." *Doering v. State*, 49 Ind. 56, 19 Am. Rep. 669; *Warner v. Grace*, 14 Minn. 487 (Gil. 364); *Burns v. Erben*, 40 N. Y. 463; *Fulton v. Staats*, 41 N. Y. 498; *Neal v. Joyner*, 89 N. C. 287; *Russell v. Shuster*, 8 Watts & S. (Pa.) 308; *Chandler v. Rutherford*, 101 Fed. 774, 43 C. C. A. 218; *Kirk v. Garrett*, 84 Md. 383, 35 Atl. 1069; *Brish v. Carter*, 98 Md. 445, 57 Atl. 210; *Gale v. Hoyt*, 5 Dane, Abr. (Mass.) 558; *State v. Hancock*, 73 Mo. App. 19; *Rarick v. Mc-*

Manomon, 17 Pa. Sup. Ct. 154; *State v. Taylor*, 70 Vt. 1, 39 Atl. 447, 42 L. R. A. 673, 67 Am. St. Rep. 648; *Pritchett v. Sullivan*, 182 Fed. 430, 104 C. C. A. 624; *Commonwealth v. Phelps*, 209 Mass. 396, 95 N. E. 868, Ann. Cas. 1912B, 566; *Keefe v. Hart*, 213 Mass. 476, 100 N. E. 558, Ann. Cas. 1914A, 716; *State v. Whitley* (Mo.) 183 S. W. 317.

The same rule applies to a private citizen. *Wright v. Commonwealth*, 85 Ky. 123, 2 S. W. 904; *Long v. State*, 12 Ga. 293; *Simmerman v. State*, 16 Neb. 615, 21 N. W. 387; *Brooks v. Commonwealth*, 61 Pa. 352, 100 Am. Dec. 645; *U. S. v. Boyd* (C. C.) 45 Fed. 851; *Reuck v. McGregor*, 32 N. J. Law, 70; *Burns v. Erben*, 40 N. Y. 463; *Hawley v. Butler*, 54 Barb. (N. Y.) 490; *Neal v. Joyner*, 89 N. C. 287; *Davis v. U. S.*, 16 App. D. C. 442; *Maliniemi v. Gronlund*, 92 Mich. 222, 52 N. W. 627, 31 Am. St. Rep. 576; *Suell v. Derricott*, 161 Ala. 259, 49 South. 893, 23 L. R. A. (N. S.) 996, 18 Ann. Cas. 636; *State v. Jones*, 91 Ark. 5, 120 S. W. 154, 18 Ann. Cas. 293.

This being the unquestioned law of the case, the inquiry naturally follows, Does the testimony show that the police officer who made the arrest, and Hodges, who I will assume instigated the arrest, come within the rule?

The testimony does not disclose a single circumstance to my mind tending to show that they, or either of them, had any other purpose or motive than to do what is the duty of every good citizen, to run down the perpetrator of a crime, or that they were not acting in good faith upon a reasonable suspicion that Falls was the guilty party. He was a stranger in Florence; neither of these men knew him, and therefore could not have entertained any personal animosity towards him; they were both, the one an officer of the law and the other an employee of the power company, deeply concerned in apprehending the criminal; and if either showed a disposition to wantonly harass the plaintiff or to do otherwise than they should be expected to have done under the circumstances, I have failed to read the testimony aright.

A felony had been committed; a store had been burglarized and property stolen; a part of the stolen property had been recovered from a man to whom the thief had sold it; property of the same kind had been offered to another for sale at suspicious prices on the night of the robbery; the latter described the man who offered the property to him by clothing and appearance, and promised to report it if he saw him again. Two days afterwards Howard, the café man, to whom the property was offered for sale, was at the Florence depot, and saw a man whom he believed to be the party who had proposed the sale. He phoned the information to the superintendent of the power company. The police department was notified, and the superintendent went around to headquarters in his car and carried the policeman to the

station for the purpose of making the arrest. The plaintiff was a stranger in Florence, and was about to leave on the train. He had with him, innocently as it developed, a bag of tools. He was identified by Howard as the man who had offered to sell him fans. Thereupon he was arrested.

The validity of the arrest must be determined, not by what followed, but by the circumstances as they existed at the time of the arrest. It may or may not have been proper for the police officer and Hodges to convey the plaintiff to the Greek for identification, as the seller of the fan, which was recovered and turned back to the company, or to refuse his request that he be vouched for at O'Dowd's Theater, where he had been at work, or to decline to pay his hotel bill, or to treat him with discourteous jest when they had carried him back to the depot, but those circumstances could not invalidate an arrest previously made if valid at the time it was made. They could only be considered upon the question of punitive damages in the event that the arrest was unlawful.

I think that under the law the police department and Hodges were entirely justified, in the circumstances, to make the arrest, and that the police would have been subjected to just criticism if they had not acted upon the information which they received, coming as it did from an entirely disinterested source and exceedingly reasonable in its nature. It is unfortunate and greatly to be regretted that they subjected an innocent man to the humiliation of an unjust accusation, but as their good faith in the matter cannot be reasonably questioned in my opinion, the plaintiff's discomfiture should be borne with equanimity and with the assurance that it is far better that individual hardships may go unrequited than that the vigor of the enforcement of the law be paralyzed by the fear of damage suits.

In my opinion it will be a serious blow to the efficient discovery of crime and arrest of the criminal to sustain the judgment in this case. It may easily be conceived that the very same circumstances that existed in this case would point to the real burglar; and yet a majority conclusion will stay the arm of the law and allow him with his kit of tools and positive identification "to fold his tent like the Arab and silently steal away."

It must be remembered that at the time Howard phoned to the company's office the warrant had been issued at the instance, not of Hodges, but of the police department, and upon information furnished, not by Hodges, but by Howard and the Greek. Both gave the same description, and the police had looked all over town for a man answering that description. The chief testified: "I had not spoken to the Palmetto Power & Light Company, or Hodges, concerning the

warrant." It is very clear that if Howard had phoned to the police instead of to the office of the company, the police would have done precisely what they did and should have done. The chief says:

"If I had found as chief of police any one answering the description contained on that warrant I would have arrested him. If I had been informed by Mr. Howard or Allowas that a certain man was the man that sold him a fan, I would have arrested him."

It is plain therefore that the police acted, not upon Hodges' insistence, but upon the information received from Howard, which had been relayed from the office.

The law requires that immediately upon arrest the party shall be taken before a magistrate to be dealt with according to law. Strictly speaking, the officer was not warranted in taking the plaintiff to the Greek's shop for identification, but, interpreting the motive by the conduct of the officer after the identification had failed, the prompt release of the plaintiff, it is clear that this was done for the benefit of the plaintiff, that he might be discharged without being committed to jail should the identification fail. I do not see that this was a matter of which he could complain, when it resulted so quickly to his advantage. Serious complaint is made upon the ground that the plaintiff was not allowed to stop at O'Dowd's Theater and obtain from him a certificate of his good character. O'Dowd does not appear to have had any acquaintance with the plaintiff until he came to Florence to do certain work upon an organ, on Friday before the arrest on Sunday. Certainly an interview with O'Dowd could not have been as effective as that with the Greek proved to be. If O'Dowd could have established the innocence of the plaintiff, which is more than doubtful, he certainly could not have accomplished more than the Greek did. The gist of his complaint is that he was not carried to one whose ability to exculpate him was questionable, but to one whose testimony completely exonerated him and caused his immediate release. As the chief of police testified, the Greek was the proper man to identify him and not O'Dowd. If the plaintiff had been carried to O'Dowd and had been vouched for by him and discharged, I have no idea that it would have prevented this suit for damages.

"A legal arrest is not tainted by a subsequent illegal detention so as to make the arresting officer a trespasser ab initio unless the arrest was intended as a cover to subsequent illegal conduct." 19 Cyc. 355, citing *Friesenhan v. Maines*, 137 Mich. 10, 100 N. W. 172.

Complaint is also made that no consideration was paid to the plaintiff after he was returned to the station. It appears that Falls was naturally and justifiably indignant on account of the unfounded charge pre-

ferred against him, and doubtless gave vent to his indignation in forcible language, which he had the right to do. But, choosing to exercise this right, he cannot complain that certain courtesies were not extended to him which, humanly speaking, were made impossible by his own extreme language.

Assuming, however, for argument's sake that the arrest was unlawful, and that it was instigated and participated in by Hodges, the superintendent of the power company, I think that the authorities are absolutely conclusive of the immunity of the corporation for such acts by its superintendent. They clearly establish this proposition:

One who is charged with custody and control of property of another is authorized to do any and all things necessary to protect and preserve the property. If it were necessary to arrest one to prevent a theft of the property, he would be authorized to cause such an arrest, not to punish the offender, but to prevent the theft. After a theft is committed, however, he would have no authority to put the criminal law in operation, because the object then sought, and the result thereby attained, would not be the protection or preservation of the property, but the punishment of the criminal and the vindication of justice.

The leading case upon the subject seems to be the English case of *Allen v. London and S. W. Ry. L. R. 6 Q. B., 65*. In that case, a clerk in the service of the corporation was charged with the duty of selling tickets to passengers, and receiving the money therefor, which he deposited in a till. The clerk arrested and gave into custody one whom he suspected of attempting to rob the till. Lord Blackburn, delivered an opinion, in which he makes the following statement of the law:

"There is marked distinction between an act done for the purpose of protecting the property by preventing a felony or of receiving it back and an act done for the purpose of punishing the offender for that which has already been done. There is no implied authority in a person having the custody of property to take such steps as he thinks fit to punish a person who he supposes has done something with reference to the property which he has not done. The act of punishing the offender is not anything done with reference to the property; it is done merely for the purpose of vindicating justice."

The Supreme Court of Maryland, after quoting Lord Blackburn, held:

"From these authorities it is quite clear that in a case like the present, where the corporation is sought to be held liable for the wrongful and malicious act of its agent or servant in putting the criminal law in operation against a party upon a charge of having fraudulently embezzled the money and goods of the company, in order to sustain the right to recover, it should be made to appear that the agent was expressly authorized to act as he did by the

corporation. The doing of such an act could not, in the nature of things, be in the exercise of the ordinary duties of the agent or servant intrusted with the custody of the company's money or goods; and, before the corporation can be made liable for such an act, it must be shown, either that there was express precedent authority for doing the act, or that the act has been ratified and adopted by the corporation." *Carter v. Howe Mach. Co., 51 Md. 290, 34 Am. Rep. 311.*

In *Mali v. Lord, 39 N. Y. 381, 100 Am. Dec. 448*, the superintendent of defendant's store caused the arrest and search of a female customer, whom he suspected of having stolen goods. The New York court thus stated the rule in holding the master not liable:

"In examining this question, it must be assumed that, by the employment, the master confers upon the servant the right to do all necessary and proper acts for the protection and preservation of his property, to protect it against any thieves and marauders, and that the servant owes the duty so to protect it to his employer. But this does not include the power in question. It cannot be presumed that a master, by intrusting his servant with his property, and conferring power upon him to transact his business, thereby authorizes him to do any act for its protection that he could not lawfully do himself if present. The master would not, if present, be justified in arresting, detaining, and searching a person upon suspicion, however strong, of having stolen his goods, and secreted them upon his person.

"The authority of the defendants to the superintendent could not therefore be implied from his employment. The act was not done in the business of the defendants, and they were not, as masters, responsible therefor."

The federal Circuit Court in *Pressley v. Mobile & G. R. Co. (C. C.) 15 Fed. 199*, reaches the same conclusion. There a person employed as a land agent by defendant company, and as such having custody of certain property, caused the arrest of plaintiff upon a charge of grand larceny committed in reference to such property. The court said:

"The question is, Can such action on his part be held to be within the scope of his agency and in the course of his employment? There may be, and the books recognize some difficulty in determining what acts of an agent or employee are properly within the range and course of his employment; but to say that to put the criminal law in operation against a party on a charge of larceny of the property of the corporation is within the scope of his agency, and in the course of his employment, is a proposition which, in the light of the decided cases, cannot be maintained."

It is held in the following cases that where the servant acts outside of the duties of his employment, and without express directions, his act ceases to be that of the master; the servant, and not the master, is

liable for the consequences. *Courtney v. Baker*, 37 N. Y. Super. Ct. 255; *Isaacs v. Railroad Co.*, 47 N. Y. 127, 7 Am. Rep. 418; *Cosgrove v. Ogden*, 49 N. Y. 258, 10 Am. Rep. 361; *Mott v. Ice Co.*, 73 N. Y. 548; *Garretzen v. Duenckel*, 50 Mo. 109, 11 Am. Rep. 405; *Carter v. Mach. Co.*, 51 Md. 297, 34 Am. Rep. 811.

"The rule is well settled that the liability of a principal for the act of his agent in instituting a malicious prosecution or causing a false arrest or imprisonment is dependent on whether the principal previously authorized the act, or subsequently ratified it, or whether the act was within the scope of the agent's employment. If previously authorized or subsequently ratified, or if within the scope of the agent's employment, the principal is liable; otherwise he is not." Note, *Fisher v. Westmoreland*, Ann. Cas. 1914B, 638.

See, also, *Mulligan v. N. Y. & R. B. Ry.*, 129 N. Y. 506, 29 N. E. 952, 14 L. R. A. 791, 26 Am. St. Rep. 539; *Markley v. Snow*, 207 Pa. 447, 56 Atl. 999, 64 L. R. A. 685; *McKain v. Baltimore, etc., Ry.*, 65 W. Va. 233, 64 S. E. 18, 23 L. R. A. (N. S.) 289, 131 Am. St. Rep. 964, 17 Ann. Cas. 634; *Tolchester Beach Imp. Co. v. Steinmeier*, 72 Md. 313, 20 Atl. 188, 8 L. R. A. 846; *Mayfield v. St. Louis, etc., Ry. Co.*, 97 Ark. 24, 133 S. W. 168, 32 L. R. A. (N. S.) 525.

The case of *Daniel v. A. C. L.*, 136 N. C. 517, 48 S. E. 816, 67 L. R. A. 455, 1 Ann. Cas. 718, contains an exceedingly able presentation of the question; the court arriving at the foregoing conclusion.

The case of *Simmons v. Okeetee Club*, 86 S. C. 73, 68 S. E. 131, is instructive. In this case Thomas was the agent and servant of the Okeetee Club, and as such charged with the care and protection of its property. Simmons, the plaintiff, an adjoining landowner, claimed that Okeetee Club had erected a fence on lands belonging to him, and he proceeded to tear down the fence. Thereafter it was replaced, and plaintiff was warned by the agent Thomas that if the fence was torn down again, he (Thomas) would shoot the plaintiff. The plaintiff did tear down the fence, and Thomas proceeded to carry his threat into execution. Simmons sued Thomas and the club, alleging that "Thomas was in charge of his duty to Okeetee Club, and acting within the scope thereof," in shooting him. Upon these facts, this court, speaking through Mr. Justice (now Chief Justice) Gary, held:

"We proceed to consider whether there was any testimony tending to show that the shooting of the plaintiff by Thomas was within the apparent scope of his authority to protect the fence. The undisputed testimony showed that at the time of the shooting the fence had been cut by the plaintiff, who had resumed work on the railroad about 1,600 feet from the place where the fence had stood; and of course he was not

then attempting to injure the fence. The act of destroying the fence was then completely executed. If the testimony had shown that the shooting took place while the work of destruction was in fieri, the nonsuit would have been improper. But we fail to see what relation the shooting had to the protection of the property, as it could not be successfully contended that it would prevent the plaintiff, in future, from cutting the fence. Under such circumstances the court cannot hold that there was testimony tending to show that the shooting was within the implied authority of the agent."

In *Davenport v. Railroad Co.*, 72 S. C. 205, 51 S. E. 677, 110 Am. St. Rep. 598, the servants of the railway company, while engaged in operating a freight train, threw bricks at plaintiff's dwelling house. And in distinguishing the case from *Polatty v. Railway Co.*, 67 S. C. 391, 45 S. E. 932, 100 Am. St. Rep. 750, Mr. Justice Jones very clearly shows that in *Polatty v. Railway Co.*, the engineer was engaged in protecting the property of his principal from a trespasser, and hence within the scope of his agency, whereas, in *Davenport v. Railway*, the servants were not so engaged, and under the facts their actions were not within the scope of their agency, and the master was not liable therefor.

This, then, is the situation. Hodges is the general superintendent in charge of the plant and property of the company at Florence. As such he has the authority to protect and preserve that property. A fan is stolen. Subsequently it is recovered. A day or two later, one suspected of the theft is arrested, upon the alleged instigation of Hodges. Even if procured by him, the company is not responsible for his act in causing the arrest. Its property has been recovered. His act in causing the arrest is not to preserve or protect its property, but to apprehend and punish the criminal. The company has no interest therein, aside from the general public interest. Hodges' act is not authorized or ratified by the company. Under the overwhelming weight of authority it is not within the apparent scope of his agency. He acted in the public interest, for the vindication of justice, not the protection of his principal. There can be but one conclusion consonant with established precedent; the company is not liable.

In the case of *Fields v. Lancaster Mills*, 77 S. C. 546, 58 S. E. 608, 11 L. R. A. (N. S.) 822, 122 Am. St. Rep. 593, the plaintiff was thrown into a pond by the overseers of the mill in the presence of the superintendent. It was an issue in the case whether the superintendent participated in the wrong. The plaintiff was a labor scout, and his presence on the mill property was not desired. The question of the mill's responsibility for the act of the superintendent was decided upon this point:

"The evidence on the part of the defendant shows the superintendent, in this instance, was intrusted with the control of its policy and the methods to be employed to prevent interference with the operatives"

—a matter placed under his control by the mill, and the court very properly held that it was within the scope of his employment.

The case of *Stephenson v. Baldwin Mills*, 114 S. C. 367, 103 S. E. 710, was one of arrest under a void warrant. The court says:

"The evidence is conclusive that the warrant was gotten out by the authorities of the mill, to collect the debt."

Of course under these circumstances there could be no question but that the mill was liable.

In *Hypes v. Railway Co.*, 82 S. C. 315, 64 S. E. 395, 21 L. R. A. (N. S.) 873, 17 Ann. Cas. 620, the action was against the corporation for a slander by its superintendent. The case was upon demurrer to the complaint, which alleged that the slander was uttered "within the scope of his authority and in the discharge of his duties as superintendent," which of course brought it within the rule.

In *Daniel v. A. C. L.*, 136 N. C. 517, 48 S. E. 816, 67 L. R. A. 455, 1 Ann. Cas. 718, this exceedingly clear and logical statement occurs:

"A servant intrusted with his master's goods may do what is necessary to preserve and protect them, because his authority to do so is clearly implied by the nature of the service; but when the property has been taken from his custody or stolen, and the crime has already been committed, it cannot be said that a criminal prosecution is necessary for its preservation or protection. This may lead to the punishment of the thief or the trespasser, but it certainly will not restore the property, or tend in any degree to preserve or protect it. It is an act clearly without the scope of the agency, and cannot possibly be brought within the limits of the implied authority of the agent. It would seem that so plain a proposition should need neither argument nor authority to support it, but we are abundantly supplied with both in the cases upon the subject."

In *Washington Co. v. Lansden*, 172 U. S. 534, 19 Sup. Ct. 296, 43 L. Ed. 543, the rule is thus stated:

"The result of the authorities is, as we think, that in order to hold a corporation liable for the torts of any of its agents, the act in question must be performed in the course and within the scope of the agent's employment in the business of the principal."

In that case it was sought to hold the corporation liable for a libel published by the general manager of the company, relating to certain testimony the plaintiff had given before a congressional committee. The court said further:

"There must be evidence of some facts from which the authority of the agent to act upon or in relation to the subject-matter involved may be fairly and legitimately inferred by the court or jury," and that, if only one inference can be drawn from the evidence, the question is one of law for the court.

They held that although Leetch was the general manager and was writing about a matter connected with the business of the company, there was no evidence from which it could be legitimately inferred that his authority extended to the matter in hand.

I think that it is perfectly clear that Hodges is not liable, for the reason that he acted as a man of ordinary care would have acted and as a correct conception of a public duty dictated; that the power company is not liable, for the reasons just stated; but, if Hodges should be liable and the power company not, the judgment should be reversed as to him, for the reason that the burden of paying the verdict which has been assessed against them both jointly should not be permitted to rest upon the appellant Hodges individually.

The jury in writing its verdict was seeking not only to compensate respondent, but also to punish both appellants. It would hence be obviously unfair to compel the appellant Hodges to suffer for the punishment of both. It would follow, therefore, that if this company should have had a verdict directed in its favor, then the verdict should be set aside, and the appellant Hodges granted a new trial. This is in accordance with the general rule. The rule is thus stated:

"An entire judgment, jointly binding on several parties, if it is reversed as to one, must be reversed as to all."

This rule is supported by the weight of authority in this country. Thus it has been held by the United States Supreme Court in *Washington Gaslight Co. v. Lansden*, 172 U. S. 534, 19 Sup. Ct. 296, 43 L. Ed. 543, that—

"Where the rights and liabilities of defendants are so intermingled that, although there was error as to only one, it might work an injustice as to the others if the judgment was left intact as to them, the judgment will be reversed in toto."

It cannot be affirmed that a verdict of \$2,500 would have been rendered against Hodges, a private citizen, if the suit had been dismissed against the corporation as it should have been.

I have devoted more attention to this case than my other duties perhaps justified, but I am deeply impressed with the far-reaching consequences of affirming this judgment, upon the administration of law and order. In this day of an unprecedented crime wave,

every encouragement should be extended to the guardians of the law, and, although individual instances of hardship may occur, these faithful protectors of society should not be themselves manacled, as I fear will be the consequence.

My conviction is that the circuit court should have directed a verdict in favor of both defendants, and that in any event the judgment against Hodges should be reversed, and a new trial granted.

(117 S. C. 291)

MATHESON et al. v. CARIBO et al. (No. 10744.)

(Supreme Court of South Carolina. Nov. 4, 1921.)

1. Bills and notes §537(1)—Genuineness of indorsement by mark held for jury.

In action on note, whether defendant's intestate indorsed note held for jury, notwithstanding testimony of witness, whose name appeared on note as that of subscribing witness to intestate's signature by her mark, that intestate had not made the mark.

2. Trial §139(1)—Verdict not directed unless reasonable minds can draw but one inference from evidence.

A verdict should not be directed except where reasonable minds can draw but one inference from the evidence; that is, where there is an entire absence of evidence to support a contrary conclusion.

3. Signatures §5—Subscribing witness' denial of execution of signature by mark not conclusive.

Denial of genuineness of signature by mark by subscribing witness thereto is not conclusive that signature is not genuine, but the mark can be shown to have been in fact made by person by whom it purports to have been made, by other evidence.

Watts, J., and Gary, C. J., dissenting.

Appeal from Common Pleas Circuit Court of Marlboro County; Ernest Moore, Judge.

Action by J. J. Matheson and another against James H. Caribo and Julian McLaurin, as administrator of the estate of M. J. Hood, deceased. Judgment for last named defendant, and plaintiffs appeal. Reversed, and new trial granted.

W. M. Stevenson, of Bennettsville, for appellants.

J. W. Le Grand, of Bennettsville, for respondents.

COTHRAN, J. [1] I think that under the evidence in this case the issue of fact as to

the indorsement by Mrs. Hood of the Caribo note should have been submitted to the jury, and for that reason I dissent from the judgment of the court approving the circuit judge's direction of a verdict in favor of the defendant.

[2] The rule is well established that the circuit judge should direct a verdict in those instances only where reasonable minds could draw but one inference from the evidence; this of course would occur where there is an entire absence of evidence to support a contrary conclusion. I do not think that result can be attained in this case.

The evidence tends to establish the following facts: In the fall of 1914 Robert H. Hood, son of Mrs. M. J. Hood, the defendant's intestate, was indebted to the plaintiff, whom I shall refer to as "Matheson," in the sum of \$1,166.12, on account of goods sold. The account was secured by three notes and mortgages given by Robert H. Hood to Matheson aggregating \$1,595.60, and by a note for \$241.77, given by the defendant Caribo to Robert H. Hood, due October 15, 1914, which was assigned to Matheson as collateral security to his obligations. When the Caribo note fell due on October 15, 1914, he renewed it, making the new note for the same amount payable to Matheson instead of Hood, and due November 15, 1914. Matheson was pressing Robert H. Hood for the debt of \$1,166.12, and his mother, Mrs. M. J. Hood, was disposed and anxious to help her son out of his financial difficulties. It is positively testified to by one of the Mathesons: That he went to the home of Mrs. Hood on October 29, 1914, for the purpose of getting the matters between them and Robert H. Hood settled. That in his presence Mrs. Hood agreed with Robert H. Hood to advance him \$925.95, indorse the Caribo note for \$241.77, and take an assignment from Matheson of the notes and mortgages they held against Robert H. Hood. That a bank check was drawn by Mrs. Hood for \$925.95, payable to Matheson and turned over to him. This check was signed by Mrs. Hood by her mark, and witnessed by another son or son-in-law, J. M. Hood, who attended to all of her business. The notes and mortgages of Robert H. Hood were transferred to Mrs. Hood; the date of the transfer being the same as that of the check, October 29, 1914. Matheson left, taking with him the check and the Caribo note, indorsed "M. J. ^{her} x Hood. Witness: J. M. Hood." He collected ^{mark} the check and turned the Caribo note over to Mr. Powell, a member of his firm.

The Caribo note not having been paid at maturity, this action was instituted against Caribo and the respondent McLaurin as administrator of the estate of Mrs. Hood. The

complaint, in addition to the usual allegations, contains the allegation:

"That before delivery and in order that the said Matheson Bros. should accept the same, M. J. Hood indorsed said note."

This allegation is not sustained by the evidence, the plaintiff clearly showing that the Caribo note had been renewed by him on October 15, 1914, placed among the assets of the firm and taken from thence when one of the plaintiffs started to Mrs. Hood's house for the purpose of settling matters. No point, however, appears to have been made upon this discrepancy; the issue being upon the execution of the indorsement by Mrs. Hood, which was disputed in the answer.

Upon the trial of the case *J. M. Hood*, whose name appears as a witness to Mrs. Hood's indorsement by her mark, was called as a "hostile" witness by the plaintiffs. He practically admitted his signature, but denied that his mother signed the indorsement or knew anything whatever about the note. Other witnesses for the defendant testified to very much the same effect.

[3] The circuit judge's ruling upon the motion for a directed verdict was to the effect that the subscribing witness should be produced, and, should he, although admitting his signature, deny the execution of the instrument, that would be an end of the matter; that there would be "no room for presumption." I think that this is an erroneous conception of the law. It practically puts the proponent of the document at the mercy of the self-interest, forgetfulness, or rascality of the subscribing witness, and limits the proof of the execution of a document to the testimony of a subscribing witness.

It must be remembered in the first place that the paper in question is not one which is required by law to be witnessed. While the general practice is to have a witness to the signature of one who signs by mark, I know of no law which requires it, but regard it as more a matter of convenient proof than anything else.

"A note executed by a mark may be proved by one who witnessed it, whether he was named as a subscribing witness or not." *Robinson v. Robinson*, 20 S. C. 567, at page 570.

"We are very much inclined to think that, in view of the disposition both of the courts and of the Legislatures to relax the strictness of the common-law rules of evidence, it would be more in accordance with reason, and more conducive to a prompt disposition of causes, to hold that the execution of any written instrument except a will can be proved by any testimony, otherwise competent, and that it is not necessary to introduce the subscribing witness for that purpose." *Swancey v. Parrish*, 62 S. C. 240, at page 244, 40 S. E. 554, 555.

But assume for the moment that the signature was required to be witnessed, what

is the law? The proponent has done his duty when he produces the subscribing witness; he is not bound hand and foot by the answers of that witness.

This court has declared in the case of *Merck v. Merck*, 89 S. O. 347, at page 351, 71 S. E. 969, 971 (Ann. Cas. 1913A, 937):

"We are of the opinion, however, that the circuit judge erred in excluding evidence of the handwriting of the persons whose names are on the paper as subscribing witnesses. The defendant Mann was in this plight: Mrs. L. C. Merck, one of the persons whose names were subscribed as witnesses to the alleged deed from Blumer Merck to L. O. Merck, was hostile, and, upon being put on the stand, testified in effect that the deed was not delivered. The other witness, Hester, was excluded because disqualified by interest. Under these conditions the defendant Mann had a right to introduce other testimony tending to prove the execution of the deed; and evidence of the handwriting of the witnesses, of the grantor's acknowledgment of the validity of the deed after its execution, and of any facts tending to show that the deed had been executed, was clearly admissible. Land titles would be very insecure if they should fail whenever the subscribing witnesses might deny that they witnessed the execution of the deed, or might become for any cause incompetent to testify to its execution. It is true in proving a deed the subscribing witnesses must be produced or their absence accounted for, but manifestly the title cannot be made to depend entirely on their testimony. Whenever the witnesses are dead or inaccessible, or have become incapacitated, or deny the execution in their presence, or for any cause are unable or unwilling to prove the execution, then other evidence may be introduced. This is a principle of general recognition. *Pearson v. Wightman*, 1 Mill, 336, 12 Am. Dec. 636; *Congdon v. Morgan*, 14 S. C. 594; *Gable v. Rauch*, 50 S. C. 95, 27 S. E. 555; *Brucke v. Hubbard*, 74 S. C. 144, 54 S. E. 249; *Buchanan v. Simpson* (Ga.) 31 S. E. 105; *Greenleaf on Evidence*, vol. 1, p. 762; 11 A. & E. Ency. 598."

That was the case of a deed where subscribing witnesses are required by the law. The cases and authorities cited by the court are full to the point. Would it not be a remarkable situation, take this case, for instance, that the plaintiffs, who are debarred by the Code from testifying must be absolutely concluded by the testimony of a subscribing witness directly interested in the result?

Now let us see whether or not there is any evidence, outside of the denial of the subscribing witness, which tends to show that Mrs. Hood signed the indorsement. If so, an issue of fact was presented for the jury, and it was error to direct a verdict.

In the first place, as Mr. Wigmore says (vol. 1, § 157):

"The existence of the document purporting to be signed by A. is, under all circumstances, some evidence of A.'s genuine execution of it."

In the next place, proof of the handwriting of the subscribing witness is admissible evidence of the execution. It is stronger than that here, for the witness admits his signature.

In the last place, the circumstances of the negotiations impress me, to say the least, as pointing to the indorsement of the note by Mrs. Hood.

Assuming for the purposes of this appeal the statements of Matheson to be true, there was an agreement upon Mrs. Hood's part to settle the debt of her son to Matheson by paying cash \$925.95, indorsing the Caribo note of \$241.77, and taking from Matheson an assignment of the notes and mortgages of her son. It is admitted that she gave a check for the cash payment, which was signed exactly as the note appears to have been signed: "M. J. x Hood. Witness: J. M. Hood." It is also admitted that the notes and mortgages were assigned and delivered by Matheson to her. The transaction was closed, as Matheson stated the agreement to have been, with the exception of the disputed indorsement. The notes and mortgages were left with Mrs. Hood, and Matheson took with him the check and the Caribo note.

The error in the direction of a verdict was fundamental: The conclusive limitation of the plaintiffs to the testimony of the subscribing witness; the denial of the right, notwithstanding the repudiation of the indorsement by the witness, to rely upon the other pregnant facts and circumstances of the case.

In *Northrop v. Lumber Co.*, 186 Fed. 770, 108 C. C. A. 640, it is said:

"Where the subscribing witnesses deny or forget their attestation, other evidence, di-

rect or circumstantial, may, of course, be resorted to prove its execution."

Exactly in line with *Merck v. Merck*, supra. See, also, *Patterson v. Tucker*, 9 N. J. Law, 322, 17 Am. Dec. 472, a particularly well-reasoned decision, which cites our own case of *Pearson v. Wightman*, 1 Mill, Const. 336, 12 Am. Dec. 636, and sums up the discussion in these words:

"The law prudently calls for the testimony of the witness, but is too wise and too conscious of human imperfection and frailty to rest its confidence, to limit its inquiry, and to conclude the rights of the parties solely by the recollection or forgetfulness, the integrity or waywardness of any witness."

Judgment reversed, and new trial granted.

FRASER, J., and THOMAS, Acting Associate Judge, concur.

WATTS, J. (dissenting). This is an appeal from a directed verdict by his honor, Judge Moore, in favor of the respondent McLaurin, as administrator of M. J. Hood, deceased; the issue being whether Mrs. M. J. Hood, respondent's intestate, indorsed the note sued on, the exception raises the issue that his honor erred in not sending the case to the jury. The evidence of J. M. Hood, the witness to the note, M. J. Hood having made her mark, is that M. J. Hood did not indorse the note, and that the alleged indorsement was not brought to the attention of M. J. Hood while he was present. There was no evidence to send the case to the jury that Mrs. Hood indorsed the note by making her mark, or that she knew anything about it. His honor, in my opinion, committed no error, and exception should be overruled, and I think judgment should be affirmed.

GARY, C. J., concurs.

(117 S. C. 404)

MATTISON v. GLENN. (No. 10730.)

(Supreme Court of South Carolina. Oct. 10, 1921.)

Landlord and tenant \Rightarrow 331(1)—Owner must account to share cropper for market value when settlement demanded, with interest from such date.

In a share cropper's action against owner for an accounting, the court erred in charging defendant on the basis of the value of plaintiff's share of the crop, if sold at the highest price at which it could be sold at any time after plaintiff demanded settlement; defendant being properly chargeable with no more than the market value at the time settlement was demanded, with interest on the balance due from that date.

Gary, C. J., dissenting.

Appeal from Common Pleas Circuit Court of Anderson County; F. B. Gary, Judge.

Action by Pink Mattison against W. Keith Glenn. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

The decree of the court below is as follows:

This is a suit for accounting between the plaintiff and the defendant, W. Keith Glenn. The plaintiff claims that as a share cropper the said defendant is still due him practically all of plaintiff's share of the crop raised by him. The said defendant claims that he does not owe plaintiff anything. That the said defendant has furnished the plaintiff supplies to an amount greater than the plaintiff's share of the crop, and that the plaintiff is really indebted to the said defendant in the sum of 90-odd dollars. It was referred to a special referee to take the testimony in the case and to state the account between the parties. The special referee has taken the testimony and made his report. Both sides except to the report. Their several exceptions may be found in the record. The case is now before me upon these exceptions.

The testimony as to many of the facts in dispute is vague, indefinite, and unsatisfactory. Frequently it amounts to no more than an assertion on the part of the plaintiff and a denial on the part of the defendant. It is difficult to determine with certainty where the truth is. I think the special referee has in the main reached just conclusions, except as to the nature of the final judgment rendered by him. I agree with the referee as to the terms of the contract between the parties, and that they were share croppers. The main questions, then, are: First. What crops were made by plaintiff? Second. What supplies were furnished plaintiff by defendant? Third. What incidental items should be credited to each?

To answer these questions is simply to state the accounts between the parties. This we will proceed to do. The plaintiff should, of course, be credited with one-half of the crops raised by him, the value thereof being ascertained by calculating what it will amount to if sold at the highest price at which said crop could be sold any time after the plaintiff de-

manded a settlement from the said defendant. This principle of settlement between share croppers is recognized in the recent case of Rainwater et al. v. Mer. & Farmers' Bank of Cheraw, S. C., 114 S. C. 358, 103 S. E. 587.

The defendant claims to have an account against the plaintiff for supplies amounting to \$2,034.74. Some of the items going to make up this account should not be allowed. The item of \$140.82 for interest was properly disallowed by the referee. The item of \$8 for bolster should not be allowed. The item of \$8 for three wagon tongues should not be allowed. The item of \$2.50 for two hoes should not be allowed. If the remaining items are incorrect, the testimony is too unsatisfactory and vague to warrant the court in so holding.

The account of the said defendant against the plaintiff would therefore stand as follows:

The account as set forth.....	\$2,034 74
Less items disallowed.....	159 32

Balance	\$1,875 42
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The plaintiff's account against the said defendant should stand as follows:

For cotton seed.....	\$ 41 33
For 12 bushels of bottom corn at \$2.25 per bushel	27 00
For cane seed.....	6 00
For one-half good cotton, to wit, 5,095 pounds, at 33 cents per pound.....	1,681 35
For one-half off-grade cotton, to wit, 2,019 pounds, at 30 cents per pound.....	605 70

Total	\$2,361 43
	1,875 42

Balance due plaintiff.....	\$ 486 01
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—for which amount plaintiff should have judgment against the defendant, W. Keith Glenn.

It is therefore hereby ordered, adjudged, and decreed that the special referee's report herein be and the same is amended in the particulars indicated, and that the plaintiff, Mattison, have leave to enter up judgment against the defendant, W. Keith Glenn, for the sum of \$486.01.

A. H. Dagnall, of Anderson, for appellant.
Bonham & Allen, of Anderson, for respondent.

COTHRAN, J. In view of the conflicting and confused state of the testimony in this case, the circuit judge has arrived at the justice of it as nearly as we might hope to do, with these exceptions:

(1) The defendant should account for the good cotton at 28 cents per pound and the off-grade at 25 cents per pound; the rule in the Rainwater Case, 114 S. C. 358, 103 S. E. 587, does not justify charging him with more than the market value at the time settlement was demanded, with interest from that date, November 1, 1918; the interest to be calculated upon the balance ascertained to be due by the defendant to the plaintiff as of that date.

(2) The defendant should account for the bottom corn, \$20, that being the amount claimed in the complaint.

(3) The defendant should not be required to account for more than \$2 for cane seed furnished by the plaintiff, as he testifies that he only bought one-half bushel at \$4 per bushel.

The account between the parties would then stand thus:

Defendant's account.....	\$2,034 74	
Less items disallowed.....	159 32	
		\$1,875 42

The plaintiff's account:		
Cotton seed.....	\$ 41 38	
Bottom corn.....	20 00	
Cane seed.....	2 00	
Good cotton.....	1,428 60	
Bad cotton.....	504 75	1,994 73

Balance due plaintiff..... \$ 119 31

—with interest from November 1, 1918, at 7 per cent. per annum.

The judgment of this court is that the judgment of the circuit court, as thus modified, be affirmed; all costs to be paid by the defendant.

WATTS, and FRASER, JJ., concur.

GARY, C. J. I dissent. The judgment of the circuit court should not be modified, but affirmed, for the reasons therein stated.

(117 S. C. 391)

LIVINGSTON v. REID-HART-PARR CO.
(No. 10725.)

(Supreme Court of South Carolina. Oct. 10, 1921.)

1. Fraud §12—Seller's representation held mere promise not actionable.

An allegation that defendant sellers "represented that they would furnish and sell to the plaintiff a machine" of certain described character, was merely an allegation of a representation that the seller "would do" a certain thing, nothing more than a promise, and not the representation of an existing fact, and was not a sufficient allegation of fraud.

2. Evidence §137—Evidence of trouble with machines sold to other persons held inadmissible.

In an action for damages for breach of warranty of machine, court properly excluded evidence on question of defendant's knowledge as to trouble other purchasers of similar machines had, since it would extend the inquiry indefinitely to branch out into all kinds of sales and surrounding conditions.

3. Sales §446(2)—Instruction held warranted by evidence.

In an action for breach of warranty of a machine, where there was some testimony to the effect that plaintiff made a careful examination of the machine before buying, and plaintiff testified that the defects of which he complains were plainly discernible, court did not err in charging that one who knowingly

buys a defective or unsound commodity cannot complain.

4. Sales §446(4)—Instruction as to puffing statements by seller held not erroneous.

In an action by purchaser of machine for damages an instruction concerning puffing statements merely telling the jury that, when statements by the vendor only amount to expressions of opinion in the praise of his goods, such statements do not constitute fraud, was not erroneous, where followed by the further statement that "any distinct affirmation as to the quality or condition of a thing sold by the owner * * * is an express warranty."

5. Sales §267—Adoption of manufacturer's warranty exclusion of implied warranty.

Where purchaser of machine from a dealer signed an order or contract stating, "I agree to receive the above machinery * * * subject to warranty of the manufacturer as below," any implied warranty of soundness and adaptability was excluded.

6. Sales §246—Seller may limit warranty.

A seller of a machine is not obliged to give any warranty at all, and not being so obliged, has the right to contract for a limited warranty and in making warranty of the manufacturer his warranty.

7. Appeal and error §216(6)—Failure to charge not noticed where request was not called to court's attention.

Where at the conclusion of the charge the circuit judge stated "Now gentlemen, are there any matters that I have overlooked, any matters that you want to call specially to my attention?" to which counsel for plaintiff responded, "I think your honor has covered the ground," plaintiff cannot complain that the court failed to give a charge requested.

Appeal from Common Pleas Circuit Court of Richland County; Edward McIver, Judge.

Action by T. M. Livingston against the Reid-Hart-Parr Company. Judgment for defendant, and plaintiff appeals. Affirmed.

The exceptions were as follows:

(1) That his honor erred in excluding the testimony of the witness G. W. Langford, offered for the purpose of showing that, as supervisor of Saluda county, he had purchased one or more of the New Hart-Parr tractors in 1917, and that they were unsuitable for and incapable of doing the work of pulling plows and road machinery, and that the county had made numerous complaints to the defendant prior to the sale of the tractor to the plaintiff, because the said testimony was relevant and competent for the purpose of showing knowledge on the part of the defendant, at the time of making the sale to plaintiff, that the tractors were not suitable for, or capable of doing, the work represented by defendant, and for which it was purchased by the plaintiff.

(2) That his honor erred in excluding the testimony of the witness Thomas Taylor, offered for the purpose of showing that he purchased a Hart-Parr tractor from the defendant

(109 S.E.)

in 1916, for use on his farm, to pull plows and farm machinery, and that it was not suitable for, or adapted to, such purposes, and was impracticable for such uses and purposes, and that he had made repeated complaints to the defendant prior to July, 1918, in regard thereto, because the said testimony was competent for the purpose of showing knowledge on the part of the defendant at the time it made the sale to plaintiff that the machine was not suitable for, capable of, or adapted to the purposes represented by the defendant, and for which plaintiff made the purchase.

(3) That his honor erred in excluding the testimony of the witness R. O. Dunning, a mechanical engineer, offered for the purpose of showing that the Hart-Parr tractor was so constructed as to be impracticable, incapable of, and not adapted to the purposes of a farm tractor, because the said evidence was competent and relevant to show that said machine was not suitable for, or adapted to, the purposes for which it was bought by the plaintiff, and for which defendant represented it to be suitable and adaptable, and that the defendant knew this at the time of the selling it to the plaintiff.

(4) That his honor erred in charging the jury: "I charge you, however, that although a sound price demands a sound commodity, still, if one knows that he is not getting a sound commodity at the time he makes his purchase, then that principle of law would not apply. In other words, gentlemen, you know a man can buy a blind or crippled horse, if he wants to, and pay what that horse is worth, and if he knows that the horse is blind or crippled, and still undertakes to buy him, then he would buy that horse, and he could not undertake to rescind the contract on account of the fact that the article purchased was not a sound commodity, if he bought it with his eyes open, knowing that it was in that condition at the time he bought it"—because:

(a) There was no evidence that plaintiff knew that the machinery was unsound or unfit for the purposes for which it was sold to him, and for which he bought it.

(b) Defendant in its testimony claimed the tractor was new, sound, and first-class.

(c) The plaintiff, having paid full price for a new and sound machine, was entitled to such a machine.

(5) That his honor erred in charging the jury: "I charge you that the plaintiff agreed to receive that machinery, and to pay the freight on it from Charles City, Iowa, subject only to the warranty of the manufacturer, and which was adopted by the seller as his warranty in this particular case, because he says he accepts this contract and signs his name to it. I charge you that under this warranty, if this is the entire contract, the only warranty is that the New Hart-Parr tractor was well made and of good material and workmanship; that, if any of the machinery breaks within one year from the delivery of it, that they would replace that part of the machinery, if it broke on account of faulty material or workmanship, and they do not warrant the batteries, spark plugs, or other electrical equipment connected with the machine"—because the said warranty only purported to be a warranty by and in behalf of the manufacturer. It did not affect or relate

to the dealer, which is the defendant in this case, and it in no wise excluded or prevented a warranty from the defendant, as is alleged and claimed by the plaintiff in this case.

(6) That his honor erred in charging the jury, at the request of the defendant:

"(1) 'Statements by the vendor' (that is, the seller) 'of property as to its condition, quality, character, capacity, or adaptability to certain uses, are generally regarded as mere expressions of opinion, and, when such is the case, do not constitute fraud.' Yes, gentlemen, there is a narrow margin or line there that I will try to explain to you. That is the law. That is the law laid down by Blackstone, one of the earliest law-writers we have, and he illustrates it this way: That a merchant in selling his goods to a customer in his store praises up his goods and speaks of how suitable they are for the purpose the party wants them for, and unless there is an actual misrepresentation of fact, then that is merely regarded as the effort of the seller to dispose of his goods, showing them off to advantage; and where no fraud is intended, and where it is mere expression of opinion in the praise of his goods, it does not constitute fraud."

And in further charging the jury, at the request of the plaintiff:

"(4) 'In reference to the cause of action for breach of warranty, the jury are charged that any distinct affirmation as to the quality or condition of a thing sold by the owner, during the negotiations for the sale, which it may be supposed was intended to cause the sale, and was operative in producing it, and relied on by the purchaser, is an express warranty; and, if it turns out to be untrue, the owner and seller would be liable to the purchaser, therefor.' I have already charged you that"—because:

(a) The charge is calculated to confuse the issues before the jury and the correct ruling of law.

(b) Statements by a seller of machinery and dealer in machinery, as to its condition, quality, capacity, or adaptability, are in their nature warranties.

(7) That his honor erred in charging the jury: "(8) 'I charge you that, with respect to the second cause of action, set forth in the amended complaint in this action, the rights of the parties must be determined according to their contract, and that the express written order which has been introduced in evidence is alone the evidence of what was intended by the contracting parties.' I charge you that, provided the written contract includes and covers the complete and entire agreement between the parties. I have already practically charged you that"—because: It is a charge on the facts.

(8) That his honor erred in charging the jury: "(9) 'If you find from the evidence that the plaintiff retained possession of the tractor involved in this suit for more than six days after the first day's use of the tractor by the plaintiff, then I charge you that then and in that event such retention of possession by the plaintiff would be conclusive evidence that the warranty given by the seller had been fulfilled, except as to the defective parts, and the plaintiff could not recover on the second cause of action set forth in the complaint.' I charge you that, unless, I add, the defendant by its acts waived that provision of the contract re-

quiring notice to be given in six days, or the return of the property to be given in six days. I charge you that, unless the defendant waived it, as I have previously in this charge explained to you. I have charged you that one could waive and relinquish and forego the enforcement of a right, and if he did that, then he could not afterwards hold the other party to that right, as I illustrated to you about the insurance policy"—because:

(a) The provision as to retaining possession for more than six days only applies to the warranty by the manufacturer, and has no application to the warranty or agreement between the dealer or seller and the plaintiff.

(9) That his honor erred in refusing to give the plaintiff's fifth request, to wit: "False warranty does not depend upon or require knowledge of its falsity at the time it is made. The seller is held bound by his statement"—because the same contains a correct proposition of law applicable to this case.

(10) That his honor erred in refusing the plaintiff's motion for a new trial, because:

(a) His honor had erred in excluding the testimony of the witnesses Langford, Dunning, and Thomas Taylor, tending to prove fraud and guilty knowledge on the part of the defendant at the time of making the contract of sale and representations to the plaintiff.

(b) The evidence showed conclusively that, while plaintiff paid full price for a new machine, he did not receive a new machine, and there was no evidence upon which to base a verdict to the contrary.

(c) The evidence showed that the machine sold to the plaintiff had worn and defective parts, and that defendant's contract of guaranty was breached.

(d) There was not sufficient evidence to support the verdict for the defendant.

The reason of the court for excluding testimony of the witness Langford, complained of in exception No. 1, was that it would open a limitless inquiry as to a number of sales made to other people, and that inquiry must be confined to the particular machine in question to show knowledge on the part of the defendant that the machine was not giving satisfaction.

D. W. Robinson, of Columbia, for appellant.

Barron McKay, Frierson & McCants, all of Columbia, for respondent.

COTHRAN, J. Action for \$3,000 damages for alleged breach of a contract for, and for fraud and misrepresentation in, the sale of a tractor for the defendant to the plaintiff on July 25, 1918. The case was tried at February term, 1920, before Judge McIver and a jury, at Columbia. Verdict for defendant. Plaintiff appeals.

[1] The complaint states two causes of action, and the "case" contains the foregoing statement that the action was for (1) fraud and misrepresentation, and (2) breach of contract of sale, though in neither alleged cause of action do we find the necessary allegations of either fraud or misrepresentations. In the

first cause of action it is alleged that the defendants "represented that they would furnish and sell to the plaintiff a machine" of certain described character, and that after the machine had been furnished it was ascertained that those representations were untrue for certain specified reasons. A representation that the seller would do a certain thing is nothing more than a promise, not the representation of a fact as existing; and the failure to make good that representation is nothing more than the breach of a promise. There is therefore practically no difference between the two alleged causes of action; the sole grievance of the plaintiff being a breach of the contract of sale in the warranty of the machine. There is no hint in the complaint of fraud upon the part of the defendant, unless it be in reliance upon the allegation that the defendant promised to furnish a machine of certain character and did not do so, which is entirely insufficient to raise the issue of fraud. The charge of fraud was therefore entirely too favorable to the plaintiff in submitting this issue to the jury.

The main issue is whether the contract of sale contains an express warranty which excludes all other warranties, express or implied, and by the terms of which the plaintiff is bound.

The contract of sale is evidenced by the following described instrument of writing. On July 25, 1918, the plaintiff signed a written order, directed to Reid Hardware Company, a corporation at Lincolnton, N. C., of which the defendant is the successor, for a certain tractor and plow, the price of which was \$1,653.30, payable cash on delivery, together with freight from the factory at Charles City, Iowa, "subject to the warranty of the manufacturer as below." This warranty was that the machine was "well made, of good material and workmanship," guaranteed to operate with kerosene oil, and was accompanied by the following conditions:

The batteries, spark plugs and other electrical equipment were excepted from all warranty; new parts would be furnished free of charge by the manufacturer, if the breaks in the machinery should be caused by faulty material or workmanship and the broken parts be sent to the factory for inspection and proof of defect within one year from date of delivery, the purchaser paying freight both ways. "The purchaser agrees that retention or possession for more than six days after first day's use of said machinery purchased herein shall be construed as conclusive evidence that the warranty has been fulfilled, and that the manufacturer is hereby released from all further warranty, except as to defective parts."

The machine was duly delivered to the plaintiff, who paid the purchase price. It was set up for work on October 16th, a representative of the defendant assisting the plaintiff, and for a day himself operating the machine. At first, as long as the defendant's

representative was in charge, as the plaintiff testified, "it operated very well"; "it operated all right as long as Mullarky was on it." Later on trouble developed and plaintiff wired defendant to send a man to straighten it out. Defendant wrote that unless plaintiff wired to the contrary they would have a man there on November 9th, but that, if the trouble did not appear, to be mechanical, the plaintiff would have to bear the expense of the man. He wired not to send the expert that the machine was then operating all right.

The troubles of the plaintiff with the machine increased until finally he abandoned it as utterly worthless, testifying to and offering other testimony to prove various defects in material and workmanship, which are enumerated and described in detail.

The testimony for the defendant tended to show that the machine was a new one, in perfect condition, and that the troubles of the plaintiff with it were due to faulty operation.

The circuit judge submitted all of the issues raised in the pleadings in a fair, clear, and able charge, which was indeed more favorable to the plaintiff than he was entitled to, and the jury found a verdict in favor of the defendant.

The following is an epitome of the assignment of error:

(1) Exclusion of the testimony of the witnesses Langford, Taylor, and Dunning to prove that machines of the same make operated by them respectively were impracticable, incapable of, and not adapted to, the purposes of a farm tractor. Exceptions 1, 2, and 3.

(2) Error in charging that one who knowingly buys a defective or unsound commodity cannot complain. Exception 4.

(3) Error in charging the law as to puffing statements by a seller. Exception 6.

(4) Error in charging on the facts. Exception 7.

(5) Error in charging that the plaintiff was bound by the provision in the warranty relating to the retaining of possession for six days constituting a release of the warranty. Exceptions 5 and 8.

(6) Error in refusing to give the plaintiff's fifth request. Exception 9.

(7) Error in refusing motion for a new trial. Exception 10.

The exceptions will be reported in full.

[2] If the testimony had shown that the machine operated by these witnesses had been practically the same as the machine sold to the plaintiff, and the transaction had been attacked for fraud, it would possibly have been admissible, as evidence of guilty knowledge and fraudulent intent; but, neither of these elements appearing, the testimony was properly excluded for the reason assigned by the circuit judge, which will be

reported. *Kauffman Milling Co. v. Stuckey*, 37 S. C. 7, 16 S. E. 192; *Sharples Separator Co. v. Skinner*, 251 Fed. 25, 163 C. C. A. 275; *Lynn v. Thomson*, 17 S. C. 129; *Hand v. Power Co.*, 90 S. C. 271, 73 S. E. 187; *Southern Ry. Co. v. Howell*, 79 S. C. 281, 288, 60 S. E. 677; *Puryear v. Ould*, 81 S. C. 456, 459, 62 S. E. 863; *Gilliam v. So. Ry. Co.*, 108 S. C. 195, 198, 93 S. E. 865; *Rookard v. Railway Co.*, 84 S. C. 190, 65 S. E. 1047, 27 L. R. A. (N. S.) 435, 137 Am. St. Rep. 839; *Osborne & Co. v. Simmerson*, 73 Iowa, 509, 35 N. W. 615; *Murray v. Brooks*, 41 Iowa, 45; *Byrne v. Elfeth*, 41 Pa. Super. Ct. 572; *Osborne & Co. v. Bell*, 62 Mich. 214, 28 N. W. 841; *Second National Bank v. Wheeler*, 75 Mich. 546, 42 N. W. 963; *Watkins v. Phelps*, 165 Mich. 180, 130 N. W. 618; *Fox v. Harvester Works*, 83 Cal. 333, 23 Pac. 295; *Illinois Surety Co. v. Frankfort Heating Co.*, 178 Ind. 208, 97 N. E. 158; *Watson v. Bigelow Co.*, 77 Conn. 124, 58 Atl. 741; *Brunnett v. Nemo Heater Co.*, 177 Mass. 480, 59 N. E. 58.

[3] 2. There was some testimony to the effect that the plaintiff made a careful examination of the machine before buying, and he testified that the defects of which he now complains were plainly discernible. The charge was relevant to the case.

[4] 3. The court merely told the jury that, when statements by the vendor only amount to expressions of opinion in the praise of his goods, such statements do not constitute fraud; and then he followed this proposition with the further statement that "any distinct affirmation as to the quality or condition of a thing sold by the owner * * * is an express warranty." We fail to see how the jury could possibly have been confused by the portion of the charge referred to.

4. The charge was clear and fair to the plaintiff, and correctly states the law. It was in no sense a charge upon the facts.

[5, 6] 5. This raises the main issue in the case. The contract shows that the machine was sold "subject to the warranty of the manufacturer as below." That warranty has been fully explained above. The plaintiff contends that it was supplementary to, and not exclusive of, the implied warranty of the dealer, who bought from the manufacturer outright.

It will be observed that the instrument in question is entitled "Customer's Order," and is addressed to the defendant "Reid Hdwe Co., Lincolnton, N. C.," and begins, "Please enter my order for one new Hart-Parr tractor." It is signed by the plaintiff, and below the plaintiff's signature is written, "Accepted July 25, 1918. Reid Hdwe Co., Dealer." The plaintiff himself testified that on July 25, 1918, "I entered into a contract with Reid Hardware Company on that date for what is called a New Hart-Parr tractor through Mr. H. E. Reid," etc., and he him-

self introduced the contract in evidence. The testimony is uncontradicted, therefore, that the contract was between the plaintiff and the Reid Hardware Company. In the contract the purchaser (plaintiff) says: "I agree to receive the above machinery, * * * subject to the warranty of the manufacturer, as below." Since his contract, by his own testimony, was with the Reid Hardware Company, the dealer, and not with the manufacturer, his agreement to receive the machinery "subject to the warranty of the manufacturer" was meaningless, unless, as the court held, the dealer had adopted the warranty as its own and made it a part of the contract between the parties. The defendant was not obliged to give any warranty at all, if it chose to so contract and the plaintiff agreed. Not being so obliged, it had the right to contract for a limited warranty and, in making the warranty of the manufacturer the warranty of its contract with the plaintiff, it did no more than it had the right to do. An express warranty excludes the implied warranty of soundness or adaptability.

Under the cases of *Threshing Co. v. Dyches*, 108 S. C. 411, 94 S. E. 1051, and *Westinghouse v. Glencoe*, 106 S. C. 183, 90 S. E. 526, the circuit judge was entirely correct in charging as complained of in Exception 8.

[7] 6. This request was not read to the jury, and not charged. At the conclusion of the charge the circuit judge stated, "Now, gentlemen, are there any matters that I have overlooked, and any matters that you want to call specially to my attention?" to which counsel for the plaintiff responded, "I think your honor has covered the ground." If he deemed the request of sufficient importance, he should then have called the attention of the court to the omission.

7. The exception to refusal of motion for new trial is disposed of by the foregoing conclusions.

The judgment of this court is that the judgment of the circuit court be affirmed.

GARY, C. J., and WATTS and FRASER, JJ., concur.

(117 S. C. 318)

ALFORD v. YONCE. (No. 10731.)

(Supreme Court of South Carolina. Oct. 20, 1921.)

Ballment ¶33—Submission of issue as to whether defendant agreed to sell plaintiff's automobile held not warranted by pleadings or testimony.

In action against garage keeper for failure to repair and redeliver car in good condition, and for failure to try to sell it as agreed, allegations that it was agreed between plaintiff and defendant that defendant would try to sell

plaintiff's automobile provided plaintiff would purchase another automobile from defendant, plaintiff's car to be sold for the value of the new car and repairs on the old, and testimony that defendant agreed to help plaintiff sell his automobile, held not to warrant submission of issue as to whether defendant contracted to sell plaintiff's automobile for enough to pay for the other automobile to be purchased.

Appeal from Common Pleas Circuit Court of Edgefield County; R. W. Memminger, Judge.

Action by J. G. Alford against W. P. Yonce. Judgment for plaintiff, and defendant appeals. New trial.

J. William Thurmond, of Edgefield, for appellant.

S. M. Smith and S. McG. Simkins, both of Edgefield, for respondent.

GARY, C. J. On the trial of this case in the circuit court, there was much confusion as to the issues raised by the pleadings.

The complaint alleged that in July, 1919, the plaintiff placed his Overland automobile car in the defendant's garage to be repaired; that it was then agreed and understood between the plaintiff and the defendant that, after the car was repaired, the defendant would try to sell the same for the plaintiff, provided the plaintiff would purchase from the defendant a Ford car; the purchase price at which the plaintiff's car was to be sold was the value of the said Ford car, \$590, and the charges for the repairs \$100, aggregating \$690; that the plaintiff purchased said Ford car, but that the defendant not only failed to sell, but likewise to repair plaintiff's automobile; that the defendant's servants thereafter used plaintiff's car on a trip to Augusta, and operated it in such a manner as to wreck it.

The plaintiff thus testified on cross-examination:

"It was agreed that he would help sell the car and get a Ford. Did not tell Mr. Yonce I wanted to swap my car for a Ford, and then did not tell him I wanted him to sell it for me. It was not binding on him that he sell it for me. It was not binding on him that he sell it, only agreed he would try to help me sell it."

The record shows the following statement of Mr. Thurmond, defendant's attorney, after the charge and before the case was given to the jury:

"Your honor's charge submitted to the jury the question of fact, whether Yonce contracted to sell the Overland car for Alford, for enough to pay for a Ford; if so, Alford was entitled to recover that amount. This was error, as neither the pleadings nor testimony raised such issue."

In replying to Mr. Thurmond's statement, the presiding judge said:

"Mr. Thurmond, you have made your speech, and declined to correct his charge, as requested by Mr. Thurmond."

After the jury was out several hours, they returned and inquired of the presiding judge who then had title to the automobile, and his honor instructed the jury that Alford had the title; and after further consideration the jury returned the following verdict:

"We find for the plaintiff the sum of \$272.76, less note, interest, and attorney's fees of \$65.01 and account of \$7.75 for tube and gas."

The main question raised by the exceptions is whether there was error on the part of his honor the presiding judge in submitting to the jury the question of fact, whether Yonce contracted to sell the Overland car for Alford, for enough to pay for a Ford, on the ground that neither the pleadings nor testimony raised such issue. The allegations of the complaint and the plaintiff's testimony show that there was error on the part of the circuit judge in submitting such issue to the jury.

New trial.

WATTS, FRASER, and COTHRAN, JJ.
concur.

(117 S. C. 236)

LEE v. McCrory Stores Corporation.
(No. 10714.)

(Supreme Court of South Carolina. Sept. 28, 1921.)

1. Libel and slander §7(13)—Accusation of theft held actionable.

Store manager's statement to employee in presence of another person, "You have stolen \$3.70," held actionable.

2. Corporations §423—Corporation held liable for slanderous statement of general manager of its store to employee.

Corporation held liable for slanderous statement by the general manager of its store to employee, accusing her of theft; the accusation having been made in the discharge of his duty as such manager.

3. New trial §70—Denial of motion of defendant in slander case held not error.

In action for slander by young girl employee of defendant, accused by manager of its store of stealing, court's refusal to grant defendant a new trial held not error, in view of evidence from which it could be inferred that the girl had not in fact stolen the money, notwithstanding shortage shown by cash register.

Appeal from Richland County Court; M. S. Whaley, Judge.

Action by Mildred Lee, by Matthew E. Lee, her guardian ad litem, against the McCrory Stores Corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

The complaint alleged defendant's agent to have used the following language, "You have stolen \$3.70," or words of like import and meaning.

E. L. Craig, of Columbia, for appellant.

De Pass & De Pass and Alfred Wallace, Jr., all of Columbia, for respondent.

FRASER, J. This is an action for slander. The plaintiff is a girl about 14 years of age. She claims that she applied to the defendant for Saturday work; that she was engaged to work and worked on Saturday; that she did not draw her pay on Saturday evening, but went back for it on the following Monday; that she applied to Mr. Butcher, the general manager of the store, for her money, but he refused to pay her, stating that she owed money to the store, as the cash register she had operated on Saturday was short \$3.70. "I said I didn't see how it was, as particular as I was, and he said he had just seen that I had just stolen it." The plaintiff's sister was present and corroborated the plaintiff. Mr. Butcher, the defendant's witness, said that the defendant was a corporation with many such stores over the country; that he was manager and while his authority was restricted in some respects, he was in control of the local management of the store; that the plaintiff was employed by his assistant manager; that he saw the plaintiff on Saturday morning, and went to her and told her that she had worked for the defendant before, and during her former employment her cash register was short; that he overlooked the previous shortage, but that he would hold her responsible for any future shortage; that he refused to pay her because the cash register was short, and denied that he had charged her with stealing the money. It was admitted that another clerk had used the same cash register. It was admitted that the shortage may have been due to mistakes of either clerk, or to the reading of the register. The question of fact was, Did Mr. Butcher charge the plaintiff with stealing the money? The jury found that he did, and gave a verdict for the plaintiff of \$1,875. From the judgment entered on this verdict the defendant appealed.

The appellant argues the questions:

[1] I. "The presiding judge invaded the province of the jury in instructing them that they must find general damages substantial in amount, if they found that defendant's employee had used the language set forth in the complaint."

The case of *Wilson v. Palmetto National Bank*, 113 S. O. 508, 101 S. E. 841, is full authority for the charge as made. The

charges made the same distinction as to substantial and nominal damages in both cases. This is stronger case than the Wilson Case, in that an overdraft may be the result of carelessness. Stealing cannot be the result of a mistake. This exception is overruled.

II. The second question as made is:

"The undisputed evidence shows that the language alleged to have been uttered by an employee, if spoken, was the independent act of the employee, and defendant cannot be required to respond in damages therefor, and the jury should have been instructed to find for defendant."

[2] This exception cannot be sustained. Mr. Butcher was in sole charge of the local business, and the words spoken were spoken in the discharge of his duty as general manager. He reported every day the doings of the business. He kept her wages, and the company still has it. He was acting in this matter within the scope of his authority. Mr. Butcher was the vice principal.

III. The third assignment of error is:

"That in refusing to grant a new trial the presiding judge failed to exercise the discretion required of him by the law."

[3] There was no error here. It must be kept in mind that it is now a fact that the young girl was accused of stealing. The only evidence was the shortage supposed to have been shown by the cash register. There may have been a mistake by the clerk who read the cash register. The plaintiff may have made a mistake in making change. Not being very familiar with the workings of the cash register, the plaintiff may have struck the wrong numbers. The other clerk who used this same cash register may have made the mistake charged to the plaintiff. Notwithstanding all these chances for making honest mistakes, the jury have found that the defendant, through its general manager, charged the plaintiff with stealing. There was evidence from which the jury might have inferred that this young lady received a terrible shock from a charge so cruel and so baseless.

The judgment is affirmed.

GARY, C. J., and WATTS and COTHRAN, JJ., concur.

(117 S. C. 298)

BART et al. v. SRIBNIK. (No. 10715.)

(Supreme Court of South Carolina. Sept. 28, 1921.)

1. Trusts §35(1)—Separation agreement held in effect not a trust deed.

Separation agreement, in which husband gave wife the right to occupy certain property in consideration of the relinquishment by her of all claims for alimony, maintenance, and sup-

port, which specified that it was the husband's intention that after the wife's death such property should belong to their son, held not a trust deed.

2. Judgment §707—Doctrine of res judicata applies only to parties and their privies.

The doctrine of res judicata applies only to parties and their privies.

Appeal from Common Pleas Circuit Court of Charleston County; R. W. Memminger, Judge.

Action by Margaret Ellen Bart and Stephen E. Welch, as trustees under the post-nuptial settlement of Charles E. Bart, against H. Sribnik. Decree for plaintiffs, and defendant appeals. Reversed.

Louis M. Shimel, of Charleston, for appellant.

Buist & Buist, of Charleston, for respondents.

FRASER, J. Casper Bart and Louisa, his wife, found that they could not live together. There was some litigation between them, and an agreement was reached, and was as follows:

"(1) The said Louisa Bart and C. Bart for the cause of incompatibility of temper and other sufficient causes, agree henceforth to cease to live with each other as man and wife.

"(2) In the separate condition of Louisa Bart, C. Bart agrees that during his life and during her life, Louisa Bart may occupy the property in King street in which she now resides and carries on the business of selling fruits and vegetables, rent free; but upon the condition that the said Louisa Bart will pay the taxes levied upon the said property.

"(3) The said Louisa Bart agrees that henceforth she renounces all claims upon the said C. Bart, for alimony, maintenance and support; and that she will in proper manner give notice to all persons that henceforth she will contract and be contracted with as if she were unmarried; and that the said C. Bart is not liable in any manner for such contract or contracts made by her.

"(4) That the said C. Bart agrees that so long as the said Louisa Bart shall keep to and perform the matters and things in the third paragraph of this memorandum mentioned to be done by her and shall pay the taxes levied upon the property in King street in the city of Charleston occupied by her, she shall have the privilege during his life and her life to occupy and enjoy the same rent free.

"(5) All suits and proceedings in the courts of this state between the said Louisa Bart and the said C. Bart shall be discontinued and dismissed.

"(6) If the said Louisa Bart during her lifetime shall for sickness or other cause not wish to continue the business in which she is now engaged, she shall have the privilege of renting out the said house in King street or such portions thereof as she shall not occupy; receiving the rent therefor without molestation of the said C. Bart; she, the said Louisa Bart,

paying as hereinbefore stated, the taxes levied on the same, it being the intention of C. Bart, that after the death of the said Louisa Bart the said house shall belong to the son of the said C. Bart and Louisa Bart, and who is named Charles Bart, baptized Charles Edward Bart.

"Witness the hands and seals of the said C. Bart and Louisa Bart, this 18 March, 1876.

"Louisa Bart. [L. S.]

"C. Bart. [L. S.]"

The case contains this statement:

"This instrument was signed by both parties in the presence of one witness, and the same was duly probated and was recorded in the R. M. C. office for Charleston county, on the 29th day of March, 1878.

"On the 19th day of November, 1885, the said Casper Bart died in the county of Charleston, state aforesaid, leaving his last will and testament bearing date of 4th day of July, 1885, which was duly admitted to probate by the probate judge of the county of Charleston, state aforesaid, on the 25th day of November, 1885, by which will the testator devised his residuary estate unto his executors in trust to collect the rents and to pay over the same unto the testator's son, Charles E. Bart, during his life, and upon his death to the testator's daughter-in-law, Margaret Ellen Bart, during her life, and upon her death to apply the income towards the support of the child or children begotten by the said Charles E. Bart and Margaret Ellen Bart, and to divide the estate upon the said children's reaching the age of 21, and should both the said Charles E. Bart and his wife, Margaret Ellen Bart, die without leaving surviving them any child or children of their marriage, then and in that event the said executors were directed to divide the estate equally between such of the children of the testator's brothers, Matz Bart and John Bart, as should be living at the time of the death of the said Margaret Ellen Bart, share and share alike. Testator appointed Charles E. Bart and Stephen Elliott Welch executors of his will, and authorized and empowered his executors or such of them as might qualify, and the survivor of them, to sell, alien, or otherwise dispose of any portion of his estate upon such terms as the executors or executor should deem proper.

"Charles E. Bart died on September 20, 1892, without leaving any children, and Margaret Ellen Bart is still alive, but has no children."

Upon the death of Casper Bart his executors brought a proceeding in which Valentine Bart, Peter Bart, Vincent Bart, John Bart, Helena Bart Melchers, and Carolina Bart Pfleger, the only living children of Matz Bart, and Eugene Bart, Charles Bart, John Bart, the younger, Erbest Bart, Leonora Bart, and Marie Bart, the only living children of John Bart, were made parties defendant, in which proceeding the executors asked for instructions from the court as to whether or not the property involved in this case was the property of Casper Bart at the time of his death, or whether it was vested in his son, Charles M. Bart, by virtue of the agreement entered into between the said Casper Bart and his wife, Louisa Bart. In

that proceeding the master found the facts to be as hereinbefore recited, and further found that Louisa Bart had entered into possession of the premises, pursuant to the agreement with her husband as hereinabove set forth, and that during her lifetime she had paid the taxes thereon, and had complied with the provisions of the third article of the said agreement, as well as with those contained in the fifth article thereof; that during her lifetime she had continued to enjoy the rents, issues, and profits of said premises without any molestation of her husband, and that upon her death in July, 1879, Charles E. Bart, their son, had entered into possession of the premises, claiming the same in fee simple under and by virtue of the provisions of the agreement hereinbefore set forth, and that he, the said Charles E. Bart, continued so to do up to the execution of the postnuptial settlement made by him in December, 1885, and hereinafter referred to, and that by the said marriage settlement the said Charles E. Bart particularly and emphatically claimed such fee simple, and that during the lifetime of Casper Bart he suffered and permitted his said son, Charles E. Bart, to collect the rents of the premises and to claim absolute ownership thereof. The master further found that the children of John Bart and Matz Bart, mentioned above as defendants in the suit, were the only remaindermen in esse and within the jurisdiction of the court. There were no other remaindermen in esse.

Margaret Ellen Bart, through her agents, agreed to sell, and the defendant, Sribnik, agreed to purchase, the lot of land in question, but Sribnik refused to comply, on the ground that the plaintiff could not give good title. The plaintiff brought this action for specific performance, and secured a decree holding that the title is good, and the defendant ordered to comply. From this decree this appeal is taken.

[1, 2] The plaintiff claims that the agreement between Casper Bart and his wife, though informal, is in effect a trust deed, and words of inheritance are unnecessary. The agreement has no element of a trust deed. Casper Bart had a legal obligation to support his wife, and she had a legal right to inchoate dower. It was agreed that all of the wife's claim against her husband should be met by the use of the property turned over to her for her use during her life. No title passed, nor is there anything in the agreement to indicate such purpose. Charles Edward Bart was not a party to the agreement, and the absence of any statement as to the interest he should take would render the grant, even if it were a grant, void for uncertainty. The subsequent will indicated that Casper did not think he had parted with title. After Casper's death, Charles Edward, acting as executor, brought a suit, the object of which was to eliminate the contingent

remaindermen, under the will of which he was acting executor. It is said that it is too late now to raise this question, as the judgment was taken in that case, and it is now *res adjudicata*. It is elemental law that the doctrine of *res adjudicata* applies only to parties and their privies. There are exceptions to this rule, but they are founded on necessity, and there is no necessity here. The contingent remaindermen are not parties to this suit, and they cannot be assumed to be conclusively bound by the former action, unless they are parties. It may be that while they may appear to have been parties, they were not so in fact. If they shall still raise that question, this proceeding does not bind them, because they are not parties to this proceeding.

We have been asked to decide all the questions raised. We can render no effective judgment against those not parties to this proceeding, and it would be misleading to attempt to do so.

The judgment is reversed.

GARY, C. J., and WATTS and COTHRAN, JJ., concur.

(117 S. C. 307)

GILBERT v. SMITH. (No. 10722.)

(Supreme Court of South Carolina. Oct. 10, 1921.)

Habeas corpus §99(4)—Custody of orphan awarded to maternal grandmother, with whom she had always lived, notwithstanding paternal grandmother's greater financial ability.

Custody of a girl of seven, whose father died when she was a baby, and who has always lived with her maternal grandmother, to whom her mother, who has since died, gave her at her second marriage, will be given to such grandmother, other things being equal, notwithstanding the greater financial ability of her paternal grandmother, though this may entail the loss of a college education, and though the trial court, on affidavits and certain oral testimony, made award to the paternal grandmother, on the general ground of best interests of the child; conditioned, however, that the maternal grandmother give bond for faithful care, maintenance, and education of the child, at least to the extent of a high school course.

Watts, J., dissenting.

Appeal from Common Pleas Circuit Court of Darlington County; Edward McIver, Judge.

Habeas corpus proceeding by Adella Gilbert against Catherine M. Smith for custody of Jennie Belah Gilbert, an infant. Judgment for petitioner, and defendant appeals. Reversed conditionally.

E. C. Dennis and James R. Coggeshall, both of Darlington, for appellant.

L. M. Lawson, of Darlington, and Mendel L. Smith, of Camden, for respondent.

COTHRAN, J. This is a habeas corpus proceeding instituted by Mrs. Adella Gilbert, the paternal grandmother of an infant girl, Jennie Belah Gilbert, aged seven years, against Mrs. Catherine M. Smith, the maternal grandmother of the child, for the purpose of having the court award the custody of the child to her.

The matter was heard by Judge McIver upon affidavits and certain oral testimony. He awarded the custody of the child to the petitioner, the paternal grandmother, upon the general ground that it was for the best interests of the child, with no detailed statement of the considerations which moved him to that conclusion. The maternal grandmother has appealed to this court.

It appears that B. H. Gilbert, a son of Mrs. Adella Gilbert, the petitioner, about 10 years ago married Lila Smith, a daughter of Mrs. Catherine M. Smith, the respondent below, appellant here; the young couple took up their abode with Mrs. Smith, and the little girl was born in Mrs. Smith's home November 9, 1913; when the little thing was only a few months old the father died, the mother continuing to live with her mother; in November, 1919, Mrs. Gilbert, the mother of the girl, married James Galloway and moved from the old home to the home of her second husband, leaving the child with Mrs. Smith; Mrs. Galloway lived less than a year after her second marriage; she died July 16, 1920; with the exception of a week's visit to the home of the elder Mrs. Gilbert after the death of her mother, Mrs. Galloway, the child has lived continuously in the home of Mrs. Smith, who naturally has become greatly attached to her; from the time of her birth until the present she has known no other home; her clothes and trunk have been always in the home of Mrs. Smith and are there now; soon after the death of Mrs. Galloway, July 16, 1920, this proceeding was instituted, on August 25th, by Mrs. Gilbert, to have the court direct Mrs. Smith to surrender the custody of the child to her and decree in her the legal right to her custody, care, and maintenance.

It was in evidence that Mrs. Galloway gave the child to her mother when she left the old home with her husband, stating that she wanted the child to remain with the respondent; that she declared to at least three witnesses that she had given the child to her and desired her to have the care, custody, and rearing of the child.

Even in a contest between the father or mother and one to whom they had by a parol gift surrendered the custody of the child, the court will greatly respect the gift. As this court says in *Ex parte Reynolds*, 73 S.

C. 302, 53 S. E. 492, 114 Am. St. Rep. 86, 6 Ann. Cas. 936:

"Nevertheless, if a parent undertakes to make a parol contract absolutely bestowing the custody of the child upon another, and allows the child to acquire a new home, and strong attachments and tender associations to spring up, the court will not, at his instance, ruthlessly break these ties which have come into existence through his acquiescence and neglect to assert his right. In such case the parent is estopped, and the affection of those who have cared for the child and learned to love it will not be sacrificed unless the interests of the child require that it should be restored to the parent."

See, also, *Enders v. Enders*, 164 Pa. 266, 30 Atl. 129, 27 L. R. A. 60, 44 Am. St. Rep. 586; *State v. Libbey*, 44 N. H. 321, 82 Am. Dec. 223; *Stringfellow v. Somerville*, 95 Va. 701, 29 S. E. 685, 40 L. R. A. 623; *Bonnett v. Bonnett*, 61 Iowa, 199, 16 N. W. 91, 47 Am. Rep. 810.

The social standing of the two grandmothers appeared to be the same; their characters are above reproach; the moral atmosphere of one home is as good as the other; there is no claim that Mrs. Smith is not financially able to rear and educate the child; it is conceded that the petitioner, Mrs. Gilbert, is in a more favored financial condition than Mrs. Smith; eight witnesses testify to the excellent character of Mrs. Smith, her financial ability to rear and educate the child, and to her tender affection for the child; six witnesses testify to the excellent character of Mrs. Gilbert and her greater financial ability to care for and educate the child.

The supreme test is the interest of the child, its future welfare and happiness. *Ex parte Schumpert*, 6 Rich. 344; *Ex parte Reed*, 19 S. C. 605.

We cannot say that in a home of comfort and affection, even though lacking luxury and trained in frugality, she will not make a better woman than in one of greater comfort, greater luxury, greater educational advantages; we cannot say that the greater financial ability of the one shall be the determining factor.

We can say and believe that, if the child were of sufficient age to make the choice for herself, her decision that a life based on love and gratitude and fidelity cannot be given in exchange for one of greater ease and personal advantage would not only commend itself to every loyal soul, but would make for a more splendid character. As we conceive our duty, we make that choice for her, in her best interest.

At the same time the material interests of the child must be safeguarded. This decision will probably, though it should not, result in financial loss to her, and the loss, perhaps, of a college education. The appellant, whose tender feelings for the child have weighed heavily in the scales, should in a measure in-

sure a compensation for these losses. She should give a bond to the general guardian of the child in the sum of \$5,000, with sufficient surety approved by the clerk of court, conditioned upon the faithful discharge of the trust reposed in her, the care, maintenance, and education of the child, at least to the extent of a through high school course; this bond to be executed and delivered within 30 days after the filing of the remittitur.

The judgment of this court is that the order appealed from be reversed, and that, upon the conditions stated above, the right to the custody, care, maintenance, and education of the child be adjudged in the appellant; upon default in the performance of said conditions the judgment below will stand affirmed.

GARY, C. J., and FRASER, J., concur.

WATTS, J. (dissenting). I cannot concur in the opinion of Mr. Justice COTHRAN. Judge McIver, who heard the case on the circuit, was the resident judge, and heard the cause in part on affidavits and had some of the witnesses before him.

We have repeatedly held that the finding of fact of the circuit court will not be disturbed unless it is against the weight of the evidence, and in the recent case of *Manigo v. Tyler*, 107 S. E. 914, filed June 30, 1921, as to the custody of infants, we refused to substitute our judgment for that of the circuit court, so we are in the position of holding that in an ordinary equity case we will sustain the finding of the circuit court unless it is against the preponderance of the evidence, but in a case involving the custody of children we have no fixed rule to go by, but will decide it according to any caprice.

The finding of the circuit judge, in my opinion, protects the infant, and is far better for her interest than that of this court. The decree insures her education, even a college education, and while I do not approve of an avaricious person, or one who worships money, yet I have great respect for money honestly acquired, and I think one who by frugality, honesty, thrift, and industry accumulates it is to be commended, and his virtues, and are as apt to be good as that of one who is in poverty. I have great respect for an honest poor person, but I do not concede that he has any more virtue than one who has acquired an honest independent competency. It is all very well to talk about "plain living and high thinking," but the person who has to do it from necessity, in a majority of cases, would rather have more high living and do less thinking.

I do not subscribe to the doctrine that it is better for an infant to be in the custody of her maternal people than her paternal. This reason is founded on pure sentiment

and without reason. In England the husband and father has some rights that the courts respect. Here he has none, nor has his people any when he claims them in conflict with that of the wife and her people.

The court has the right to award the custody of the infant, looking to her best interest. Judge McIver's decree looked to that, and, unquestionably, from my viewpoint, was correct.

(117 S. C. 304)

BABCOCK v. POSTAL TELEGRAPH-CABLE CO. (No. 10718.)

(Supreme Court of South Carolina. Oct. 10, 1921.)

1. Action ⇨2—Wrongful invasion of rights without justification or excuse gives right of action.

The wrongful invasion of an admitted right in plaintiff without justification or excuse by defendant gives plaintiff a right to some damages.

2. Telegraphs and telephones ⇨20(7)—Necessity of cutting trees held question of law.

In an action for cutting trees near defendant's telephone line, where there was no evidence that the cutting was necessary, the court could properly decide as a matter of law that the trees were unnecessarily cut.

3. Damages ⇨112—Prospective use of timber grove element of damages for destruction.

In assessing damages for cutting trees in a timber grove, the jury might take into consideration the use to which the grove should be put; the measure of damages not being the value of the timber.

4. Appeal and error ⇨882(20)—Invited error no ground for reversal.

A remark by the trial judge, on ruling on a motion for a directed verdict, that the testimony was stronger than on a former hearing, held no ground for complaint on appeal; appellant having invited the remark by his motion, and not having asked for an exclusion of the jury.

Appeal from Richland County Court; M. S. Whaley, Judge.

Action by J. W. Babcock against the Postal Telegraph-Cable Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Lyles & Lyles, of Columbia, for appellant.
D. W. Robinson, of Columbia, for respondent.

FRASER, J. This case has been before this court before, 114 S. C. 319, 103 S. E. 522. Because of the peculiar circumstances surrounding this case, it is not necessary to consider the exceptions in detail. This court held before "there should be a new trial, because the defense is without any evidence

to sustain it." These facts stand out in the case and are undisputed:

[1] I. The plaintiff owned a small tract of land used as a hospital and grounds. A part of the grounds were taken up with a pine grove. Through this pine grove the defendant had a line of telephone poles. The defendant's servants went along the line of poles and cut as many trees as they saw fit. The defendant did not attempt to show any right on or in the premises except such as might follow necessarily from the presence of its poles and wires. The defendant did not attempt to show the extent of its rights. The easement may have been wide enough to enable it to use the ground actually occupied for the purposes for which it was used. The facts did not make out such an easement, because the defendant's servants cut down trees that did not interfere with the exercise of the defendant's use of the land. So we had an undisputed ownership in the plaintiff, an invasion of that right by the defendant beyond any limits suggested by the record. The wrongful invasion of an admitted right in the plaintiff without justification or excuse by the defendant gives the plaintiff a right to some damages, and no judgment that denied it could be allowed to stand. This court said it could not stand, and directed a new trial. The only question as to actual damages was the amount. As a matter of law, the plaintiff was entitled to a verdict. The trial judge was correct in directing a verdict for some actual damages.

[2] II. The next assignment is that his honor erred in charging that it had been found as a matter of law that the trees were unnecessarily cut. There was no evidence to show, or even an attempt to show, or even claim, that the cutting was necessary, and no evidence is a question of law.

[3] III. The next complaint is that his honor erred in telling the jury that they might take into consideration the use to which the grove should be put. The measure of damages for destroying a grove is not the value of the timber.

[4] IV. The last assignment of error is that, in ruling on the motion for a directed verdict in behalf of the defendant, the trial judge said, in the presence of the jury, that the testimony in that case is stronger than on the former hearing. The appellant cannot complain. The appellant invited the remarks by his motion. The remarks were necessary in order to decide the very question raised by the appellant. The appellant not only invited the remarks, but did not ask for the exclusion of the jury, and it is now too late to complain.

The judgment is affirmed.

GARY, C. J., and WATTS and COTHRAN, JJ., concur.

(117 S. C. 321)

COFFEY v. JENKINS. (No. 10742.)

(Supreme Court of South Carolina. Oct. 10, 1921.)

Continuance **←35**—Admitting that absent witness would testify as claimed by defendant precludes impeachment of defendant's affidavit.

On defendant's application for continuance, in compliance with practice rule 27, where plaintiff agreed to admit the affidavit of defendant that absent witness would testify to certain facts, but not that the testimony was true, plaintiff cannot on the trial impeach defendant's affidavit by introducing an affidavit made by absent witness, 10 days after the collision which was the basis of the action.

Appeal from Common Pleas Circuit Court of Spartanburg County; W. H. Townsend, Judge.

Action by Nessey Coffey against J. F. Jenkins. Judgment for plaintiff, and defendant appeals. Reversed and remanded for new trial.

The grounds of appeal were as follows:

His honor, the presiding judge, erred in admitting the affidavit of John Scruggs over the objections of the defendant on the following grounds, to wit:

(1) Because said affidavit purports to be an *ex parte* statement of the witness John Scruggs, made at a time and place and under circumstances when the defendant had no opportunity to be present or to cross-examine said witness.

(2) Because the foundation for contradicting said witness was not laid, nor was any notice given, at the time the statement offered by the defendant as to what John Scruggs would testify to, that plaintiff's attorneys had or would not offer the affidavit for the purpose of contradicting the said witness by a different statement made at a different time and place.

(3) Because the affidavit offered by the plaintiff is an impeachment of the testimony of said witness as contained in the statement admitted on the part of the defendant, as it contradicts the statements as contained in defendant's affidavit, without giving the said witness John Scruggs an opportunity to admit, explain, or deny the apparently contradictory statements, thereby impeaching the witness before the jury in his absence, and without notice or opportunity to give an explanation of the same, and to the injury of the defendant in the cause.

(4) Because, the plaintiff, who held the affidavit when the defendant offered the statement of what said witness would testify to, by not giving notice that the later affidavit would be offered to contradict the witness, waived the right to contradict said witness by means of said later affidavit, without first having laid the foundation for contradiction.

(5) Because the admission of the said affidavit was injurious to the defense, in that the said *ex parte* affidavit, offered for the purpose

of contradiction and admitted, tended to impeach, and did impeach, and destroy the force and effect of the statement offered by defendant.

(6) Because the court erred in holding that it was impossible to lay the foundation for contradicting the said witness, and therefore the case was an exception to the rule; the error being that, when the defendant offered his statement of what the witness would testify to, the plaintiff had then the right and opportunity to object to the admission of such statement, unless the defendant would also consent that the contradicting affidavit in their possession should also be admitted, and, further, because the impossibility of laying the foundation for contradiction was due to the plaintiff's attorneys, who had the opportunity to keep the defendant's statement of said witnesses' testimony out of the case, except upon the condition that their statement should also be admitted, and that, failing to use their opportunity, they waived the right to have it admitted without a proper foundation having first been laid to contradict said witness.

Bomar & Osborne, of Spartanburg, and Butler & Hall, of Gaffney, for appellant.

John Gary Evans, S. J. Nicholls, and C. C. Wyche, all of Spartanburg, and Dobson & Vassy, of Gaffney, for respondent.

COTHRAN, J. Action for damages on account of alleged personal injury resulting from a collision between a motorcycle driven by the plaintiff and an automobile driven by the defendant. Verdict for plaintiff, and defendant appeals.

Upon the call of the case for trial in the circuit court, the defendant moved for a continuance upon the ground that John Scruggs, a material witness, was absent. He had not been subpoenaed for the reason, as counsel orally announced to the court, that "only a short time before" they had learned that he was out of the state, in North Carolina, and that in the meantime they had been making efforts to locate him without avail, and that for the same reason no deposition had been taken. Counsel for the plaintiff objected to the continuance, and insisted upon a compliance with rule 27. Counsel for defendant then prepared and submitted to the court an affidavit by the defendant, containing a statement of what the witness Scruggs would testify if he were present, omitting entirely the other essential elements required by the rule. The court ruled that the plaintiff must admit that the witness would swear to the facts contained in the affidavit or the case would be continued. Counsel for plaintiff stated that they would admit that the witness, if present, would so testify, but not that the testimony was true. The case was then ordered to trial.

As a part of his evidence the defendant offered the affidavit. In reply the plaintiff offered an affidavit, made by the witness

Scruggs on the 30th of September, 1919, 10 days after the collision, totally contradictory of the affidavit by the defendant referred to. Counsel for defendant objected, upon grounds which will be reported. The court admitted the affidavit of Scruggs, holding:

"It is impossible to lay a foundation here, and I think it is an exception to the rule requiring the foundation to be laid. So the objection is overruled, and the paper is admitted, because it was impossible under the circumstances of this case to lay the foundation for contradiction."

The jury rendered a verdict in favor of the plaintiff, and the defendant has appealed, assigning error in the admission of the affidavit. No other point arises in the case.

After a careful investigation of the subject, we have not found a single authority text-book, or decided case sustaining the admissibility of the evidence. The A. & E. Enc. L., Cyc., Corpus Juris, Ruling Case Law, and cases from Alabama, Arkansas, Colorado, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Mississippi, New York, Ohio, Oklahoma, Tennessee, Virginia, and the Supreme Court of the United States are either directly or with strong implication against it. They may be found under the title "Continuance" and in the case of *National Council v. Owen*, 47 Okl. 464, 149 Pac. 231. Wigmore on Evidence states the admissibility under an *ut semble*, citing many cases *contra*, and only one, *Hutmacher v. Charleston Consol. R., Gas & Electric Co.*, 63 S. C. 123, 40 S. E. 1029, as in accord, which does not even inferentially sustain it. The case of *Jeter v. Askew*, 2 Spear, 637, is nowhere cited to sustain the admissibility, and is far from doing so. The case of *State v. Taylor*, 56 S. C. 360, 34 S. E. 939, decides that contradictory statements alleged to have been made by the deceased are inadmissible against the admitted dying declaration, upon the ground that the admission would violate the rule which requires the foundation to be laid. If the lack of an opportunity to cross-examine the witness be the basis of the admission of the testimony, it certainly would apply in such a case.

The *Jeter v. Askew* Case is one of a decidedly different complexion. There a witness was allowed to give hearsay testimony—what he heard another person say about the plaintiff. Other testimony in reply from other witnesses, of contradictory statements made by the same person, were admitted and sustained by the court upon very scant consideration. In the *Hutmacher* Case, the testimony was allowed under "particular and exceptional circumstances" arising out of the conduct of opposing counsel whereby the other was led to believe that he would be allowed to contradict the witness by a writ-

ten statement, notice of which had been given when he agreed to admit the statement of what the witness would swear, if present, and assented to by opposing counsel. It impliedly holds that, but for this reservation and notice, and assent, the testimony would not have been admissible. The rule is forcibly expressed in 30 A. & E. 1126:

"Where a continuance is sought to procure the attendance of an absent witness, and the adverse party, to avoid the postponement, admits that the witness will testify as stated in the affidavit filed for the purpose, the evidence thus given cannot be discredited on the trial by proof of contradictory statements. The party making the admission cannot be allowed to extricate himself from a situation created by his own voluntary act, in disregard of fixed rules of practice and evidence."

The plaintiff was not compelled to admit anything; he admitted the statement to secure an immediate trial, a matter presumably of advantage to him; he must assume with it the concomitant disadvantages. He could have reserved the right to contradict the witness, and, if the defendant agreed to accept the admissions with this reservation, he could not afterwards object. It is entirely conceivable that, if the defendant had been notified of the sworn statement of the witness, so flatly contradicting his own affidavit of what he would swear, he would have preferred to go to trial without his affidavit, and he spared the withering effect of the prior affidavit.

The judgment of this court is that the judgment of the circuit court be reversed and the case remanded to that court for a new trial.

GARY, C. J., and WAITTS and FRASER, JJ., concur.

(117 S. C. 353)

HINSON et ux. v. LANCASTER MERCANTILE CO. (No. 10740.)

(Supreme Court of South Carolina. Oct. 10, 1921.)

1. Landlord and tenant §34(5)—Evidence held insufficient to prove execution of lease procured by duress.

In action by husband and wife to set aside wife's lease to husband's creditor on the ground of duress, evidence held insufficient to prove that wife was induced to execute lease by threats to prosecute husband for disposing of mortgaged property.

2. Mortgages §1—Paper executed to secure a debt is in the nature of a mortgage.

Whatever may be its form, a paper executed to secure a debt is in the nature of a mortgage.

3. Mortgages \S 611—Lease, executed to secure payment of the debt, is in the nature of mortgage entitling lessor to an accounting.

Where wife executed a lease to husband's creditor to secure payment of husband's debt, the wife is entitled to an accounting, the lease being in the nature of a mortgage.

Appeal from Common Pleas Circuit Court of Lancaster County; Edward McIver, Judge.

Action by W. C. Hinson and wife against the Lancaster Mercantile Company. Judgment for defendant, and plaintiffs appeal. Reversed and remanded, with directions.

The evidence on the issue of duress consisted of the testimony of the husband, the wife, and a daughter, who read letters to her parents, that defendant had in letters to husband threatened to prosecute him for selling mortgaged property if he did not pay the balance of the debt, and husband's testimony that an officer of defendant company had threatened him in person with prosecution if he did not make some security for the balance and had proposed that wife give defendant a lease as security.

The attorney who drew up the lease testified that no representative of the defendant was present at the time of its execution, and that no threats to prosecute the husband were made to the wife at such time, and that she executed the lease voluntarily.

Harry Hines, of Lancaster, for appellants.
John T. Green, of Lancaster, for respondent.

FRASER, J. This is an action to set aside a lease of land belonging to the plaintiff, Mary Hinson, made in February, 1917, to the defendant, to continue to December 31, 1921. This action was commenced July 26, 1919. The plaintiffs claim that W. C. Hinson had dealings with the defendant; that the defendant notified the plaintiff W. C. Hinson that he still owed it a balance, and if he did not pay up the debt he would be indicted for selling property under a lien; that Mary Hinson, his wife, was frightened by the threat, and in consequence thereof made the lease sought to be set aside. The plaintiff also asks for an accounting for rents and profits. The case was tried before Judge McIver. Judge McIver said: There are two questions: (1) Was the lease void for duress? The duress was a threat of prosecution of the husband. (2) Should there be an accounting?

[1] I. The finding of his honor that the lease was not made under duress is fully sustained by the evidence, and this objection cannot be sustained.

II. Is the appellant entitled to an accounting? The respondent put up only one witness. That witness testified:

"She understood from what I told her that she was signing them to secure the debt due by her husband to Lancaster Mercantile Company."

[2, 3] Whatever may be its form, a paper executed to secure a debt is in the nature of a mortgage, and the appellant is entitled to an accounting.

The judgment appealed from is reversed, and the case remanded to the court of common pleas for Lancaster county for the taking of the account between the parties.

GARY, C. J., and WAITTS, and COTHRAN, JJ., concur.

(117 S. C. 470)

STATE v. TURNER et al. (No. 10732.)

(Supreme Court of South Carolina. Oct. 10, 1921.)

1. Homicide \S 234(7)—On failure to connect accused with killing, his conduct afterward cannot convict him.

In prosecution for murder on failure to connect the accused with the actual killing or to show that he was present, aiding and abetting, his conduct after the homicide cannot convict him.

2. Criminal law \S 753(2)—Acquittal should be directed where evidence is insufficient.

Where, admitting as true every fact and circumstance relied on by the state without reference to whether it was competent or not, there was not sufficient evidence to warrant conviction, a verdict of not guilty should have been directed.

3. Criminal law \S 406(5)—Statement of accused, throwing light on subject of trial, is competent against him.

Any statement made by any of defendants, even though he did not admit commission of the crime, is competent as against the party making it, if it throws any light on the subject being tried, and elucidates the subject-matter of the trial.

4. Criminal law \S 409—Whether a statement by accused was voluntary is largely within the discretion of the trial judge.

The question of whether a statement by the accused was voluntary is in a large manner within the discretion of the trial judge.

5. Criminal law \S 472, 656(5)—Expert opinion as to ballistics admissible; remarks by trial judge as to testimony held prejudicial.

Where a witness had qualified as an expert on ballistics, he was entitled to give his opinion, and a remark of the trial judge that, "I think the rapidity with which a projectile would fly through the air would depend on the force behind it, and if he knows how that pistol was charged, he can testify. I think he is talking through his hat"—was prejudicial as tending to discredit the evidence of the witness and invading the province of the jury.

Appeal from General Sessions Circuit Court of Marion County; George E. Prince, Judge.

Archie Turner and Mack Turner were convicted of murder, and they appeal. New trial.

W. B. Norton, of Mullins, and A. F. Woods and W. F. Stackhouse, both of Marion, for appellants.

L. M. Gasque, of Marion, and Bullard & Stringfield, of Fayetteville, N. C., for the State.

WATTS, J. The appellants were indicted along with Thomas Turner for the murder of Edwin White, and tried before Judge Prince and a jury. At the close of state's evidence a motion was made for a directed verdict in favor of defendants, and refused. At the close of all the evidence in the case a similar motion was made and granted by his honor as to Thomas Turner, and refused as to Archie Turner and Mack Turner; they were convicted by the jury of murder with a recommendation to mercy and sentenced; thereupon they appeal.

[1, 2] We will consider the exceptions of Mack Turner, as to the sufficiency of the evidence to sustain his conviction. It must be borne in mind that Mack Turner is convicted and was tried for the killing of Edward White, not that of accessory after the fact of the killing. A careful, diligent, and close investigation of the evidence warrants us in concluding that the evidence was not sufficient to support the verdict of guilty as to him. Neither the evidence nor the circumstances warrant his conviction; while the whole case raised a suspicion, and a grave one at that, it does not warrant a verdict of guilty. The state failed to connect him with the actual killing, or that he was present aiding and abetting at the time of the killing, or that he had anything to do with it at all, until after the killing occurred, and his conduct after the homicide cannot convict him of an offense that the state failed to prove. Admitting as true every fact and circumstance relied on by the state to be true, without reference to whether it was competent or not, there is not sufficient evidence to warrant the conviction of Mack Turner, and his honor was in error in not directing a verdict of not guilty as to him.

There was sufficient evidence to go to the jury as to Archie Turner, and his honor committed no error in submitting his case to the jury for their determination, and the exceptions, alleging error on the part of his honor in not directing a verdict of not guilty, are overruled.

Exceptions 5, 6, 7, 8, 9, and 10 complain of error in admitting in evidence the oral and written statements of defendant designated as "confessions." The state did not offer them as confessions, but as declarations of the defendants.

[3, 4] Any statement made by any of the defendants, even though he did not admit the commission of the crime, is competent as against the party making it, if it throws any light on the subject being tried, and elucidates the subject-matter of the trial. His honor was careful to warn the jury that it was competent only against the party making the statement, and could not be used against the others. As to whether it was voluntary or not, that is in a large manner within the discretion of the trial judge, and rests in a large manner in his wise discretion, and from the whole case we see no error as complained of in these exceptions, and they are overruled.

[5] Exception 11 complains that his honor erred in not allowing Col. Johnson to answer the questions put to him by defendant's counsel, and making the following comment and ruling:

"I think the rapidity with which a projectile would fly through the air would depend on the force behind it, and if he knows how that pistol was charged he can testify. I think he is talking through his hat."

This was prejudicial, the witness had qualified as an expert in ballistics, and was entitled to give his opinion for what it was worth, and that was for the jury to determine. The testimony was competent, and in reply to evidence of the state in relation to the same point and an expression on the part of his honor, nullifying the opinion of the expert witness on a material point in the case and practically discrediting his evidence with the jury, which made his honor invade the province of the jury and become a participant with them of the determination of a question of fact and in violation of the principles decided by this court in *Latimer v. Electric Co.*, 81 S. C. 379, 62 S. E. 438; *State v. Arnold*, 80 S. C. 383, 61 S. E. 891; *Stokes v. Murray*, 99 S. C. 221, 83 S. E. 33. This exception must be sustained.

Exceptions 12, 13, 14, 15, and 16 are overruled. The judge's charge, taken as a whole, cannot be considered as prejudicial as complained of. His honor should have charged the request No. 16, but there must be a new trial under exception 11, which is sustained.

New trial.

GARY, C. J., and FRASER and COTH-RAN, JJ., concur.

(117 S. C. 384)

MURRAY CO. v. PEACOCK. (No. 10713.)

(Supreme Court of South Carolina. Sept. 27, 1921.)

1. Sales ⇨285(2)—Parties bound by time limit for notice of defects under warranty.

Where warranty of cotton gin required notice as to defective parts within 10 days from beginning of operation, the buyer could not avail himself of the warranty where he failed to give notice within such time.

2. Sales ⇨267—Express warranty limits warranty to that expressed.

An express warranty excludes an implied warranty.

3. Sales ⇨285(4)—Notice of defects under warranty held not waived.

Under a warranty of cotton gin requiring notice as to defective parts to be given within 10 days, that seller sent a man to inspect the gin, and to fix it after the 10 days had expired, held, under the terms of the contract, not a waiver of notice within that time.

Appeal from Common Pleas, Circuit Court of Barnwell County; I. W. Bowman, Judge.

Action by the Murray Company against E. D. Peacock. Judgment for plaintiff, and defendant appeals. Affirmed.

Brown & Bush, of Barnwell, for appellant.
M. M. Mann, of St. Matthews, and Harley & Blatt, of Barnwell, for respondent.

FRASER, J. This is an action for the credit portion of the purchase price of a cotton gin. The defendant admits the execution of the notes sued on, but sets up failure of consideration, and a counterclaim for damages for defective ginning. The defendant claims that the ribs of the gin were so far apart that the seed passed between them and "seeded" the cotton; that he did not discover the defect until he offered 88 bales of cotton for sale, and then he found that the seeded cotton was worth three and one-half cents per pound less than properly ginned cotton. The gin was sold under a written contract, which contained an express warranty, limiting its liability to defective parts, and required notice in writing, or by telegraph, to the home office within 10 days. The plaintiff obligated itself to supply defective parts of which it had notice within 10 days from the time the defendant began to operate the gin.

The defendant admitted the execution of the notes sued on. The defendant did not show notice within 10 days, or indeed for some 6 weeks after the operating began, and

only then by inference from the fact that the plaintiff sent a man to inspect and help to put the gin in order after the defect was discovered. At the close of the evidence, the judge directed a verdict for the notes, less the price of the defective parts, and there being no evidence of the price of the defective parts, the jury found for the plaintiff the whole sum sued for. There are 17 exceptions, but the appellant says he will argue only three or four questions.

[1] I. The appellant asks, Was there a breach of warranty? So far as the record shows, there seems to have been. The contract which the defendant signed gave the defendant only 10 days in which to notify the plaintiff, and the defendant did not avail himself of this protection. That the parties are bound by the time limits set by their contract is fully decided in *Westinghouse Electric & Manufacturing Co. v. Glencoe Cotton Mills*, 106 S. C. 133, 90 S. E. 526. The appellant claims that the defect was latent, and the appellant did not know of it. The case just cited is full to that point also. The first question must be decided adversely to the appellant.

[2] II. The next question is as to the implied warranty. An express warranty limits the warranty to that expressed. This point cannot be sustained.

III. The third question is as to the effect of the 10 days' notice. That is binding on the appellant, as we have seen. The courts cannot make contracts for people. The appellant expressly agreed to the 10 days for trial and notice, and is bound by it.

[3] IV. The appellant claims that there is a question of waiver of the 10 days' notice from the fact that the plaintiff sent a man to inspect the gin and fix it after the 10 days had expired. The contract provides:

"Failure to make such trial, or to give such notice, or use after ten days without such notice, or use for any ten days without notice, shall be conclusive evidence of the fulfillment of the warranty if the Murray Company shall, at the request of the purchaser, render assistance of any kind in operating said machine, or any part thereof, or in remedying any defects at any time; said assistance shall in no case be deemed an acknowledgment on its part of a breach by it of this warranty, or a waiver of, or excuse for, any failure of the purchaser to fully keep and perform the conditions of this warranty."

This point also must be determined against the appellant.

The judgment is affirmed.

GARY, C. J., and WATTS and COTH-RAN, JJ., concur.

(117 S. C. 388)

MURRAY CO. v. OUZTS. (No. 10717.)

(Supreme Court of South Carolina. Sept. 28, 1921.)

1. Damages §=78(6)—Sale contract held to provide for penalty.

A contract for the purchase of a ginning outfit, reciting that in case of countermand the purchaser was to reimburse the seller for any and all expenses incurred in the sale, and pay to the seller 20 per cent. of the purchase price, *held* to provide for a penalty as to the 20 per cent.

2. Evidence §=442(6)—Breach of contemporaneous parol contract inadmissible in action on written contract.

In an action on a contract of purchase of a ginning outfit, evidence of the breach of a contemporaneous parol agreement, by which plaintiff agreed to sell the outfit which defendant then owned, *held* properly excluded, the written contract containing all of the agreement between the parties.

3. Evidence §=258(1)—Letter by salesman after execution of contract sued on held properly excluded where agent's authority not shown.

In an action on a contract by defendant for the purchase of a ginning outfit, exclusion of a letter written by the salesman after the execution of the contract *held* proper, no authority in the agent being shown to modify the contract or to make a new one.

4. Sales §=23(2)—Purchaser's letter to seller of ginning outfit held a countermand.

A letter from the purchaser to the seller *held* a countermand of the purchaser's order.

Appeal from Common Pleas Circuit Court of Greenwood County; Ernest Moore, Judge.

Action by the Murray Company against J. L. Ouzts. Judgment for plaintiff, and defendant appeals. Reversed, and new trial ordered.

Grier Park & Nicholson, of Greenwood, for appellant.

M. M. Mann, of St. Matthews, and Featherstone & McGee, of Greenwood, for respondent.

FRASER, J. The defendant signed a written contract of purchase of a ginning outfit from the plaintiff. The contract provided:

"In case of countermand, it is understood that the purchaser is to reimburse the Murray Company for any and all expenses incurred in this sale, and to pay to Murray Company 20

per cent. of the purchase price of this contract."

His honor the trial judge charged the jury that the 20 per cent. was liquidated damages, and not a penalty, and directed the jury to find the full 20 per cent. sued for.

[1] I. The first exception questions this ruling. The first exception must be sustained. The contract required the defendant to pay "for any and all expenses incurred in this sale." This provision covered all of plaintiff's actual damages. The "20 per cent." was additional, and can be a penalty, and nothing else. The first exception covers the measure of damages also, but, as neither party argues this subdivision, it is not considered.

[2] II. The defendant set up a breach of a contemporaneous parol agreement, by which plaintiff agreed to sell the ginning outfit which the defendant then owned. The presiding judge refused to allow any evidence of the parol contract. In this his honor was right. The written contract contains all of the agreement between the parties.

[3] III. The third allegation of error arises from the exclusion of a letter written by the salesman some time after the execution of the contract. There was no error here. No authority in the agent was shown to warrant his modification of the contract, or make a new contract. This exception is overruled.

IV. The last exception complains of error in the construction of certain letters written by the defendant to the plaintiff as a countermand of the order. The defendant wrote:

"Yours of the 5th at hand and duly noted, am very sorry that I cannot install new machinery. But as I explained to you on the 2d of this month, unless you dispose of my old outfit, it will be impossible for me to install a new one."

"I want the 'Murray' plant but I cannot meet your terms. If I could it would be a pleasure for me to install it."

"If you have bought engine and boiler for me, I will take same, if we can get together on terms, and I will try to install balance next year."

"If you ship the entire outfit July 15th you do so at your own expense."

[4] This language must be construed to be a countermand. The defendant does not even now offer to comply.

The judgment is reversed and a new trial ordered.

GARY, C. J., and WATTS and COTHRAN, JJ., concur.

(117 S. C. 516)

WIDEMAN v. HINES, Director General of Railroads. (No. 10741.)

(Supreme Court of South Carolina. Oct. 10, 1921.)

1. Railroads ⇐350(1)—Negligence held question for jury.

In an action for the death of a passenger in an automobile struck by a train, where there was evidence that the driver looked before attempting to cross, that his view was obscured, and that the defendant did not give the statutory signals, the determination as to who was negligent was for the jury.

2. Railroads ⇐313—Omission of statutory signals negligence.

The failure to give the statutory signals of the approach of a train to a crossing is negligence per se.

3. Negligence ⇐136(10) — Question for jury on conflicting evidence.

Where the evidence is conflicting, the issues of negligence and contributory negligence are for the jury.

4. Railroads ⇐351(9)—Charges as to signals held proper.

In an action for death at a crossing, the court properly read to the jury the statute (Civ. Code 1912, §§ 3222, 3230) requiring signals and imposing liability for neglect to give signals, unless decedent was guilty of gross or willful negligence or violation of law contributing to the injury.

5. Trial ⇐295(6)—Instruction as to railroad's liability for death resulting from failure to give statutory signals not reversible, in view of whole charge.

In an action for death of passenger in an automobile struck by a train at a crossing, where the court fully charged as to burden of proof and effect of defendant's negligence, and plaintiff's contributory negligence, and read to them the crossing statutes (Civ. Code 1912, §§ 3222, 3230) under which defendant was liable if it failed to give the statutory signals, unless decedent was guilty of gross or willful negligence or violation of law contributing to the injury, instructions that, if defendant's failure to give the statutory signals was the proximate cause of the injury, plaintiff could recover, unless decedent was guilty of want of slight care, and that the failure to give such signals was some evidence of willfulness and wantonness, were not reversible error.

6. Appeal and error ⇐169—Points not made in circuit court cannot be considered by Supreme Court.

Points not made in the circuit court cannot be considered by the Supreme Court.

Cothran, J., dissenting.

Appeal from Common Pleas Circuit Court of Greenwood County; Thomas S. Sease, Judge.

Action by Jane Wideman, as administratrix, etc., against Walker D. Hines, Director

General of Railroads. Judgment for plaintiff, and defendant appeals. Affirmed.

The court charged the jury that plaintiff must prove by the preponderance of the testimony some one of the specifications of negligence alleged: That defendant must prove its affirmative pleas of contributory and gross negligence by the preponderance of the testimony, that negligence and contributory negligence is the want of such care as a person of ordinary care and prudence would have observed under all the circumstances; that, if defendant's negligence was not the proximate cause of the injury, plaintiff could not recover; that decedent's contributory negligence should not be considered unless it was the proximate cause of the injury; that violation of statutory provisions, which the court read, as to the giving of signals is negligence per se; that gross negligence is the want of slight care, and willful negligence the conscious failure to observe slight care; that plaintiff could not recover at common law if decedent was guilty of contributory negligence, nor under the statute (Civ. Code, §§ 3222, 3230) if guilty of gross negligence as above defined; that if defendant failed to give the statutory signals, and such failure was the proximate cause of the injury, plaintiff could recover unless decedent was guilty of want of slight care; that one approaching a crossing must observe due care and use the senses with which he is endowed; and that the failure to give the statutory signals was some evidence of willfulness and wantonness.

Grier, Park & Nicholson, of Greenwood, for appellant.

Tillman & Mays, of Greenwood, and O. L. Long, of Laurens, for respondent.

WATTS, J. This is an appeal from judgment rendered and entered for \$5,000. Plaintiff's intestate was killed at a crossing collision with one of the trains of C. & W. C. Railway Company, operated by the defendant. The verdict of the jury was for actual damages. The exceptions, five in number, can be considered under the following heads:

[1, 2] Was it error on the part of his honor in refusing to direct a verdict as moved for by the defendant?

In making the motion defendant relied, in a large measure, on the case of Cable Piano Co. v. Southern Ry. Co., 94 S. C. 144, 77 S. E. 868. The facts of this case are very different from the facts of that case. In that case no other inference could be drawn than that it was the failure of the driver to look. This was the sole cause of the injury. In this case there was conflict of evidence, and that presents an entirely different situation. There is plenty of evidence that the driver of the car looked, and his view was cut off by

the way the public road ran, and the way the railroad ran, and that his view was obstructed by a ridge and the contour of the land and weeds and bushes. There was evidence that the railroad did not give the statutory signals; this was negligence per se. There was evidence to be submitted to the jury for their proper determination as to who was negligent.

[3] The plaintiffs by evidence showed defendant was negligent; the defendant introduced evidence showing plaintiff's intestate was. This court nor the circuit court is called upon to decide such issues when there is a conflict of evidence, and more than one inference can be drawn. The jury is the one to decide such issues. *Cable Piano Co. v. Railway*, was decided upon the particular facts of that case; so was *Callison v. Railway*, 106 S. C. 123, 90 S. E. 260; and every other case will be so decided. His honor committed no error in refusing to direct a verdict.

[4-8] Did his honor restrict the defense to a want of slight care in his charge, and did he commit an error in his charge with reference to statutory signals, as complained of in exceptions 2 and 3? The charge taken as a whole could not have prejudiced the defendant as complained of. He read to the jury the statute (Civ. Code, §§ 3222, 3230) in reference to crossing. This was a compliance of law as decided in *Mercer v. Railway*, 44 S. E. 750. His charge was full and clear, and did not deprive the defendant of the defense relied on, and he did not invade the province of the jury by a charge on fact or intimation that was prejudicial as to the force or effect of the evidence. He fully charged the law, and left to the jury to find the facts, uninfluenced in any way as to what he thought. The attention of the court below was not called to the questions relied on in exceptions 4 and 5. The points were not made in circuit court, and cannot be considered by us, but we will say in passing there was no merit in them.

All exceptions are overruled, and judgment affirmed.

GARY, C. J., and FRASER, J., concur.

COTHRAN, J. (dissenting). The intestate John Wideman, was killed at a railroad crossing by a collision between the automobile in which he was riding and an engine "running light" (that is, without a train) on December 18, 1919. The case was tried before Judge Sease and a jury April term, 1920, and resulted in a verdict of \$5,000 in favor of the plaintiff.

At the close of all of the testimony the defendant made a motion for a directed verdict in his favor, upon two grounds: (1) That there is no testimony tending to establish the allegations of negligence as the proximate cause of intestate's injury and death,

and no testimony tending to establish willfulness and wantonness; (2) that the testimony shows conclusively that intestate's injury and death was due to and caused by his own contributory negligence and his gross and willful negligence under the statute, as the direct and proximate cause of his injury and death, and without which the same would not have happened.

It will therefore be necessary to make a statement of the facts and circumstances attending the collision:

The railroad, at the locus in question, runs approximately east and west, between the two stations of Bradley and Troy; between these two stations is a crossing of the railroad and the highway which runs from Abbeville to Edgefield; about 200 yards south of the crossing is what has been known for many years as "Chiles' crossroads," a crossing of the highway above referred to, and the highway between Bradley and Troy; the highway last referred to runs from Bradley towards Troy, in a measure parallel with the railroad and on the south side of it; the intestate lived on the north side of the railroad, and, returning to his home from Bradley, along this highway, he was compelled to cross the railroad at the crossing referred to; he was riding in an automobile owned by him and driven by his son; the driver was on the left front seat, and the intestate on the right, with another colored man sitting in his lap; three other colored men were on the back seat; the party left Bradley in the afternoon bound for home; the living occupants of the car testified that they were traveling at the rate of from 10 to 15 miles an hour, until just before reaching the crossing when they speeded up to make the incline which led up to the crossing; at Chiles' crossroad they turned to the right, making for the crossing; about 200 feet from the crossing is the mouth of a cut, extending some 500 feet back towards Bradley, the deepest part of it being some 10 or 12 feet deep; along the top of the banks of the cut were some weeds and small bushes, and in the field on the right as they turned into the Abbeville road; cotton and corn were planted, both naturally having been harvested at that time of the year; upon the question whether or not the engine could have been seen after they turned into the Abbeville road, Lewis Whitlock, one of the occupants of the car, stated that it could not have been seen; John Wideman, the driver, made no statement as to this; Daniel Wideman, another of the occupants, stated:

"Looking to the right of the crossroad you can see the top of an engine through the cut, and when it comes out of the cut you can see it all right before it gets to the crossing."

The witness, Lewis Whitlock stated that he was looking to the front, "looking straight

ahead"; his statement, therefore, that the engine could not be seen coming through the cut goes for nothing; the witness for the defendant testified that the cut was not more than 10 feet deep at any point, and that the top part of an engine could easily have been seen at any point from the crossroads to the railroad crossing. In view of the testimony both for the plaintiff and for the defendant, I think that it is abundantly established that the engine could have been seen coming through the cut at any point along the road from the crossroads. It further appeared that the distance from the crossing to the mouth of the cut was 200 feet, and that at a point 30 feet from the crossing the engine could have been seen on the track 500 feet in the direction of Bradley; the driver of the car made no stop or slacking of speed between the crossroads and the crossing, but in fact speeded up to make the incline. The fact that a witness states that he looked and did not see the engine goes for nothing if the situation is such that if he had looked he would have seen.

"Nor will he be permitted to say that he did not see what he must have seen, had he looked, or that he did not hear what he must have heard, had he listened." *Hines v. Smith* (C. C. A.) 270 Fed. 132.

I think that the case comes squarely within the *Cable Case* and is ruled by it. The only difference between the two cases that I can see is that in the *Cable Case* it was conceded that, approaching the crossing, a train could have been seen for three-quarters of a mile; while here, notwithstanding the testimony of the plaintiff's witnesses, it is contended that the engine could not have been seen, a fact that has absolutely no testimony to support it.

But, assume that the engine could not have been seen at all points along the road between the crossroads and the crossing, as it came through the cut; it is well-established law that, the more dangerous a crossing may be, the greater vigilance is required of both the traveler and the railroad company; if the traveler cannot see, the demand is imperative upon him that he listen for an approaching train, and, if listening will not avail him on account of the noise of his own vehicle, it is his duty to stop. The railroad track itself is a warning of danger; he cannot go heedlessly upon it, with increased speed, without exercising the senses which Providence has given him. The most available sense that can be exercised is vision. The *Cable Case* holds that, if by looking he could see the approaching train, and he did not look, he is guilty of gross contributory negligence. If that sense of vision should be rendered useless by obstructions, does that fact relieve him of the necessity of using such other senses as may avail? Does it give him a license to rush into a place of

known danger without the use of other means available to him of discovering what his vision could not discover? As a matter of fact, his sense of hearing is a quicker and more reliable detective than his sight, particularly where the train is passing through a cut. There cannot be a doubt but that, if he had given this sense full opportunity, by stopping his car, if necessary, the accident would not have occurred. He did not use a single sense that was available to him on this occasion, and how can it be said that he was in the exercise of even slight care? Slight care denotes some care, however small; and if he did not use any at all, it follows that he did not use even slight care; and if he did not use slight care, he was guilty of gross negligence.

Where the facts are not in dispute, gross negligence is a question of law for the court, and not one of fact for the jury. *Cable Piano Co. v. Railway Co.*, 94 S. C. 143, 77 S. E. 868; *Jarrell v. Railway Co.*, 58 S. C. 491, 36 S. E. 910.

It cannot be laid down as a hard and fast rule that, in every case, the duty of a traveler on the highway approaching a railroad crossing requires of him, as a legal obligation, to stop, look, and listen for a train. So much depends upon the circumstances of the particular case, the location of the crossing, the vehicle, the view to be had of the track ahead, the passing of other trains, etc. The circumstances may require him to stop and listen, or to stop and look, or to look, or to listen. In every case that has ever happened, or that can be conceived, as a matter of law, the traveler must exercise at least one of these functions. If the view be unobstructed, he need not stop, for his movement is no impediment to his vision, but he must look; if the view be obstructed, the function of vision is rendered useless, and he is not required to do the vain thing of looking, but he must stop and listen; it is conceivable that, even if the view be obstructed, he may not be required to stop, for his movement may be so noiseless as not to impair the function of hearing, and listening would be all that should be required of him. If it should appear that the traveler did not stop, did not look, and did not listen, the question whether or not his view was obstructed is of no consequence; for in the one event he failed to stop and listen, and the other he failed to look.

The law imposes upon every capable person the duty of observing due care for his own safety when approaching a railroad crossing, which necessarily involves the exercise of his senses. *Cable Piano Co. v. Railway Co.*, 94 S. C. 145, 77 S. E. 868; *Bamberg v. Railway Co.*, 72 S. C. 389, 51 S. E. 988; *Osteen v. Railway Co.*, 76 S. C. 868, 57 S. E. 196.

It is not enough for plaintiff to testify

that he did not see and did not hear an approaching train before undertaking to cross a railroad track at a public highway crossing. The law imposes on him the positive duty of exercising due care and making proper use of his senses of sight and hearing, and where it appears from the undisputed testimony that, by the exercise of ordinary care in looking or listening, he could have avoided a collision at the crossing, it is the duty of the court to direct a verdict in favor of the defendant. *Cable Piano Co. v. Railway Co.*, 94 S. C. 143, 77 S. E. 868; *Bamberg v. Railway Co.*, 72 S. C. 389, 51 S. E. 988; *Osteen v. Railway Co.*, 76 S. C. 368, 57 S. E. 196; *Drawdy v. Railway Co.*, 78 S. C. 379, 58 S. E. 980; *Griskell v. Railway Co.*, 81 S. C. 193, 62 S. E. 205; *Schofield v. Chicago & St. P. R. Co.*, 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224; *Continental Imp. Co. v. Stead*, 95 U. S. 161, 24 L. Ed. 403; *Elliott v. Chicago, M. & St. P. Ry. Co.*, 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1068.

In *Brommer v. Railroad Co.*, 179 Fed. 577, 108 C. C. A. 135, 29 L. R. A. (N. S.) 924, plaintiff was injured in a crossing collision; it appeared that he was unfamiliar with the crossing; that for 170 feet along the highway the view of the track on both sides was totally obstructed, until a point 30 or 40 feet from the rails was reached, from which a train approaching could have been seen for 500 or 600 feet. The court held that the lower court properly directed a verdict for the defendant, saying:

"His failure to stop, look, and listen, at a point where stopping and where looking and where listening would have prevented the accident, directly contributed thereto."

In *Davis v. Chicago, Rhode Island & P. Ry. Co.*, 159 Fed. 10, 88 C. C. A. 488, 16 L. R. A. (N. S.) 424, Davis was riding in a buggy, two-seated, with his friend Pfeutze, visiting a point of mutual interest. Pfeutze, the owner of the rig, was driving, Davis sitting by him on the front seat. They approached a railroad crossing. The view of an approaching train was obstructed until they reached a point 34 feet from the rails, from which it could be seen at a distance of about 90 feet. At 15 feet it could be seen 232 feet. They trotted the horse until they got within 20 or 25 feet of the track, and then slowed down to a walk. They were both familiar with the crossing, and testified that they looked and listened for a train, and, neither seeing nor hearing one, they drove onto the track without stopping. Just as the horse's fore feet reached the rail the plaintiff saw the train coming. The driver whipped the horse and cleared the track. The plaintiff, taking fright, jumped, and was injured. The court in a very elaborate opinion held that the conduct of the occupants of the buggy was careless to a degree of "recklessness," and denied the plaintiff's right to recover.

In *Railroad Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542, the court says:

"But, aside from this fact, the failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employees in these particulars was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant."

In *Northern P. R. Co. v. Freeman*, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014, Freeman was driving a pair of horses in a farm wagon along a highway which approached a crossing through a deep cut, the sides of which obscured the view of an approaching train until a point 40 feet from the track was reached. He did not stop. After passing the 40-foot point he was seen looking at his horses, and not toward the track along which the train was approaching. When he noticed the train on him it was too late; he was struck and killed. The Supreme Court held that the testimony tending to show his contributory negligence was "conclusive," and that the defendant was entitled to a directed verdict. The court says:

"The duty of a person approaching a railway crossing, whether driving or on foot, to look and listen before crossing the track, is so elementary, and has been affirmed so many times by this court, that a mere reference to the cases of *Railroad Co. v. Houston*, 95 U. S. 697, and *Schofield v. Chicago & St. Paul Railway Co.*, 114 U. S. 615, is a sufficient illustration of the general rule."

Again:

"Judging from the common experience of men, there can be but one plausible solution of the problem how the collision occurred. He did not look; or, if he looked, he did not heed the warning, and took the chance of crossing the track before the train could reach him. In either case he was clearly guilty of contributory negligence."

In *Erie R. Co. v. Weinstein*, 166 Fed. 271, 92 C. C. A. 189, it is said:

"If the undisputed physical facts made it so clear as to warrant no other inference than that the deceased by the use of his senses could have seen the approach of this train, if he had looked before reaching the crossing, in time to have kept off and permitted it to pass,

or that he saw the train and endeavored to cross in front of it, the court would have erred in denying the motion for a peremptory instruction."

In *St. Louis & S. F. Ry. Co. v. Cundieff*, 171 Fed. 319, 98 C. O. A. 211, the syllabus reads:

"Plaintiff, while walking across a railroad track at a crossing on a dark and foggy evening, was struck and injured by a freight train which backed against him and was moving at a speed of not more than five or six miles an hour. He was a railroad man and was familiar with the crossing. Witnesses introduced by him testified that they saw the train at a distance of not less than 30 feet, and there was no obstruction to prevent plaintiff from hearing or seeing it if he had stopped and looked and listened before stepping on the track. Held, that he was chargeable with contributory negligence as matter of law, which precluded his recovery; that, in view of the other testimony and of the physical facts, his own testimony that he did so stop and look and listen was not entitled to credence, and did not create a conflict of evidence."

In *Chicago, M. & St. P. R. Co. v. Bennett*, 181 Fed. 799, 104 C. O. A. 309, the syllabus is as follows:

"The negligence of the servants of railroad companies in failing to sound whistles or ring bells on the approach of their trains to crossings constitutes no excuse for the failure of travelers on the highways to discharge their duty to exercise reasonable care to look and listen effectively to avoid collisions before they enter upon railroad tracks."

And:

"Where a plaintiff upon a highway, approaching a railroad crossing, cannot look or listen effectively without stopping, it is his duty to stop and look and listen before entering upon the railroad, and a failure so to do is fatal to his recovery, if such failure contributes to his injury."

"If his view is obstructed, then he must listen more attentively and carefully. If his eyes are useless, and there is any noise or confusion which he controls, such as that of horses' feet, or the rumbling of a wagon, or the grinding of brakes, which interfere with the acuteness of his hearing, it is his duty to stop such noise or interfering obstruction and listen for the train before going upon the track."

This rule has been adopted by the Circuit Court of Appeals of this circuit in the very recent case of *Dernberger v. Railroad Co.*, 234 Fed. 405 (District Court, Judge Dayton), and 243 Fed. 21, 155 C. O. A. 551 (C. O. A., Judge Pritchard).

The opinion of Judge Simonton (C. O. A.) in the case of *Neininger v. Cowan*, 101 Fed. 787, 42 C. O. A. 20, is an exceedingly clear statement of the doctrine. See, also, *Curtis v. Railroad Co.*, 232 Fed. 109, 146 C. O. A. 301. The rule is the same in South Carolina. *Cable Piano Co. v. Railroad Co.*, 94 S. C.

145, 77 S. E. 868; *Bamberg v. Railroad Co.*, 72 S. C. 389, 51 S. E. 988; *Osteen v. Railroad Co.*, 76 S. C. 368, 57 S. E. 196.

In the *Cable Piano Case*, supra, the facts were these:

A negro boy was driving plaintiff's team, drawing a covered piano wagon along a highway which ran close to and parallel with the railroad for three-quarters of a mile, and then turned abruptly across the track, the distance from the turn in the highway to the crossing being from 20 to 30 feet. He testified that, on account of the cover of the wagon, he could not see the train, which was approaching from his rear, without leaning out of the wagon, and that he could not hear it because of the noise made by the wagon. The track was straight, and the view unobstructed for at least three-quarters of a mile in both directions. The court held as follows:

"It necessarily follows that, if the driver had looked before going upon the crossing, he would have seen the train in time to prevent the collision. The law imposes upon every capable person the duty of observing due care for his own safety, when about to cross a railroad track, which necessarily involves the exercise of his senses. And, while it is ordinarily a question of fact for the jury to say whether, under the circumstances of the particular case, the traveler did exercise such care, when the facts are undisputed and susceptible of only one inference, it becomes a question of law for the court. *Zeigler v. Railroad Co.*, 5 S. C. 221; *Edwards v. Railway*, 63 S. C. 271, 41 S. E. 458; *Bamberg v. Railway*, 72 S. C. 389, 51 S. E. 988; *Osteen v. Railway*, 76 S. C. 378, 57 S. E. 196; *Drawdy v. Railway*, 78 S. C. 379, 58 S. E. 980; *Griskell v. Railway*, 81 S. C. 193, 62 S. E. 205. In this case plaintiff's driver did not observe the slightest care for his own safety, or that of the property in his custody, and the failure to observe such a slight precaution as to look for approaching trains, before driving upon the crossing, was gross negligence. The evidence warrants no other inference than that his failure to look was the sole cause of the accident, or at least, a proximate contributing cause. Therefore defendant's motion to direct the verdict should have been granted."

There is no testimony in the case as to the speed of the engine except from the defendant's witnesses, and that was to the effect that it was 18 or 20 miles an hour. From the testimony of the plaintiff's witnesses the speed of the automobile could have been little, if any, less than that. Consequently when the engine emerged from the cut, 200 feet from the crossing, the automobile, moving at practically the same speed, was 200 feet from the crossing, at a point from which the engine was plainly visible. The driver of the car testified that he looked to the right all the way from the crossroads to the crossing, but did not see the engine. In view of the physical impossibility of this

statement being true, it should be rejected. The great probability is that the presence of his father with another colored man in his lap, sitting on the right of the driver, prevented him from seeing the engine.

It appearing to me that the occupants of the car not only did not exercise slight care, but did not exercise any care at all, the verdict should have been directed in favor of the defendant upon the ground of gross contributory negligence.

I think, too, that the circuit judge was in error in charging the jury that a failure to give the statutory signals is some evidence of willfulness and wantonness. The charge instructs the jury what force and effect to give to certain testimony. The failure to give the signals may support an inference by the jury that there was willfulness or wantonness, but it does not in all cases point to willfulness or wantonness. It may be inadvertent, or it may be from a conscious failure to observe due care, and therefore willful. In all cases it is a question of fact to be decided by the jury, and the instruction by the court that such failure was evidence of willfulness was a practical instruction that they should infer willfulness from the failure. There was no testimony in the case tending to show why the signals were not given. All of the testimony was directed to the fact of whether or not the signals were given. Therefore, when the court told the jury that the bare failure was evidence of willfulness, it was tantamount to telling them that, if they found a failure to give the signals, they must also find that the defendant was willful rather than negligent.

In the cases of *Woodward v. Railway*, 90 S. C. 286, 73 S. E. 79, *Sanders v. Railway*, 93 S. C. 543, 77 S. E. 289, *Kirkland v. Railway*, 97 S. C. 72, 81 S. E. 306, *Folk v. Railway*, 99 S. C. 284, 83 S. E. 452, *Ritter v. Railway*, 101 S. C. 8, 85 S. E. 51, *Callison v. Railway*, 106 S. C. 123, 90 S. E. 260, it is generally held that the inference of willfulness may be drawn by the jury from a failure to give the statutory signals; but none of these cases go further than that. In the *Callison* Case the question is discussed more elaborately, probably, than in any of the other cases. We quote at length from that case:

"The failure of a railroad company to give the signals required by statute at a public crossing is negligence per se; moreover, it is sufficient to warrant a reasonable inference of recklessness, willfulness, or wantonness, and therefore sufficient to carry that issue to the jury. No doubt, in some instances, it may be the result of mere inadvertence; if so, it would be negligence only; but, when the positive command or prohibition of a statute is violated or disobeyed, it is deemed sufficient to require submission to the jury of the question whether, under all the circumstances, it was the result of mere inadvertence, or of indifference to the rights of those who travel the high-

ways, or a conscious failure to be careful for their safety. The reason upon which the rule is based is that, when anything is commanded or prohibited by legislative authority, every one is conclusively presumed to know it, and is bound to act accordingly, and, the matter having been brought to his attention in such a solemn and impressive way, his violation or disobedience cannot be entirely excused, and therefore it amounts at the least to negligence; and, while it may be negligence only, it is also enough to warrant a reasonable inference that it was due to indifference to the command or prohibition, or to a conscious disregard thereof, and of the rights of those intended to be safeguarded thereby. True, the facts and circumstances may repel such an inference, but it is for the jury to decide whether they do or not, unless the evidence is susceptible of but one inference."

It is clear from this that the court has the right to submit testimony of the failure to give statutory signals on the issue of willfulness and wantonness, and the jury is at liberty, if they so desire, to draw an inference of willfulness and wantonness, or may simply draw an inference of negligence. In the present case, the presiding judge told the jury that the failure was in itself evidence of willfulness, and, there being no evidence as to why or how the failure to give the signals was caused, the jury may have concluded under the charge that such failure was willful.

The only case which tends to support the charge of the judge is that of *Keel v. Railway*, 108 S. C. 393, 95 S. E. 65. There the court uses this language: "It is evidence of willfulness, wantonness, and recklessness, but it is for the jury to say"—clearly following the doctrine laid down in *Callison v. Railway*. The Supreme Court or the judge, on a motion for a nonsuit or for the direction of a verdict, has the right, of course, to say that there is evidence as to any issue made by the pleadings. This is very different, however, from the right to charge the jury that there is evidence of a fact in issue. The Constitution requires the judge simply to charge the law applicable to the issue, and forbids his stating whether or not there is evidence to support such issue. So it is for the jury to draw the inference from the evidence, without intimation from the court as to what inference they should draw. Therefore, when the court told the jury in this case that the failure to give the signals was evidence of willfulness, it practically instructed the jury to draw an inference of willfulness from such failure.

In the case of *Finch v. Railway*, 87 S. C. 196, 69 S. E. 209, the court charged the jury that negligence could not be inferred from the simple happening of an accident; but, if the railroad should know the circumstances and fail to explain how the accident happened, the jury might infer negligence from

their failure or refusal to explain how it occurred.

The Supreme Court, in discussing this, say in substance that it is the duty of the court to define negligence and state the principles of law applicable thereto. It cannot, however, indicate any particular fact, and instruct the jury that from that fact an inference of negligence may be drawn.

"The Constitution does not allow the presiding judge to state the evidence; much less does it allow him to single out any particular act or omission of the defendant and instruct the jury that if that appears then they may infer that the defendant was negligent."

In the present case, the circuit judge violated this principle. He singled out the issue of failure to give the statutory signals, and told the jury that such failure was evidence of willfulness, and thereby invaded the province of the jury. The jury alone had the power to determine whether the failure to give the statutory signals evidenced willfulness or evidenced neglect.

The case of *Lawson v. Railway*, 91 S. C. 216, 74 S. E. 473, is to the same effect.

In the case of *Brown v. Railway*, 83 S. C. 56, 64 S. E. 1012, the presiding judge charged the jury that plaintiff's admissions are received in evidence only as discrediting his testimony, and not as affirmative proof of material facts in issue. On its face this appears to be an abstract statement of the law as to evidence; but, upon further examination, it is clear that it is a direction as to the weight and sufficiency of evidence, and the Supreme Court held that it was in violation of the mandate of the Constitution. In the present case, when the presiding judge told the jury that failure to give the statutory signals was evidence of willfulness, he told them what force and effect and weight they might attach to such failure.

In *Turbyfill v. Railway*, 83 S. C. 328, 65 S. E. 278, the court again announced the same doctrine, to wit: It is the duty of the court to define negligence, but it is the province of the jury to draw the inference from the facts.

It is stated in the leading opinion and in respondent's argument that the verdict was for \$5,000 actual damages. If this be true, the charge of the judge may possibly have been harmless; but I find in the record nothing to substantiate this statement. The verdict was a general one, and there is no way of telling whether it included punitive damages or not; and, even if it did not, the jury may have found that the tort was willful, and therefore not to be defended by the contributory negligence of the plaintiff, though they were not disposed to inflict punitive damages.

CHAPMAN et al. v. SUMNER CONSOL. SCHOOL DIST. et al. (No. 2654.)

(Supreme Court of Georgia. Dec. 16, 1921.)

(Syllabus by the Court.)

1. Schools and school districts \S 97(4)—Two-thirds of voters voting at a bond election, and constituting majority of registered voters, sufficient.

As amended in the year 1918 (see Laws 1918, p. 99), article 7, \S 7, par. 1, of the Constitution of the state of Georgia (Civ. Code 1910, \S 8563), requires the assent of two-thirds of the qualified voters of the county, municipality, or division of the state, voting at an election for that purpose, to authorize the incurring of a debt, provided said two-thirds so voting must be a majority of the registered voters. Subsequently to such amendment, Civ. Code 1910, \S 442 must be construed consistently therewith, and the "requisite two-thirds of the voters" mentioned in said section means two-thirds of the qualified voters of the county, municipality, or division voting at said election, provided said two-thirds so voting constitute a majority of the registered voters.

(a) A petition filed by the solicitor general of a judicial circuit, for the validation of district school bonds issued under a school district election alleged to have been held under and pursuant to section 143 of the "School Code of Georgia," which on its face shows that "two-thirds of the qualified voters" of the school district "voting at said election" cast their ballots in favor of bonds, and that such affirmative votes constituted a "majority of the registered voters" of said district, is not defective on the ground that it shows on its face that the affirmative votes did not constitute "two-thirds of the voters of the division," as prescribed by section 442 of the Code of Georgia, and referred to by section 143 of the "Code of School Laws of Georgia" (Acts 1919, pp. 345, 346).

2. Schools and school districts \S 97(4)—One whose name does not appear on county registrars' list not entitled to vote; ordinary to procure list of voters for bond election from registrars; voter who did not take oath when signing voters' book not entitled to vote; signature to oath is prima facie evidence that voter took oath; substantial compliance as to administration of oath sufficient; one having name entered on voters' book, but not on registrars' list, etc., not entitled to vote; one whose name does not appear on registrars' list not entitled to vote, though appearing on other books or lists.

No person is lawfully entitled to vote in a school district bond election held under section 143 of the "Code of School Laws of Georgia" (Acts 1919, pp. 288, 345) whose name does not appear on any list of the county registrars filed with the clerk of the superior court of the county, showing the names of the registered voters of the county entitled to vote.

(a) This is true notwithstanding the name of such person does appear on the voters' book of the tax collector of the county, and, except as

to registration as mentioned in the headnote numbered 2, he is otherwise a qualified voter under the law of Georgia.

(b) This is true notwithstanding the name of such person does appear on the certified list of registered voters furnished by the ordinary to the managers of the election, and also appears on the voters' book of the tax collector of the county, and, except as to registration as mentioned in the headnote numbered 2, he is otherwise a qualified voter under the laws of Georgia: The act of 1919, known as the "Code of School Laws of Georgia," at page 346 provides that "the ordinary shall furnish a certified list of registered voters in such school district * * * to the managers of the election." Properly construed, this provision does not substitute the ordinary for the board of county registrars. It merely provides that the ordinary shall procure a certified list of registered voters from the legally constituted board of registrars, and furnish the same to the election managers.

(c) This is true although the name of such person does appear on the voters' book of the tax collector of the county, and, "although the name of such person was entered in such voters' book within six months of said special bond election, but more than six months before the next ensuing general state election," and except as to registration as mentioned in the headnote numbered 2, he is otherwise a qualified voter under the laws of Georgia.

(d) This is true although the name of such person "does appear on the certified list of registered voters furnished by the ordinary to the managers of the election, and also appears on the voters' book of the tax collector of the county, and although the name of such person was entered in such voters' book within six months of said special bond election, but more than six months before the next ensuing general state election," and, except as to registration as mentioned in the headnote numbered 2, he is otherwise a qualified voter under the laws of Georgia.

(e) A person is not lawfully entitled to vote in a school district bond election held under section 143 of the "Code of School Laws of Georgia," whose name appears on the certified list of registered voters furnished by the ordinary to the managers of the election, and also appears on the general list of the county registrars filed with the clerk of the superior court, showing the registered voters of the county entitled to vote, and also appears on the voters' book of the tax collector of the county, where, in an attack upon the validity of his vote in the proceeding to validate such bonds, it is shown by positive and uncontradicted testimony that the oath prescribed for voters by sections 36, 40, 41, 42, 43, 46, and 47 of the Political Code of Georgia of 1910, was not read by, or read or mentioned to, such person when he signed the voters' book, and that he made no such oath or affirmation, and, except as herein stated, he is otherwise a "qualified voter under the laws of Georgia." The fact that one's name is signed to the oath in the voters' book, prescribed in Civ. Code 1910, §§ 36, 40, et seq., will be prima facie evidence that the oath was administered as required by law, a substantial compliance with which shall be sufficient. *Brown v. Atlanta*, 152 Ga. —, 109 S. E. 686. The tax collector or his clerk shall in no instance permit

a person to sign the voters' books or any separate printed oath unless such person shall have actually made the oath before him thereon contained, and a "violation of this section by either the tax collector or his clerk shall be a misdemeanor."

(f) A person is not lawfully entitled to vote in a school district bond election held under section 143 of the "Code of School Laws of Georgia," whose name does not appear on the certified list of registered voters furnished by the ordinary to the managers of the election, nor on any general or supplemental list of the county registrars filed with the clerk of the superior court of the county, showing the names of the registered voters of the county entitled to vote, although the name of such person does appear on the voters' book of the tax collector of the county; and when, in an attack upon the validity of his vote in the proceeding to validate such bonds, it is shown by positive and uncontradicted testimony that he moved from another county to that of the bond election prior thereto, and, by application to the tax collector of the latter county, had his name transferred to and entered upon the voters' book of the latter county, but at no time made any application to the registrars of the latter county for such transfer, and offered no proof before them as to his qualifications to vote, and, except as to registration as mentioned in the headnote numbered 2, he is otherwise a qualified voter under the laws of Georgia.

(g) A person is not lawfully entitled to vote in a school district bond election such as above mentioned, "whose name does not appear on the general or supplemental list of the county registrars filed with the clerk of the superior court of the county, showing the names of the registered voters of the county entitled to vote, but whose name does appear on the certified list of registered voters furnished by the ordinary to the managers of the election, and also appears on the voters' book of the tax collector of the county, although, in an attack upon the validity of his vote in the proceeding to validate such bonds, it is shown by positive and uncontradicted testimony that he moved from another county to that of the bond election prior thereto, and, by application to the tax collector of the latter county, had his name transferred to and entered upon the voters' book of the latter county, but at no time made any application to the registrars of the latter county for such transfer, and offered no proof before them as to his qualifications to vote," and, except as to registration as mentioned in the headnote numbered 2, he is otherwise a qualified voter under the laws of Georgia.

Beck, P. J., and George, J., dissenting in part.

Certified Questions from Court of Appeals.

Action between A. C. Chapman and others and the Sumner Consolidated School District and others. Judgment for the latter, and the former brought error to the Court of Appeals, which certified questions to the Supreme Court. Questions answered.

Passmore & Forehand, of Sylvester, for plaintiffs in error.

R. S. Foy, Sol. Gen., and J. H. Tipton, both of Sylvester, for defendants in error.

GILBERT, J. The Court of Appeals certified questions to which the rulings stated in the headnotes are answers. Save what is said in this opinion following, none of the headnotes require elaboration.

[1, 2] No person is lawfully entitled to vote in a school district bond election held under section 143 of the "Code of School Laws of Georgia," (Acts 1919, pp. 288, 345), whose name does not appear on any list of the county registrars filed with the clerk of the superior court of the county, showing the names of the registered voters of the county entitled to vote. Article 2, § 1, par. 1, of the Constitution of Georgia (Civil Code 1910, § 6395); Civil Code, §§ 34, 58, 59, 68; Acts 1919, "Code of School Laws of Georgia," at page 346. The fact that a person's name may appear upon a list purporting to show the registered voters, furnished by the ordinary to the managers of the election, or that the name appears on the voters' book of the tax collector of the county, and that this person is otherwise a qualified voter under the laws of Georgia, with the exception of having his name on the general or supplementary list of registered voters filed by the county registrars in the office of the clerk of the superior court, will not alter his legal status as a voter as above mentioned. The voter's name must appear on a list, general or supplementary, of the county registrars, filed with the clerk of the superior court of the county, showing the registered voters of the county entitled to vote; otherwise such person cannot vote. Counsel contending for the opposite view call our attention to an expression frequently used heretofore by this court that "registration adds no qualification to voters, but only serves to identify them as persons entitled to vote." To adopt the view insisted upon manifestly would amount to a nullification of the law in regard to registration. We think that a brief examination of the subject will demonstrate that the contention is not well founded. The expression has been used repeatedly by this court. As far as we are aware, the principle was first announced in the case of *McMahon v. Savannah*, 66 Ga. 217, 224, 42 Am. Rep. 65. That case was decided at the September term, 1880, of this court, and at that time the general registration laws did not apply to municipalities. In that case certain citizens and taxpayers denied the right of the city of Savannah to require the payment of a poll tax, the taking of an oath, and the like, as requisites to registration. This court said:

"These municipal laws do not add new qualifications to the voter, but are designed to secure the duty citizens may owe the municipal government and to protect the purity of the ballot."

And in the opinion the court said:

"The new requirement of a registration has been held not to be the addition of a qualification, 'to an elector.'"

The right of a person whose name did not appear on a legal list of registered voters was not involved. In the case of *Mayor, etc., of Madison v. Wade*, 88 Ga. 699, 16 S. E. 21, the expression was used. In that case also the question of the right of a person to vote whose name did not appear on a legal list of registration was not involved. In that case the General Assembly had empowered the city of Madison to require a special registration of persons qualified to vote at any corporate election, and therefore at an election to approve a local school tax, which was the election involved in the case. No ordinance comprehensive enough to include this latter election had been passed when the election was held. The election managers confined the vote to the persons whose names appeared on a registration list made under an existing ordinance applicable to a previous election of a different kind. The submission was not to the whole body of the legal electors. The existing registration applied only to the election of municipal officers. This court affirmed the judgment of the lower court, to the effect that the election was illegal, and, with reference to the fact that the names of those voting appeared on the list of registered voters which was not applicable to that election, said:

"Registration adds no qualification to voters, but only serves to identify them as persons qualified to vote."

The expression was again used in *Davis v. City Council of Dawson*, 90 Ga. 817, 17 S. E. 110, and there no question was involved as to the right of a person to vote whose name did not appear on a legal list of registered voters. In that case the General Assembly had provided for a system of registration applicable to municipal elections in the city of Dawson. There was also a system of registration applicable to the county of Terrell, which had no application to municipal elections in the city of Dawson. At an election held in the city of Dawson the managers rejected the ballots of persons duly registered for the city election, and otherwise qualified to vote, simply because they had not registered in accordance with the provisions of the county registration act. This court held that to be illegal, and that it was not the purpose of the law to have two distinct and separate systems of registration operating upon the same election. The principle was again stated in *Floyd County v. State*, 112 Ga. at page 794, 38 S. E. 37. In that case the question was whether two-thirds of the qualified voters of the county of Floyd had assented to the issuance of bonds; and the controlling question was how, under the law, the court, in a proceeding to validate the bonds, was to determine what constituted two thirds of the qualified voters. On the hearing it was agreed that the total number of votes favorable to the issue of bonds was less than two-thirds of the number

of voters whose names appeared on the lists of registration of voters had for the county, but more than two-thirds of the number of votes cast at the last general election held in the county. In this case, which was decided at the October term, 1900, the case of Mayor, etc., of Madison v. Wade, supra, was cited, and it was again noted that the general registration laws did not apply to elections held in cities and towns; and it was held that reference to the registration lists must be had to determine what was two-thirds of the qualified voters where there was a system of registration in operation. The question of the right of a person to vote whose name did not appear on any legal registration list was not involved. The expression was again used in Garrett v. Cowart, 149 Ga. at page 564, 101 S. E. 186. There the question was whether one whose name appeared on the registration list illegally, because of a failure to pay all taxes required of him under the law, was a legal voter. It was of course held that such a person was not a qualified voter. While it is the law that one must have his name on a list of qualified voters in order to entitle him to vote, manifestly, if the name of such a person appears on the list illegally or fraudulently, it would be the same as if the name did not appear on the list. In other words, the converse of the proposition is not true. The Constitution and the laws of the state declare what things are necessary and requisite as a qualification for voting, such as payment of taxes, signing the oath in the voters' book, residence, and the like. To vote without these qualifications is to vote illegally. To procure the placing of one's name on the registration books without these qualifications is illegal, and if done it adds no qualification, as the statute specifically declares that:

"Each person whose name is upon the registration list * * * shall be entitled to vote, * * * provided that such person is not otherwise disqualified from voting, * * * and provided that no person shall be qualified to vote at any election unless he shall have paid all taxes due at least six months before the same, except when said election is held within six months from the expiration of the time fixed by law for the payment of said taxes." Civil Code 1910, § 59.

Registration is now permanent.

"The tax collectors of the several counties of this state are required to keep a book to be called the permanent qualification book, upon which all persons desiring to qualify as electors shall be required to qualify as now required by the Constitution and laws of the state. Such elec-

tors upon qualification shall sign their names in alphabetical order, and shall be subject to examination by the board of registrars as now provided by law. Such board of registrars shall have the right, and shall be charged with the duty of examining each two years the qualification of each elector entered thereon, and shall not be limited or stopped by the action taken at any prior time." Acts 1913, p. 115; Park's Code, § 47(a).

But this does not mean that one lawfully registered, but subsequently disqualified by reason of nonpayment of taxes, or conviction of a crime involving moral turpitude, or other cause of disqualification, continues to be a qualified voter by reason of registration. The list of registered voters is subject to revision, and the elimination of the names of those persons not qualified to vote and whose names are improperly included in the list of registered voters. Civil Code 1910, § 55. Moreover, aside from all that has been said in regard to the cases just mentioned, the question is settled by the Constitution of this state in paragraph 1, § 1, art. 2 (Civil Code, § 6395), and the provisions of the Constitution have been followed by acts of the General Assembly in execution thereof, now found in sections 34, 58, 59, and 69 of the Civil Code, and in the act known as "the Code of School Laws" of the state of Georgia, especially applicable to this case. The Constitution provides as follows:

"After the year 1908, elections by the people shall be by ballot, and only those shall be allowed to vote who have been first registered in accordance with the requirements of law."

In the paragraphs of the Constitution immediately following the one just quoted there is specific provision as to who is entitled to register and vote, and the qualifications of electors. The provisions of the Constitution that no person shall be allowed to vote who has not been "first registered in accordance with the requirements of law" was enacted as statute law, and is found in section 58 of the Civil Code, where it is declared:

"And no person shall vote * * * unless his name is upon the said registration list so filed by said registrars."

Any other conclusion than that the name of the voter must appear on the registry list would render it impossible to legally determine when two-thirds of the registered and qualified voters had assented.

All the Justices concur, except BECK, P. J., and GEORGE, J., who dissent from the ruling in headnote 2 (e).

(152 Ga. 262)

GLASS v. YARBROUGH et al. (No. 2440.)

(Supreme Court of Georgia. Nov. 17, 1921.)

*(Syllabus by the Court.)***No error committed.**

Under the pleadings and the evidence in this case, the court did not err in the refusal to allow the decree previously granted to be amended, nor in dissolving the restraining order and refusing the injunction.

Error from Superior Court, Clarke County; Andrew J. Cobb, Judge.

Suit between S. R. Glass and W. H. Yarbrough, executor, and others. Judgment for the latter, and the former brings error. Affirmed.

Ray & Ray, of Jefferson, and Jno. J. Strickland, of Athens, for plaintiff in error.

Thos. J. Shackelford, of Athens, for defendants in error.

BECK, P. J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent because of sickness.

(152 Ga. 300)

MACKLE CONST. CO. v. LOWENSTEIN INV. CO. (No. 2467.)

(Supreme Court of Georgia. Dec. 16, 1921. Rehearing Denied Jan. 13, 1922.)

*(Syllabus by the Court.)***Injunction against action at law.**

This case is controlled by the decision in the case of Massachusetts Bonding & Insurance Co. v. Lowenstein Investment Co., 109 S. E. 902, decided by this court December 2, 1921.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Suit by the Lowenstein Investment Company against the Mackle Construction Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Norman I. Miller, of Atlanta, for plaintiff in error.

Rosser, Slaton, Phillips & Hopkins, of Atlanta, for defendant in error.

BECK, P. J. Judgment affirmed. All the Justices concur.

(117 S. C. 536)

TURNER et al. v. MOORE et al. (No. 10745.)

(Supreme Court of South Carolina. Nov. 4, 1921.)

Appeal and error ¶901—Appellants must show that findings are against weight of evidence.

The appellants must satisfy the Supreme Court that the findings of the circuit judge are against the weight of the evidence.

Appeal from Common Pleas Circuit Court of Beaufort County; H. F. Rice, Judge.

Action by Emily K. Turner and others against Morton K. Moore and another. Decree for defendants on a referee's report, and plaintiffs appeal. Affirmed.

DePass & DePass and Colcock & Colcock, all of Columbia, for appellants.

W. J. Thomas and Talbird & Jenkins, all of Beaufort, for respondents.

WATTS, J. This was an action to set aside a conveyance for damages for alleged fraud and collusion. After issue joined the cause was finally referred to J. M. L. Kirkland, Esq., as special referee, to take testimony and report to the court his findings in the case. Upon the coming in of his report exceptions were duly taken, and Judge Rice heard the cause on exceptions to referee's report, and overruled the exceptions, and sustained and confirmed the report of the referee. From the decree of Judge Rice, appellants appeal, and by 10 exceptions impute error.

This court has decided in a number of cases—among others, Hickson Lumber Co. v. Stallings, 91 S. C. 473, 74 S. E. 1072, and Leland v. Morrison, 92 S. C. 501, 75 S. E. 889, Ann. Cas. 1914B, 349—that the appellants shall satisfy this court that the findings of the circuit court are against the weight of the evidence. In the case at bar, we have the concurring findings of both the special referee and the circuit judge, and the appellants have failed to convince this court that their findings are against the weight of the evidence; and we see no error at all in the decree of his honor.

All exceptions are overruled, and judgment affirmed.

GARY, C. J., and FRASER and OOTH-RAN, JJ., concur.

(117 S. C. 356)

STATE v. CORBETT. (No. 10719.)

(Supreme Court of South Carolina. Oct. 10, 1921.)

1. Criminal law ¶293—Demurrer to plea of former jeopardy admits facts alleged.

Demurrer to accused's plea of former jeopardy admits the allegations of fact contained therein.

2. Criminal law ¶1067(3)—Upon appeal from overruling of demurrer, unnecessary that testimony be incorporated in record.

Upon appeal from overruling of demurrer to plea, it is unnecessary that testimony taken upon the trial be incorporated in the record.

3. Criminal law ¶293—Demurrer to plea of former acquittal does not admit characterization of facts.

Where accused, having killed three persons in one affray, was separately indicted for mur-

der for each killing, and, on trial upon one indictment, was acquitted, the allegation in his plea of former acquittal to another of the indictments "that the several shots fired by him from the said revolver at said persons at said time and place * * * were actuated and moved by the same and identical impulse, and constituted one single act of volition," was a mere characterization—an inference from the alleged facts—so that demurrer to the plea did not admit that the three homicides were a single act on his part.

4. Criminal law §200(8)—Plea of former acquittal of murder not good as to separate indictment for another killing at same time.

Where accused, having killed three persons in one affray, was separately indicted for murder for each killing, and, on trial upon one indictment, was acquitted, such acquittal was not a bar to prosecution upon one of the other indictments, the accused having committed a separate act against each one killed, nor could accused's claim that his act constituted but one offense be sustained even if the three homicides were a single act on his part, as more than one offense may follow from a single act, and, in any event, Const. art. 1, § 17, prohibits double jeopardy "for the same offense," and not for the same act.

5. Criminal law §297—On overruling demurrer to plea, accused not necessarily entitled to order sustaining plea.

It did not follow from the order overruling demurrer to plea of former acquittal that accused was entitled to an order sustaining his plea, a demurrant being usually accorded the privilege of pleading over.

Watta, J., dissenting.

Appeal from General Sessions Circuit Court of Orangeburg County; S. W. G. Shipp, Judge.

Carlos Corbett was prosecuted for murder. From the overruling of a demurrer to his plea of former acquittal and an order sustaining the plea, the State appeals. Reversed and remanded.

Paragraph 10 of accused's plea was as follows:

(10) That the several shots fired by him from the said revolver at said persons at said time and place, and under the said circumstances, were actuated and moved by the same and identical impulse and constituted one single act of volition, namely, to do anything and everything against the said three men, to wit, Bryan Salley, Jule Cooper, and Hugh Fanning, to protect his person and habitation against their joint and confederated aggression.

The ruling of Circuit Judge S. W. G. Shipp on motion to direct a verdict on the grounds of previous acquittal in the above-entitled case was as follows:

The defendant in this case sets up the plea of former acquittal, autrefois acquit; he alleges substantially in his plea that he was indicted on March 27, 1920; that heretofore in September, 1920, he was arraigned and pleaded not

guilty to the indictment found against him by the grand jury of Orangeburg county charging him with the murder of Bryan Salley on the 27th of March, 1920; that the jury was impaneled and that he was duly acquitted on that charge. He further states that he is now called at the bar of the court to answer to an indictment charging him with the murder of one Julian Cooper on the 27th of March, 1920; he alleges that he was in former jeopardy in the trial for the murder of Bryan Salley because he alleges the evidence necessary to prove the charge against him for the murder of Julian Cooper would be the same evidence as was used against him in the case charging him with the murder of Bryan Salley. He goes on in his plea to state that at his former trial it was in evidence that at his home in his front yard on the night of March 27, 1920, he fired several shots in quick succession at three men, mentioning them, Bryan Salley, Julian Cooper, and Hugh Fanning; that these three parties were making an attack upon him jointly in his own yard, and that he shot from the necessity of defending and protecting his life and home. He further alleges that the act in shooting at these three men, alleged aggressors, constituted one act and one volition; that he shot at no particular one, but was endeavoring to protect himself and his home against aggression; that he killed all three of these men at one time and that it was in pursuance of one act and one volition.

The defendant further alleges that all of these facts came out in the trial for his killing Bryan Salley, and that at that trial three issues were submitted to the jury who tried the case; that three theories were presented to the jury. The three theories that he sets up in his plea are: (1) That the defendant purposely fired at and killed Bryan Salley with malice; (2) that the defendant fired at Julian Cooper and Hugh Fanning, and missing them killed Salley; (3) that with a reckless disregard of human life the defendant fired at the three men, killing them. He says that those three issues were submitted to the jury, and that he was duly acquitted by the jury, and he alleges that the action of the jury in acquitting him is the equivalent to finding that he was excusable in the act that he committed on that occasion. That is substantially what he alleges.

When a defendant puts in a special plea of former acquittal or former conviction, two courses are open to the state: The state may traverse the plea by denying the allegations thereof, and the question would then be one of fact to be tried by a jury, or the state may demur to the plea, and then it becomes a question of law; not a fact for the consideration of the jury, but a question of law for the court. When the defendant demurs to a paper, that is an admission of the facts stated in the paper; it is not an admission of any legal conclusions, but it is an admission of the truth of any fact pleaded in the paper that is properly pleaded. That is held in the case of *State v. De Wees*, 76 S. C. 74, 56 S. E. 674, 11 Ann. Cas. 991.

In considering a question of former acquittal it involves a consideration of the record. Two

indictments involved in the case are made a part of the plea and a part of the demurrer; that is for the consideration of the court. The court considers the record, the indictments, and it also considers partially in a question of fact, where there is the allegation in the plea that it is the same act, the same transaction, and the same volition; that is a question of fact. If the indictment shows that the offenses charged are so distinct and separate that, notwithstanding the demurrer on the part of the state, if the indictment shows that the charges were so separate and distinct, notwithstanding the admissions, the court comes to the conclusion that they are separate and distinct, the court would have to sustain the demurrer. That involves a question of fact; still, if the indictment shows on its face that it could not result from the same act, the state would lose nothing by the demurrer. If on the other hand there can be shown, or if they might have been the result of the same act, that is an admission on the part of the state.

It is unfortunate that in South Carolina the Supreme Court of this state has never ruled on the precise question in this case in any similar case. The state relies on the case of the State v. Thurston, 2 McMul. 382, in which it was held that the indictments in the Thurston Case were so separate and distinct, that notwithstanding the admissions by the demurrer, the court was justified in holding that the offenses charged were not the same act. An examination of the Thurston Case shows—and I have not had as much time to examine these cases as I would like to have had, because I have to rule promptly—an examination of the Thurston Case shows that the indictment in that case involved the question of larceny; where a person is charged with the stealing of goods belonging to A. he cannot be convicted for the stealing of goods belonging to B. That is true, of course, because to convict of larceny, you have to prove the owner is not a different person, the very nature of the ownership or the possession of the property, and where the case could not be the result of one act. It remains to be seen that where a person kills two persons, that may be shown to be the result of the same act.

Counsel for the state has cited the case of State v. Evans, 33 W. Va. 417, 10 S. E. 792, a West Virginia case. An examination of the Evans Case shows that the plea was not set out in that case, and I have not the benefit of knowing exactly what was alleged in the special plea set up. The court held in that case that it could not be one act, because the circumstances alleged showed that there was aggravation from one separate and distinct from the other. The judge who rendered the opinion stated that he could conceive of a case in which the principal might apply, and he cited the case referred to by Mr. Raysor where an engineer was charged with killing a number of people through the negligent running of a train, and the plea interposed was that it was accidental; he was charged with the murder of one of the passengers, and the jury rendered the verdict of acquittal, and it was held that that was an adjudication, and no further criminal liability attached, and he could not be held for the death of other passengers resulting from the same act.

It is recognized by the court that there may be cases where a person may kill more than one person as the result of the same act. That is one case. I can conceive of another case; a sheriff is charged with the custody and with the safety of the prisoners in jail; he stands there for the purpose of protecting those prisoners; an attack is made on him, and he kills ten men, and he is called for trial for the killing of one of the ten men; he sets up the defense that he killed the ten men in the discharge of his official duty; that a mob came there for the purpose of taking the prisoners from the jail, and in defense of their lives he took the life of ten men who were killed. He is tried for killing one of those men, and that question is submitted to the jury, and the jury say he is not guilty; that he was excusable in taking life. There is one act and one purpose to protect the prisoner; that is an adjudication the sheriff acted within the law. There is an instance where the sheriff shot repeatedly, but it was from one design and one purpose, and an adjudication in one case would be an adjudication in all.

No one can testify as to the intent of a person. I cannot testify as to what is in the mind of any other man, but I can testify as to my own intent, and the only person who can testify as to the intent of any person is that person himself. We have in this paper here, admitted by the demurrer, the declaration of the defendant under oath that he had one purpose and one intent, and that was to defend himself against his aggressors. It has been held in a number of cases that the defendant may testify as to his purpose and intent. That is the only evidence we have in the case, and that is admitted by the demurrer.

I am sorry that the state admitted these facts in the demurrer. I am called on to rule on this paper with an admission on behalf of the state; it becomes a question of law, and I am bound; I could not rule otherwise with this admission of intent, the admission of one purpose and one act; I could not rule otherwise than that the demurrer must be overruled in the case, and therefore it becomes a question of law, and it being admitted that the killing of the three men was the result of one impulse, and it being alleged that it was done in defense of the defendant's home and person, I cannot say that that does not state a proper defense.

I will have to overrule the demurrer, and, for the reasons stated above, the demurrer is overruled.

T. M. Rayson, A. H. Moss, and A. J. Hydrick, all of Orangeburg, for the State.

Wolfe & Berry, of Orangeburg, Cole L. Blease, of Columbia, M. L. Smith, of Camden, J. L. Dukes, of Orangeburg, J. H. Fanning, of Springfield, and B. J. Wingard, of Lexington, for respondent.

COTHRAN, J. At the May term of the court of general sessions for Orangeburg county true bills, upon separate indictments, were returned against the defendant, charging him with the murders, respectively, of Bryan Salley, Julian Cooper, and Hugh Fan-

ning, on March 27, 1920. At the September term he was tried upon the indictment charging him with the murder of Bryan Salley, and was acquitted. At the following January term he was called for trial upon the indictment charging him with the murder of Julian Cooper. He thereupon filed a plea of former acquittal, based upon the proposition that the three homicides, resulting from a single act, intent, impulse, and volition, constituted but one offense, and that, having been acquitted of any criminality in connection therewith, as evidenced by his acquittal as stated, he was entitled to be discharged.

To this plea the state demurred, upon the ground that the indictment in the case in which the acquittal occurred and that in the case at bar show that the offenses charged in the two indictments are distinct and different, and require proof of distinct and different facts.

The circuit judge heard argument upon the plea and the demurrer, and orally announced his ruling (which is incorporated in the record and should also be in the report) overruling the demurrer. He then passed a formal order, rectifying the fact that he had overruled the demurrer, and adjudging that the plea of former acquittal be sustained. From said ruling and order the state appeals.

[1] Upon the presentation of the plea two courses were open to the state: To traverse the plea, or to demur. The state adopted the latter course, and the legal effect thereof was to admit the allegations of fact contained in the plea. *State v. De Wees*, 76 S. C. 74, 56 S. E. 674, 11 Ann. Cas. 991.

[2] The question at issue must therefore be decided upon the plea, the demurrer, and the two indictments, without reference to the testimony taken upon the trial which has been had. It was unnecessary and improper that this testimony be incorporated in the record for this appeal. The exceptions of the state to the order of the circuit judge striking out this testimony in settling the case for appeal are therefore dismissed.

The main facts, pertinent to the present inquiry, alleged in the plea and admitted by the demurrer, are the following, omitting those already stated herein and certain argumentative statements therein:

On the night of March 27, 1920, while the defendant was in his front yard, several men, among whom were Bryan Salley, Julian Cooper, and Hugh Fanning, advanced upon him; that in self-defense, to protect his person and habitation from their joint and confederated attack, the defendant fired at them several times with an automatic revolver, firing as rapidly as the pistol would fire, not aiming particularly at any one of them, but shooting at them one and all, whereby the three men named were instantly killed; that in said shooting the defendant

was actuated and moved by the same and identical impulse, a single act of volition to do anything and everything against said three men to protect his person and habitation against their joint and confederated aggression.

The validity of the defendant's plea of former acquittal depends upon a solution of the following questions, battle ground upon which the defendant has pitched this controversy:

(1) Were the three homicides a single act on the part of the defendant?

(2) If the three homicides were a single act on the part of the defendant, is he entitled to claim that the act constituted but one offense?

It is apparent that if each homicide was a separate act, then necessarily each act constituted a distinct and separate offense; or if the three homicides were a single act from which distinct and separate results flowed, each homicide was a separate offense.

1. Were the three homicides a single act on the part of the defendant?

[3] The defendant so alleges in his plea, and now contends that the state by its demurrer has admitted that to be a fact. We do not so regard the demurrer. The allegation in the plea is nothing more than a characterization, in the interest of the defendant—an inference favorable to him, which he draws from certain alleged facts; the issue is one of law, therefore, not of fact; and a demurrer admits only facts.

As is declared by the court in *State v. De Wees*, 76 S. C. 75, 56 S. E. 675, 11 Ann. Cas. 991:

"If the two indictments charged offenses which in their nature are so separate and distinct as to be incapable of legal identity, then defendant's allegation that they charged the same offense would not make it so, since the demurrer only admits the facts properly pleaded."

So here, when the defendant alleges the circumstances of the affray; that the three men and another were advancing upon him; that he shot them down, inferentially, one at a time; that he fired his pistol as rapidly as it would turn the cylinder; that he was determined to do anything and everything to stop their confederated aggression, which of course included as many shots and reloadings as might be necessary—it is not for him to decide or for the state to admit by its demurrer, that such intense, determined, continuous, and effective warfare, defensive though it may have been, was a single act.

Assume as we must that the defendant acted not in malice or in the hot blood of aggravation and exasperation, but in defense of his home and person, a circumstance which goes to the merits of his defense, and not to the discussion of the question whether or not his shooting down three men with

separate shots was a single act, the circumstances cry out against his favorable interpretation. His purpose, as he states, was to halt this confederated aggression; at least four men were advancing upon him; he had a pistol as his weapon of defense; he knew that it fired only one shot at a time, he could not possibly kill all four at one shot; he necessarily, therefore, predetermined to fire at least four times, each firing being a separate act, and each, as events developed, followed by the fall of a man. The admitted facts, aside from the argumentative characterization of the shooting as a single act, show a predetermined and pursued series of acts, to shoot, and shoot, and shoot; to do "anything and everything against the three men * * * to protect his person and habitation." We are concerned here with what he did, not with the purpose; and in the attempted justification of his conduct he reveals the character of his conduct as a series of acts, and not a single act.

[4] The authorities are simply overwhelming that under the circumstances stated the defendant was guilty of a separate crime (if a crime) against each one of his victims, and that the acquittal of one charge is not a bar to a further prosecution.

"But when one assaults or kills two persons by separate strokes, although in the same riot or affray, one acquittal or conviction of one assault or homicide is no bar to an indictment for the other, as they are distinct acts." 12 Cyc. 289.

In *Gunter v. State*, 111 Ala. 23, 20 South. 632, 56 Am. St. Rep. 17, the court declared:

"If, in the same affray, one person shoots and kills one person, and by a second act shoots and wounds another, in such case the two results, the killing of the one and the wounding of the other, by different acts of shooting, cannot be said to grow out of the same unlawful act, but out of two distinct acts, and the party shooting is responsible for the two results from the two separate acts, and may be indicted and punished separately for each."

In *Bell v. State*, 120 Ark. 530, 180 S. W. 186, the defendant was incensed with the sister of his wife, her husband, her father, and her brother, on account of their alleged participation in the separation of himself and wife. He determined to exterminate the entire family; armed with a repeating shotgun he went to their home, and in turn killed each one. It was one intent, one volition, one transaction, one impulse. He was convicted of the murder of the husband and sentenced to life imprisonment. Upon the trial for the killing of his wife's sister, he pleaded former conviction. The court said:

"The court did not err in overruling appellant's plea of former conviction. The conviction of appellant at a former term of the court for the crime of murdering Eard Bearden was a conviction for an entirely separate offense than

that of the murder of Abbie Bearden. The proof shows that the killings were not simultaneous; that they were not the result of one shot, but were the result of entirely separate acts. The question as to whether the murder of two persons by the same act would constitute but one offense is not presented. Therefore a conviction in one of the cases could not be set up in bar of a prosecution for the other."

In *Morris v. Territory*, 1 Okl. Cr. 617, 99 Pac. 760, the defendant claimed to have been attacked by father and son, and that in self-defense he killed them both, shooting as fast as he could with a shotgun and a pistol. The father was killed by shots from the gun; the son, from the pistol, not more than 30 seconds later; the transaction was one; the intent, purpose, volition, impulse, were one. The defendant was acquitted of the murder of the father, and pleaded that acquittal as a bar to the indictment for killing the son. The court, upon full discussion of the subject, ruled, quoting from the syllabus:

"If in the same affray a person shoots and kills one person, and by a second shot kills another person, he may be separately prosecuted for killing each of them, and may be properly acquitted in one case and convicted in the other."

In *Com. v. Anderson*, 169 Ky. 372, 183 S. W. 898, the defendant, in an alleged effort to defend himself against a confederated attack by two brothers, rapidly firing, killed one of them and wounded the other. He was acquitted of murder in the one case, and to a separate indictment for assault upon the other brother pleaded former acquittal. The court refused to sustain the plea, holding:

"But we have been unable to find any case holding that where, by two separate and distinct acts of the defendant, two separate and distinct offenses were committed, they could in any sense be called 'the same offense' as is required to successfully invoke the constitutional provision. The fact that these two distinct offenses were committed in close proximity as to time, and while engaged in one affray, cannot be allowed to unify the two offenses, when as a matter of fact they are not so. The time intervening between the commission of the two offenses can have no effect on the case whatever"—citing 12 Cyc. 289, and many cases from Kentucky; *Keeton v. Com.*, 91 Ky. 522, 18 S. W. 359; *Com. v. Browning*, 146 Ky. 770, 143 S. W. 407.

The case of *Com. v. Browning*, 146 Ky. 770, 143 S. W. 407, cited in the *Anderson Case*, is stronger for the defendant than the *Anderson Case* or the case at bar, and while we are not called upon to approve its conclusions, the facts are interesting in this connection and its reasoning instructive. In that case the defendant with one shot from a pistol wounded two men with whom he was engaged in a fight. Defendant was convicted of assault upon one of the men, and

to a separate indictment for assault upon the other he pleaded former conviction. The court overruled the plea, saying:

"Manifestly, appellee, if first tried for the shooting and wounding of Caywood, could not be convicted on proof that he shot Stewart, though both Caywood and Stewart were wounded by one and the same shot. As well might it be argued that, in the killing of several of the same family by putting poison in the food eaten by them, conviction of the prisoner for the death of one of them would bar a prosecution for the killing of the others. * * *

"The offenses committed by appellee were not included within one another, though resulting from the same act, but were separate and distinct offenses. Therefore he was not protected by section 13, Bill of Rights, against a prosecution for either by a conviction or acquittal for one of them."

In *Keeton v. Com.*, 91 Ky. 522, 18 S. W. 359, it was held, quoting from the syllabus:

"Presenting a pistol at two persons at the same time, coupled with a demand of their property, and compelling a surrender thereof by both at the same time, constitutes distinct offenses against them—an assault on and robbery of each."

In *Kelley v. State*, 43 Tex. Cr. R. 40, 62 S. W. 915, the defendant and the two De Walt brothers were working in adjoining fields, a wire fence separating them; one of the De Walts accused defendant of sending a valentine reflecting upon their sister; hot words ensued, and the two De Walts made for the defendant, and as they were in the act of breaking down the strands of wire to cross the fence to attack the defendant, he fired, killing one and wounding the other. He was tried for the murder of the one killed, and acquitted; upon the trial for assaulting the other, he pleaded former acquittal. The court held that the plea was insufficient.

In *Augustine v. State*, 41 Tex. Cr. R. 59, 52 S. W. 77, 96 Am. St. Rep. 765, the defendant was one of a mob which fired at and killed two men, they being killed by different shots from different members of the mob. The defendant was acquitted of the murder of the one whom he had not shot, and upon trial for the murder of the other, whom he had shot, he pleaded former acquittal. The court overruled the plea, saying:

"But here the testimony shows that the parties were killed by distinct acts. Mr. Bishop says: 'Obviously, there is a difference between one volition and one transaction, and on the view of our combined authorities there is little room for denial that in one transaction a man may commit distinct offenses of assault or homicide upon different persons, and be separately punished for each.'"

In *State v. Robinson*, 12 Wash. 491, 41 Pac. 884, the defendant in an affray killed two men, Schultz and Smith; he was acquitted of the murder of Schultz, and then, upon

trial for the murder of Smith, he pleaded former acquittal. We quote at length from the interesting opinion of the court:

"It follows that, if the killing of each of the men constituted a distinct crime, there was no proof tending to show that the appellant had been formerly acquitted of the crime alleged to have been committed in the killing of Smith. The fact that the same line of proof was introduced for the purpose of showing that he was guilty of the killing of Schultz as that introduced to show his guilt in the killing of Smith would in no manner tend to show that an acquittal for the killing of the former would constitute an acquittal for the killing of the latter, if the killing of each was a distinct crime. That such proofs in reference to two prosecutions for the commission of a single offense would be proper to go to a jury upon the question of former acquittal or conviction is beyond question, but to us it seems equally clear that proof which was necessary and competent to convict of one crime would have no weight upon such question in the prosecution for another, even although the same criminalizing circumstances were relied upon in the latter as in the former case. Was the killing of each of these men a distinct crime? They were killed in a single affray, and the connection of the appellant was substantially the same in his relations to such affray, as it related to each of such men. If the result of the meeting at which the two were killed had been the death of only one of them, a prosecution for murder could have been founded upon his death, and under the circumstances of this case this would have been true whether the one so killed had been Schultz or Smith; and there can be no good reason why that which would have warranted a prosecution for murder should lose force by reason of the fact that another circumstance, which in itself would warrant such a prosecution, occurred at the same time and place. If the prosecution had been founded upon the killing of the two, and the case had gone to trial upon a plea of not guilty, proof of the killing of either of them would have warranted a conviction. It follows that the killing of each was, so far as the homicide was concerned, a distinct transaction. The taking of a human life with certain intent constitutes murder, and neither law nor public policy will justify a holding that each life is of less value when taken with another than it would be if taken alone. If a person without justification intends to kill A. and does so, he will be guilty of a crime; if he intends to kill B., he will be guilty of another and a different crime; and the fact that he entertains the intent to kill both, and carries such intent into effect at the same time and place, should not be held to make of that which would otherwise be a foundation for two distinct prosecutions a foundation for only one. In our opinion, the undisputed proofs, when interpreted in the light of the law which it was the duty of the court to find, clearly showed that the appellant had never been on trial for the killing of Smith."

In *Winn v. State*, 82 Wis. 571, 52 N. W. 775, the defendant had an altercation with one De Foy in a saloon, and was assaulted

by him; he went home, secured a pistol, and returned; De Foy was on the sidewalk with others, including one Coates; the defendant snapped his pistol at De Foy, and in the struggle to disarm him the pistol was discharged, killing Coates; the defendant was acquitted of the murder of Coates, and was then indicted for the assault on De Foy; he pleaded former acquittal. The court disallowed the plea, holding:

"The rule is that the offenses charged in two indictments are not identical unless they concur both in law and in fact, and that the plea of *autrefois* acquit or convict is had if the offenses charged in the two indictments be distinct in law, no matter how closely they are connected in fact. In order to determine whether there is a concurrence in law, that is, whether a conviction or acquittal on one indictment is a good bar to a prosecution on another, the true inquiry is whether the first indictment was such that the accused might have been convicted under it by proof of the facts alleged in the other indictment. If he could not, the conviction or acquittal under the first indictment is no bar. The result of an application of this test to the present inquiry is obvious. Winn could not have been convicted of the murder of Coates merely upon proof that he made a felonious assault upon De Foy. Proof that he killed Coates would also be required. Hence an acquittal on the information charging the murder of Coates is no bar to this information for a felonious assault on De Foy, and the special plea was properly overruled."

In a note to *Roberts v. State* (Ga.) 58 Am. Dec. 540, Judge Freeman says:

"When same act constitutes two or more distinct offenses, each is separately indictable. The defendant may be separately punished for each offense, and an acquittal, or conviction, or pardon, of one of these distinct offenses is no bar to the prosecution of the others. [Citing cases.] And the test will here apply. In each case the plea of *autrefois* acquit or convict is bad, because the facts of the two offenses are different. The proof of the allegations of the second indictment would not secure a legal conviction under the allegations of the first. A well-settled example of this—of two offenses distinct from each other, arising from the same act—occurs when the criminal act affects two different persons"—citing *State v. Fife*, 1 Bailey, 1.

Further the learned annotator observes:

"So where the defendant, by his act, injures in fact two or more persons, though it be accomplished in the same transaction, yet as many distinct offenses are committed. The facts of one are materially variant from those of the other. Such is the case where two or more persons are shot at the same time."

We conclude, therefore, that the killing of Bryan Salley physically could not have been the same act as that which took the life of Julian Cooper, and that the law, so far from compelling a disregard of what we know the

fact to have been, is in harmony with the dictates of reason, physical laws, and common sense.

2. If the three homicides were a single act on the part of the defendant, is he entitled to claim that the act constituted but one offense?

Assuming, however, for the sake of argument that the defendant's contention in this regard may be sustained, it by no means follows necessarily that but a single offense has been committed. On the contrary, the rule in this state is that under certain circumstances more than one offense may follow from a single act.

In *State ex rel. Burton v. Williams*, 11 S. C. 292, the court declared:

"And of the other result—that of subjecting an offender to two punishments for the same act, not the same offense—it may be said that it is not so monstrous as might at first be supposed, inasmuch as we find that our own courts have decided that for the same act a man may be twice punished, because by the one act he has violated two distinct statutes of the state, committed two distinct offenses, and is therefore liable to two distinct punishments."

In *State v. Switzer*, 65 S. C. 187, 43 S. E. 513, the court says:

"It is not sound to say unqualifiedly that more than one criminal offense cannot be predicated upon a single act; for when a single act combines the requisite ingredients of two distinct offenses, the defendant may be separately indicted and punished for each, as shown in *State v. Taylor*, 2 Bailey, 49, and *State v. Thurston*, 2 McM. 395."

In *State v. Thurston*, 2 McM. 382, the defendant was charged in three separate indictments with having stolen at the same time cotton belonging to three separate individuals. The act, intent, and volition was one and the same. The court held (quoting from syllabus):

"That the cotton so stolen by the defendant belonged to three different individuals, and he was very properly indicted in three cases, and a conviction in one case was no bar to a conviction in the two others. The stealing of the goods of different persons is always a distinct larceny."

In *State v. Sonnerkalb*, 2 Nott & McC. 280, the defendant raised the question of being liable to two indictments for separate offenses both growing out of a single act. The court said:

"But let it be admitted that the defendant committed physically but one act; two offenses may be committed by one act, even at the common law; a person fires a gun, kills one, and wounds another; if he escapes for the homicide (that is, if his life be not taken), he may be indicted for the assault on the other; or suppose he severely wounded two, he may be indicted for two assaults."

In *Hellams v. Switzer*, 24 S. C. 39, the action was brought by several plaintiffs severally owning land claiming damages on account of a dam of the defendant. The court held that they could not maintain a joint action; that their injuries were several. The opinion contains this statement pertinent to the pending issue:

"The principal underlying is that it is not the act, but the consequences, which are looked at. Thus, if two persons are injured by the same stroke, the act is one, but it is the consequences of that act, and not the act itself, which is redressed; and therefore the injury is several."

In a full note by Judge Freeman to *People v. McDaniels* (Cal.) 92 Am. St. Rep. 120, he points out the two lines of decisions in reference to a single act causing death to two or more persons, placing this state in line with others holding that two offenses have been committed, though rather leaning to the opposite holding. He points out very clearly, however, that whatever doubt may exist upon that proposition there is none where more than one act has been committed. He says:

"If one shot is fired and injures two people, there is, as we have seen, a conflict of authority as to the possibility of separate and successive prosecutions. But where several shots are fired, each injuring one person, the mere propinquity, in point of time or action, of the two assaults does not make them a single assault, and all the authorities agree in holding that there may in such a case be as many prosecutions as there were assaults."

A familiar illustration of the rule is where the single act is a separate and distinct offense under municipal, state, and federal statutes, or where the single act is a distinct infraction of more than one state statute. Surely if a single sale of liquor may constitute three statutory offenses, or if a single act of theft may constitute more than one offense, a single murderous shot may constitute a separate offense as to each human being whose life is cut short. If a malpracticing physician in producing an abortion should cause the death of the mother and of the child breathing after its forced birth, can there be a question that from his single act, actuated and moved by a single intent, impulse, and volition, there would spring three separate offenses?

If, the act being single, only one offense has been committed, the rule should apply to civil actions as well as to criminal prosecutions; and yet we do not apprehend that, if the defendant should have prevailed in an action by the administrator of Bryan Salley for damages on account of his alleged wrongful death, he could defeat a similar action by the administrator of Julian Cooper upon the ground of former adjudication; or that that rule would apply in the case of a negligent collision at a railroad crossing by

which the lives of several persons were lost. It would indeed be anomalous to hold in the criminal prosecution that the act was single, and only one offense was committed, and in the civil actions the act was single and several offenses (civil) were committed; the plea of former adjudication being sustained in the one case and denied in the other upon opposite conclusions from the identical state of facts.

Mr. Van Fleet in his work on *Former Adjudication*, vol. 3, par. 622, states that the rule that, if several persons are injured in person or property by the same act, there is but one offense, is maintained in the courts of several states named, but that the contrary is held in Arkansas, California, Kentucky, New York, South Carolina, and Virginia.

There is another view of this question which, however, it is really not necessary to discuss, in view of the foregoing conclusions, but which is equally fatal to the defendant's plea. The constitutional provision invoked is:

"Nor shall any person be subject for the same offense to be twice put in jeopardy of life or liberty." Const. art. 1, § 17.

Note that the identity of the offense, and not of the act, is referred to. Hence, in order to claim the benefit of this protection it must be made to appear that the latter indictment contains a charge of the same offense of which the defendant may have previously been acquitted or convicted.

From a common-sense, layman's view there could be no hesitation in saying that the first indictment charges the murder of Bryan Salley, one distinct crime; the second, of Julian Cooper, another distinct crime. But we are expected to throw to the winds this chart and compass, and be guided by a strained technicality of the law. The law does not compel this conclusion. In determining the question of the identity of the offenses, the law prescribes the following test:

In *State v. Glasgow*, Dud. 40, the court declares:

"The test by which the question is to be determined, whether a former conviction is a bar to another prosecution, is this: Would the evidence necessary to support the second indictment have been sufficient to procure a legal conviction on the first?"

The same test is applied in the case of *State v. Thurston*, 2 McM. 382, and in *State v. Risher*, 1 Rich. (S. C.) 219, in practically the identical terms. In *State v. Parish*, 8 Rich. (S. C.) 322, the court declared (referring to former conviction):

"To constitute this a good defense the offense must be identical or necessarily included the one within the other."

In *State v. Jenkins*, 20 S. C. 351, the court lays this down as the test:

"Could the accused have been convicted at the first trial and under the first indictment of the offense charged in either of the other two? * * * If, then, the accused could not, under any circumstances, have been convicted of the present offense in the former trial, how then can it be said that upon the present trial he has been put in jeopardy twice for the same offense?"

In *State v. Switzer*, 65 S. C. 187, 43 S. E. 513, the court says:

"In determining whether both indictments charged the same offense, the test generally applied is 'whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first.'"

In *State v. Switzer*, 65 S. C. 191, 43 S. E. 513, it is held that the plea of former acquittal must be sustained when it appears that the offense charged in the second indictment is not legally distinct from that in the first.

In *State v. Van Buren*, 86 S. C. 297, 68 S. E. 568, the court declares:

"The test laid down as useful and generally adequate, though not infallible, by which it may be decided whether two indictments charge the same offense, is: 'Would the evidence necessary to support the second indictment have been sufficient to procure a legal conviction upon the first?'"

In *State v. Rodgers*, 100 S. C. 77, 84 S. E. 304, the same test was applied as in the case of *State v. Jenkins*, 20 S. C. 351.

In *Burton v. United States*, 202 U. S. 344, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 362, it is said:

"A plea of *autrefois acquit* must be upon a prosecution for the same identical offense. 4 Bl. 336. It must appear that the offense charged, using the words of Chief Justice Shaw, 'was the same in law and in fact. The plea will be vicious, if the offenses charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in fact.'"

In *Ebeling v. Morgan*, 237 U. S. 625, 35 Sup. Ct. 710, 59 L. Ed. 1151, it is said:

"The principle applied in *Gavieres v. United States*, 220 U. S. 338, is applicable, where this court held that, when in the same course of conduct, and upon the same occasion, certain rude and boisterous language was used, and an officer insulted, two offenses were committed, separate in their character, and this, notwithstanding the transaction was one and the same. The principle stated by the Supreme Judicial Court of Massachusetts in *Morey v. Commonwealth*, 108 Mass. 433, was applied, where it was held that a conviction upon one indictment would not bar a conviction and sentence upon another indictment, if the evidence required to support the one would not have been sufficient to warrant the conviction upon the other without proof of an additional fact."

In *Morgan v. Devine*, 237 U. S. 632, 35 Sup. Ct. 712, 59 L. Ed. 1153, it is said, quoting from *Bishop*:

"The test is whether, if what is set out in the second indictment had been proved under the first, there could have been a conviction; when there could, the second cannot be maintained; when there could not, it can be."

In *Blair v. State*, 81 Ga. 629, 7 S. E. 855, the rule is thus stated:

"If the evidence required to convict under the first indictment would not be sufficient to convict under the second indictment, but proof of an additional fact would be necessary to constitute the offense charged in the second indictment, then the former conviction or acquittal could not be pleaded in bar of the second indictment."

In note to *Com. v. Vaughn* (Ky.) 45 L. R. A. 858, it is said:

"For this reason, therefore, a conviction of one offense will not bar a prosecution for the other, or entitle the defendant to the plea of former jeopardy, *autrefois convict*, or *autrefois acquit*, as such plea can only avail a defendant who has already been convicted or acquitted upon the same charge or offense for which he is charged the second time, or, in other words, when the two offenses are identically the same."

In *Morey v. Com.*, 108 Mass. 433, cited with approval in *Gavieres v. United States*, 220 U. S. 342, 31 Sup. Ct. 422, 55 L. Ed. 489. It is said:

"A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense."

The Massachusetts case was also cited with approval in *Carter v. McClaughry*, 183 U. S. 394, 22 Sup. Ct. 193, 46 L. Ed. 236, where the court said:

"The offenses charged under this article were not one and the same offense. This is apparent if the test of the identity of offenses that the same evidence is required to sustain them be applied. The first charge alleged 'a conspiracy to defraud,' and the second charge alleged 'causing false and fraudulent claims to be made,' which were separate and distinct offenses, one requiring certain evidence which the other did not. The fact that both charges related to and grew out of one transaction made no difference."

In *Kelley v. United States*, 258 Fed. 392, 169 C. C. A. 408, it is said:

"This was in effect a plea of *autrefois acquit*. Such a plea, however, is unavailing unless the offense presently charged is precisely the same in law and fact as the former one

relied on under the plea; thus, as Mr Justice Harlan said (*Burton v. United States*, 202 U. S. 344, 380, 26 Sup. Ct. 688, 693, 50 L. Ed. 1057, 6 Ann. Cas. 362), in adopting language of Chief Justice Shaw, it must appear that the offense charged 'was the same in law and in fact. The plea will be vicious, if the offenses charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in fact.' "

In *Bens v. United States* (C. C. A.) 266 Fed. 152, it is said:

"The prohibition of the Constitution is against a second jeopardy for the 'same offense'; that is, for the identical crime. The offenses charged in the two prosecutions must be the same in law and in fact. *Burton v. United States*, 202 U. S. 344, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 392; *Thomas v. United States*, 156 Fed. 897, 84 C. C. A. 477, 17 L. R. A. (N. S.) 720, 16 C. J. 263. If the facts which would convict on the second prosecution would not necessarily have convicted on the first, then the first will not be a bar to the second, although the offenses charged may have been committed in the same transaction."

In *United States v. Farhat* (D. C.) 269 Fed. 33, it is said:

"The test of identity of offenses, when double jeopardy is claimed, is whether the same evidence is required to sustain them. If not, then the fact that both charges relate to and grow out of one transaction does not make a single offense, where two are defined by the statutes."

In *People v. Majors*, 65 Cal. 138, 3 Pac. 597, 52 Am. Rep. 295, the defendant had counseled and advised another to rob a certain man at his home; the emissary took with him a confederate; they found unexpectedly a friend at the home of the man to be robbed: in the attempt to carry out the design of robbery both the man to be robbed and his friend were killed at the same time by the emissary and his confederates. The defendant was convicted of murder in the case of the man who was to have been robbed, and to an indictment in the case of his friend he pleaded former conviction. The court overruled the plea, saying (quoting from syllabus):

"The murder of two persons constitutes two separate crimes, for each of which a defendant is liable to a separate prosecution and trial, though the killing be by the same act; and a conviction or acquittal in one case does not bar a prosecution in the other on the plea of once in jeopardy."

Applying this test, it must be apparent that the plea must fail. In the first case, the defendant was charged with the murder of Bryan Salley. The state was required to make good the allegation that the defendant took the life of Bryan Salley; it was compelled to prove the corpus delicti. In the

second, the same burden was upon it with reference to Julian Cooper, necessarily a difference in the proof. The proof of Cooper's death would not have answered the obligation resting upon the state in the first case to prove the death of Salley and, conversely, the same could be said of the second case.

In *People v. Albez*, 49 Cal. 452, an indictment charged the defendant with the murder of three persons by the administering of strychnine at the same time. The court arrested the judgment upon the ground that three distinct offenses had been charged in one indictment.

[5] We take occasion to say that it did not necessarily follow from the order overruling the demurrer that the defendant was entitled to an order sustaining his plea of former acquittal. Assimilated to demurrers in civil actions, the demurrer is usually accorded the privilege of answering over; and doubtless this privilege, that of traversing the plea, would have been allowed the state if it had been applied for. In the absence of such a request the defendant was entitled to and the circuit judge was authorized to pass the order in question, subject, of course, to review on appeal.

The judgment of this court is that the order appealed from be reversed, and that the case be remanded to the court of general sessions for Orangeburg county for trial.

EUGENE B. GARY, C. J., FRASER, J., and PRINCE, WILSON, SEASE, FRANK B. Gary, Moore, BOWMAN, TOWNSEND, and PEURIFOY, Circuit Judges, concur in the opinion of COTHRAN, J.

DE VORE and RICE, Circuit Judges, concur in the result.

EUGENE B. GARY, C. J. The defendant was charged in three separate indictments for the murder of Bryan Salley, Julian Cooper, and Hugh Fanning. He was tried under the indictment charging him with the murder of Bryan Salley, and the jury rendered a verdict of not guilty. At the next term of the court, he was called upon to answer to an indictment charging him with the murder of Julian Cooper, and he set up the plea of former jeopardy. It does not appear that a motion was made to consolidate the cases and try them together. If they had been tried at the same time, and the jury had rendered a verdict of not guilty as to the homicide of Bryan Salley alone, the defendant could not again have been placed in jeopardy. But those were not the facts. Having failed to make such motion, he was not in jeopardy for the killing of Julian Cooper when he was only tried for the murder of Bryan Salley.

It would be an anomaly to allow a plea of former acquittal, unless there had been a

former trial for the homicide of Julian Cooper.

WATTS, J. For the reasons assigned by Judge Shipp, I think the exceptions should be overruled and the judgment affirmed.

(117 S. C. 537)

ROBINSON v. ATLANTIC COAST LINE RY. CO. (No. 10746.)

(Supreme Court of South Carolina. Nov. 4, 1921.)

1. Trespass ⇐67—Nonsuit for failure to prove title held properly denied.

In an action for trespass in which plaintiff alleged and produced testimony tending to prove that he was in peaceful possession of the land, denial of motion for nonsuit on ground that plaintiff had failed to prove title in himself held proper.

2. Railroads ⇐114(1)—Charter held admissible under general denial in trespass.

In action against a railroad for trespass in construction of track upon land of which plaintiff claimed to be in peaceful and rightful possession, the charter of defendant's predecessor held admissible, under a general denial, to prove defendant's right to the possession of the land for corporate purposes and to disprove the allegations and testimony of the plaintiff to the effect that he was in peaceful and rightful possession of the land.

Appeal from Common Pleas Circuit Court of Sumter County; Edward McIver, Judge.

Action by Frank Robinson against the Atlantic Coast Line Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Exceptions referred to in opinion follow:

1. The court erred in refusing to grant a nonsuit at the close of plaintiff's testimony for the reasons stated in the ground of said motion, which was as follows:

The defendant moves for a nonsuit on the ground that as this action alleges an injury to the title by the absolute taking of possession of part of the land alleged to be the land of the plaintiff and is not a mere action of trespass against the possession of the land, it was necessary for the plaintiff to prove his title, and this he has failed to do.

2. The court erred in holding that this was an action of trespass quare clausum fregit, that the defendant, not having pleaded title in itself in its answer, could not justify its entry under a claim of title, and on these grounds refusing to admit in evidence the charter of the Wilmington & Manchester Railroad Company offered by the defendant as the title of its predecessor and under which it claimed.

3. The court erred in refusing to allow the defendant to offer in evidence the charter of the Wilmington & Manchester Railroad Company, its predecessor in title, for the reason

that the defendant was entitled as against the plaintiff alleging possession, to show under its answer pleading a general denial that it was in possession for railroad purposes at the time of the alleged trespass, and that any use which plaintiff was making of the property at that time was not inconsistent with defendant's possession for railroad purposes under the original charter.

4. The court erred in refusing to admit in evidence the charter of the Wilmington & Manchester Railroad Company when offered by the defendant as the title of its predecessor, for the reason that it was not necessary in this case for the defendant to plead title in itself in order to be allowed to introduce such charter in evidence.

5. The court erred in holding that after the plaintiff withdrew his claim for punitive damages, the defendant was not entitled to introduce in evidence the charter of the Wilmington & Manchester Railroad Company to show that its entry on the land was not done in a willful and wanton way, for the reason that since a plaintiff is entitled, upon proof of willfulness, to recover both actual and punitive damages, the withdrawal of the claim for punitive damages did not destroy the cause of action for willfulness, and the defendant had the right to introduce evidence as to the claim under which it entered, for the purpose of defeating the recovery of actual damages on the cause of action for willfulness.

6. The court erred in refusing to direct a verdict in favor of the defendant for the reasons stated in the grounds of said motion, which were as follows:

(1) Because the plaintiff fails to show title in himself.

(2) Because no demand for the possession was ever alleged to have been made, or was ever made, upon the defendant.

(3) Because no damages recoverable in an action in the nature of a trespass quare clausum fregit have been proven in this case.

7. The court erred in refusing defendant's motion for a new trial, for the reasons stated in the grounds thereof, which were as follows:

(1) The verdict of the jury was excessive and against the weight of the evidence, both the testimony of the witnesses and the actual inspection of the premises.

(2) The action was not brought for the value of the land claimed to have been trespassed upon, as for a perpetual ouster of plaintiff, but was for damages for a willful tort in committing the acts alleged in the complaint, and it was error to permit the jury to consider and assess damages as for a taking of the land in question.

(3) It was error to hold that the action was in the nature of quare clausum fregit, and therefore and thereupon to exclude the evidence offered by defendant of its right to an easement over the land for railroad purposes, and thereafter as the applicable measure of damages in the case permit the jury to consider and find a verdict for plaintiff as for the actual taking of the land in question by an ascertainment of the difference in value of the entire tract before and after the construction of the track.

(4) Plaintiff was not in possession of the land within the limits of the original right of

way of the Wilmington & Manchester Railroad Company as against the defendant, because there was no evidence (or, if there was, it was for the jury to pass upon) that any use which plaintiff may have made thereof was inconsistent with its possession by defendant for railroad purposes under the original charter, and defendant was entitled as against plaintiff alleging possession, to show under its answer pleading a general denial that it was in possession for railroad purposes at the time of the alleged trespass.

P. A. Willcox and H. E. Davis, both of Florence, and L. W. McLemone, Mark Reynolds, and H. D. Moise, all of Sumter, for appellant.

L. D. Jennings and A. S. Harby, both of Sumter, for respondent.

GARY, C. J. This is an action for damages to the plaintiff's lot, in the city of Sumter, S. C. The allegations of the complaint, material to the questions under consideration, are as follows:

"That the plaintiff is the owner in fee, and at the times hereinafter mentioned was in peaceable possession of the following described lot of land in said city of Sumter, to wit: * * *

"That on or about the 20th day of March, 1917, the defendant caused a gang of laborers to approach plaintiff's property for the purpose of laying a railroad track thereon. That when said laborers commenced to go upon plaintiff's land, he warned them, together with the foreman or person in charge of them, not to trespass upon his property, and ordered them to desist from attempting to lay said track thereupon, and positively refused to allow them to encroach upon his property, and in order to make his property line more apparent, and to prevent any mistake as to its location, and to further signify his refusal to permit the defendants to lay their track thereon, the plaintiff erected a wooden fence along the line of his property.

"That on the following day the plaintiff's property and said fence was left alone, until late in the afternoon, when the said construction gang of said defendant, under the orders and directions of the defendant, as plaintiff is informed, approached said fence, dug up his posts, cut the land away from underneath the same, and ran their track upon plaintiff's land, and later tore down said fence altogether, all against the will, and without the consent, and over the objection, of the plaintiff."

The answer of the defendant was a general denial.

The jury rendered a verdict in favor of the plaintiff for the sum of \$2,000, and the defendant appealed upon exceptions which will be reported.

[1] At the close of the plaintiff's testimony the defendant made a motion for a nonsuit, on the ground that the plaintiff had failed to prove title in himself. As the plaintiff alleged that he was in peaceful possession of the lot, and there was testimony to that effect, the refusal to grant the nonsuit

was free from error. *Investment Co. v. Lumber Co.*, 86 S. C. 358, 68 S. E. 637, 30 L. R. A. (N. S.) 243.

Furthermore, the plaintiff's attorneys stated in open court that they were not asking that the land be surrendered to the plaintiff, but merely for damages for the trespass. His honor the presiding judge also stated:

"They do not ask for the recovery of the land, but they ask for damages for your having broken into their possession, and invaded their quiet possession. That does not bring up the question of title. I think this is clearly a case of *quare clausum fregit*, and in actions of that kind the title does not enter."

Therefore the exceptions raising this question cannot be sustained.

[2] We proceed to the consideration of those exceptions assigning error on the part of the circuit judge in refusing to allow the defendant to introduce in evidence the charter of the Wilmington & Manchester Railway Company, its predecessor.

In ruling upon this question his honor, the presiding judge, used the following language:

"Now for the defendant to say, 'I went in on that property and I was justified by showing I had a right to do it under our statutes, under any charter, or under a grant from somebody else,' that is, an affirmative defense that he must set up in his answer. I can't see it any other way, and consequently I am obliged to rule this testimony out."

In *Hill v. Bailey*, 8 Mo. App. 85, the court, in holding that a general denial of the plaintiff's title will admit evidence of adverse possession, said:

"The plaintiffs insist that the finding and judgment were erroneous, because the answer did not set up the statute in defense. When the statute is relied on as a bar to the remedy merely, it must be specially pleaded. The rule is ancient, and needs no citation of authorities to sustain it. But where the title to real estate is in question, the operation of the statute is found to have a higher range. It is capable of conferring an absolute title. Hence it has long been held that a general denial of the plaintiff's title will suffice for the admission of evidence of adverse possession for the statutory period; because this will not merely bar the remedy, but may establish a title in the defendant which will conclusively negative any ownership in the plaintiff. In other words, it sustains and verifies the denial of the plaintiff's title. *Nelson v. Broadhack*, 44 Mo. 596. The rule is not confined to actions of ejectment. The reasoning upon which it is founded sanctions its application to any case wherein the title to land is in dispute. There was, therefore, no error in admitting this defense under the general denial."

The foregoing is quoted with approval in *Sutton v. Clark*, 59 S. C. 440, 38 S. E. 150, 82 Am. St. Rep. 848.

If the defendant had pleaded a bar to the plaintiff's action, testimony offered by him

would have been admissible to prove it, but not under a general denial. It, however, was offered for the purpose of establishing the right of the defendant to the possession of the land for corporate purposes, and to disprove the allegations and testimony of the plaintiff, to the effect that he was in peaceful and rightful possession of the lot in question.

The exceptions raising this question are sustained. All other exceptions were dependent upon the questions which we have considered.

Reversed and remanded for new trial.

WATTS, FRASER, and COTHRAN, JJ., concur.

(117 S. C. 240)

CUNNINGHAM v. ATLANTIC COAST LUMBER CORPORATION et al. (No. 10724.)

(Supreme Court of South Carolina. Oct. 10, 1921.)

1. Logs and logging §3(11)—Grantor of timber rights held to acquiesce in fixing reasonable time for removal of timber.

Where a contract gave a lumber company 10 years from the beginning of operations in which to cut and remove the timber, and the owner of the land permitted the lumber company to enter and remove timber more than 10 years after the date of the contract, the owner, by so doing, acquiesced in fixing that time as a reasonable time in which to commence to cut and remove the timber.

2. Logs and logging §3(11)—Timber contract construed as to time of expiration.

Where a contract provided that a lumber company should have 10 years, beginning from the time of the beginning of the cutting and removing of the timber, in which to cut and remove it, and the company commenced operations 11 years after the date of the contract with the landowner's acquiescence, the company had, as a matter of law, 10 years from such commencement of operations in which to cut and remove the timber.

3. Logs and logging §3(11)—Application for extension of time not a waiver of rights under timber contract.

Where a contract for cutting and removing timber provided for an extension on payment of interest, that the company operating under the contract endeavored to procure an extension of time held not a waiver of its rights under the contract.

Watts, J., dissenting.

Appeal from Common Pleas Circuit Court of Williamsburg County; James E. Peurifoy, Judge.

Suit by J. S. Cunningham against the Atlantic Coast Lumber Corporation and another for an injunction and for damages. Judg-

ment for defendants on the report of a special referee, and plaintiff appeals. Affirmed.

The report of the special referee, the exceptions thereto, and the order were as follows:

Report of Special Referee.

On the 26th day of August, 1899, the plaintiff, in consideration of \$750, conveyed to Atlantic Coast Lumber Company all the timber of every kind and description, both standing and fallen, 12 inches stump diameter and upwards, 12 inches from the ground at the time of cutting, on a tract of 919 acres of land in Williamsburg county, in said state, fully described in the deed, with a certain reservation not here involved.

Along with the sale, there was a grant that the purchaser and its successors and assigns should have 10 years, beginning from the time of the beginning of the cutting and removing of the timber, in which to cut and remove it, and, if not then removed, additional time should be had, upon paying 7 per cent. per annum on the purchase price.

Atlantic Coast Lumber Corporation, one of the defendants, afterwards acquired the timber and rights under this deed, and on the 1st day of November, 1910, entered upon the premises and cut at least half, if not more, of the timber.

On the 13th day of September, 1920, the said defendant again entered upon the premises and sought to cut timber from the land which had not been cut over. This was done over the protest of the plaintiff, and after the defendant had endeavored to procure an extension of time from the plaintiff, but had failed in so doing.

This suit was brought to enjoin the defendant from cutting and removing any more of the timber, and for damages. The cause was referred to me, by consent, to take the testimony and determine all of the issues. At the hearing before me a statement of the plaintiff's testimony was submitted in the shape of an affidavit, and was made subject to objections noted. Oral testimony was also offered.

The plaintiff bases his right to prevent the cutting of the timber, in substance, upon the ground that, if the defendant be permitted to cut and take away the timber at this time, it would get a large number of trees which had grown to the stated size after the time of making the contract, and not contemplated nor included in the estimate of the parties, thereby stripping the lands of large quantities of timber for which no consideration had been paid, that a reasonable time had elapsed for cutting and removing the timber, and that the time had long since expired for the exercise of the rights granted, and that it would be inequitable at this time to permit the defendant to re-enter and cut and remove the timber.

A number of cases have recently been passed upon by our courts, but the principal point involved here has never been passed upon.

The cases already decided were brought in some instances by the owners of the land for the purpose of declaring the rights of the purchasers forfeited, and in other instances were brought by the purchasers of the timber

to prevent trespasses by the owners of the land, raising practically the same issues; the objects of the suits in other cases being to ascertain and protect the rights of the parties bringing the suits.

I will not undertake to review and discuss these cases at length.

Commencing with *Flagler v. Lumber Corporation*, 89 S. C. 328, 346, 71 S. E. 855, a well-defined principle is announced and maintained. Quoting from *Flagler v. Lumber Corporation*: "Suffice it to say that we are of opinion that, both by the inherent reason of the thing, as well as by authority, that the true rule is that wherever it is apparent in a contract that the parties had in view some time for the commencement of the removal of the timber, which intent was not embodied in the terms of the contract, that the law will presume and will enforce that such commencement of the removal of the timber shall be within a reasonable time from the date of the contract." This principle is reaffirmed in *McClary v. Lumber Corporation*, 90 S. C. at page 163, 72 S. E. 145.

The court was asked to review these decisions in *Atlantic Coast Lumber Corporation* (one of the defendants here) *v. Litchfield*, 90 S. C. 368, 73 S. E. 182, 728, but declined to disturb the rulings in the other cases. The same doctrine was reaffirmed and enforced in *Minshew v. Lumber Corporation*, 98 S. C. 8, 81 S. E. 1027, and in *Gray v. Lumber Co.*, 102 S. C. 298, 86 S. E. 640.

The difficulty in deciding this case arises from the fact that here a part of the timber has been cut and removed, and then a period of nearly 10 years has elapsed from the time of the commencing of the operation, while in the other cases this state of facts did not exist.

Mr. Justice Watts made a thorough review of the cases in passing upon the issues raised in the *Minshew Case* and used this language (98 S. C. at page 22, 81 S. E. 1032): "Under contracts of this character, the purchaser has only the right to have a reasonable time to get the fruits of his purchase. He has no right to enjoy by indefinite extension what would practically amount to a perpetuity and deprive the owner of enjoyment of his property. What is a 'reasonable time' depends upon the circumstances of each case, and is a question of fact, and no particular rule has yet been laid down to govern cases."

The contention of the plaintiff is, in substance, that the defendant should have commenced and completed the removal of the timber within a reasonable time, in order to get the fruits of his purchase, and the question in my mind has been whether it was the duty of the defendant, although not so provided in the contract, that it should go on and continuously cut until it had executed its contract, after having once commenced to cut the timber. Along with the statement in the *Minshew Case*, Mr. Justice Watts also says: "That the grantee must begin the removal of the timber within a reasonable time and it follows as a natural, logical, and irresistible sequence that, upon the failure to commence the removal within a reasonable time, the estate of interest granted is terminated and the interest granted reverts to the grantor or his privies."

Mr. Justice Hydrick in writing the opinion of the court in *Gray v. Lumber Co.*, 102 S. C. at page 294, 86 S. E. 641, says: "The circuit court found that the failure to commence to cut for nearly 15 years was unreasonable, but, leaning no doubt to the principle of equity against forfeiture, held that the court should fix the time within which the cutting should have commenced just as if it had in fact been commenced, and thus put in operation the running of the first definite period of 10 years. But the court must enforce the contract as made and performed by the parties and declare their rights accordingly, and not as they should have made it, or exercised their rights under it. The court cannot, therefore, fix the time when the cutting should have begun, and add to that the 10 years during which it might have been continued, if it had been begun, and, in addition to that, allow the defendant the option of extending it 10 years longer by the payment of interest."

Had the contract simply been to the effect that the purchaser of the timber should commence to cut it within 10 years, then there would be less difficulty in deciding the question, but the terms of the contract are explicit and provide that the purchaser shall have 10 years after the time of commencing to cut the timber. To hold otherwise would be to change the terms of the contract made by the parties.

There are two things that appear to be plain as conclusions from the decisions referred to. The one is that the purchaser must commence to cut the timber within a reasonable time, and the other is that, if this be done, it will be in operation and running for 10 years' time from that date in which to cut and remove the timber, and the latter conclusion is simply following the terms of the contract.

In this case, I think it is fair to assume that the plaintiff was not advised of the plans of the purchaser or of the extent of its holding at that time, or of its contemplated purpose of adding to these holdings immense quantities of timber. I think it is fair to assume also that at the time a part of the timber was cut and removed from his land the rights of parties under contracts of this kind were little understood and very uncertain as to their effect; for it was soon after that time that litigation commenced concerning the consideration of contracts made practically at the same time as the making of this contract.

The testimony in this case shows that the defendant had large connected timber interests covering a great many tracts of land, and that its plan of operation was to put a railroad track alongside of these holdings and cut the timber from each of them as it went along, cutting, as was testified to in this case, some distance into the tracts of land and leaving the remainder of the timber to be reached by a track running on the other side of the holdings, and thus removing the remainder of the timber, as was sought to be done in this case.

At the time of the making of this contract these lands were not known to the plaintiff, but it is fair to assume that after the purchase of large bodies of timber by the defendant and extensive operations on other tracts adjacent to or near by the defendant was charged with the extent of the holdings of the defendant and

its mode of operation, and most likely had constructive notice from the records although such does not appear in this record.

The statement of the plaintiff was read in lieu of his appearance and testifying orally, and certain objections were made to his testimony. I find that these objections should be sustained, as they state conclusions on his part and in contradiction of his contract; but if the objections were not sustained, and were the testimony to remain as competent, it would not be hurtful to the defendant, for the reason that, if the plaintiff's understanding were to be admitted as testimony, then it would appear that, after understanding that the timber was to be cut and removed before the time that they actually commenced to cut, he waived his right to insist upon his construction of it, by permitting the defendant afterwards to exercise its rights after, as a matter of fact, more than 10 years had elapsed before the cutting was commenced.

I therefore find, and conclude, as matters of fact:

[1] (1) That the plaintiff permitted the defendant lumber corporation to enter upon the land in question and cut and remove a part of the timber under this contract more than 10 years after its date, and thereby acquiesced in fixing that time as a reasonable time in which to commence to cut and remove the timber.

[2] (2) As a matter of law, that the defendant lumber corporation had 10 years from the 1st day of November, 1910, in which to cut and remove the timber from the land not already cut over, and that the injunction should be dissolved and the complaint dismissed.

[3] (3) That under this contract the defendant lumber corporation had until the 1st day of November, 1920, in which to cut and remove the timber, and that it did not waive its right thereto by endeavoring to procure an extension beyond the time.

It has the same number of days of which it was deprived, in which to hereafter cut and remove the timber, but it must exercise its rights with due diligence after the final determination of this case, and what is due diligence must depend on the situation of the defendant at that time.

All of which is respectfully submitted.

Exceptions to Report of Referee.

To Messrs. Kelley & Hinds, Attorneys for the Defendant: Take notice that the plaintiff herein excepts to the report of referee in the above-stated case, dated the 14th day of February, 1921, on the following grounds, to wit:

I. Because the referee erred in sustaining defendant's objections to plaintiff's testimony as to his understanding at the time the timber contract in question was entered into as to when the timber would be cut and removed, and as to the right of the defendant lumber company to once cut a large portion of the timber, and then some 10 years later re-enter and cut the remainder of the same, in that anything which took place at the time the contract was entered into that goes to show the intention of the parties as to the time of cutting and removal would be competent as evidence.

II. Because the referee erred in sustaining defendant's objections to plaintiff's testimony as to his understanding at the time the contract was entered into as to what timber he was selling and the lumber company was buying, in that the circumstances surrounding the parties at the time the contract was made can be stated, and any separate agreement or separate understanding apart and not embodied in the written contract, and in no sense a part of the written contract entered into, is competent evidence.

III. Because the referee erred in finding and holding as a matter of law that the defendant lumber company had 10 years from November 1, 1910, in which to cut and remove the timber from the lands not already cut over, and that the injunction should be dissolved and the complaint be dismissed in that: (a) This gives the defendant lumber company an unreasonable time in which to cut and remove the said timber without paying anything further for it; (b) in that the defendant lumber company will get timber which has since the date of the contract grown to be of the size mentioned in the contract as being sold for which he has paid nothing, and was not understood to be sold at the time of making the contract; (c) this would give the defendant lumber company what practically amounts to a perpetuity, as it could, just prior to the termination of the 10 years provided for, pay 7 per cent. on the purchase price of the timber and have such additional time as it desires to cut same, thereby making a further extension of 20 years or more if the same is desired; (d) in that under the laws of this state a lumber company under similar contracts is given only a reasonable time to get the fruits of its purchase and has no right to enjoy the indefinite extension what would amount to a perpetuity, and thereby deprive the owner of the enjoyment of his property.

IV. Because the referee erred in finding that the defendant has the same number of days of which it was deprived in which to hereinafter cut and remove the timber, in that a reasonable time within which to cut and remove the same had expired long before the present entry and the date of the issuance of the injunction herein; therefore the defendant's entry was unlawful, and it had no legal right to go upon the premises when the said injunction was issued.

V. Because the referee erred in finding and holding that, under a proper construction of the timber deed in question, the lumber company would have 10 years from its entry, even though that was made more than 11 years after the date of the deed, in that the courts have held that under similar deeds the lumber company has only a reasonable time to get the fruits of its purchase, and 21 years would be an unreasonable time to give it to cut the timber in this case.

VI. Because the referee erred in finding that, because the defendant company was permitted to go upon the premises and cut the timber in the first instance, 1910, that fixed a reasonable time, and that it would have 10 years from the date of that entry in which to remove the remainder of the timber, in that, under a proper construction of the deed, the defendant

would have only a reasonable time within which to cut and remove same regardless of the date of its first entry, and that, merely because the plaintiff permitted it to cut in 1910, that would fix a time for the beginning of the 10-year period mentioned in the contract, because more than a reasonable time would expire before the end of the 10-year period.

VII. Because the referee erred in finding and holding, in substance, that from August 26, 1899, to November 1, 1920, was a reasonable time within which to cut and remove the timber in question, in that this finding is not supported by the evidence.

VIII. Because the findings of fact and conclusions of law of the referee are not supported by the testimony and the law of the case.

Order.

This matter was called up for a hearing before me in the court of common pleas for Williamsburg county on March 4, 1921, upon the exceptions from the report of the special referee. I did not then have sufficient time to hear argument of counsel upon the exceptions, and it was agreed by and between the attorneys for both parties that the matter should be heard and disposed of at chambers in Manning, S. C. Pursuant to that agreement, I heard argument of counsel for plaintiff and defendants at Manning, S. C., on the 17th day of March, 1921, and, after hearing argument of counsel and taking the matter into consideration, I have reached the conclusion that the report of the special referee herein is correct.

It is therefore ordered, adjudged, and decreed that the said exceptions to the said report of the special referee herein be, and the same hereby are, overruled.

It is further ordered, adjudged, and decreed that the said report of the said special referee herein be, and the same hereby is, in all respects ratified and confirmed and made the judgment of this court.

It is further ordered, adjudged, and decreed that the injunction heretofore issued herein by his honor Judge I. W. Bowman, and dated September 21, 1920, be, and the same hereby is, dissolved.

It is further ordered, adjudged, and decreed that the complaint herein be, and the same hereby is, dismissed.

It is further ordered, adjudged, and decreed that the Atlantic Coast Lumber Corporation has the same number of days of which it was deprived in which to hereafter cut and remove the timber owned by it and remaining uncut upon the tract of land described in the complaint herein.

J. D. O'Bryan, of Kingstree, for appellant.
Kelley & Hinds, of Kingstree, for respondents.

GARY, C. J. For the reasons therein assigned, the judgment of the circuit court is affirmed.

FRASER and COTHRAN, JJ., concur.
WATTS, J., dissenting.

(117 S. C. 461)

SIMS et al. v. CAMP CREEK SCHOOL DIST. No. 15 of LANCASTER COUNTY. (No. 10728.)

(Supreme Court of South Carolina. Oct. 10, 1921.)

1. Reformation of Instruments ¶13(4)—Deed to school district properly reformed by adding forfeiture clause.

Where a deed to a school district recited that the land was conveyed for the purpose of erecting a schoolhouse for white children, but it appeared that the district abandoned the school and threatened to sell the land, and that the intention of the parties was that in such case the land should revert, but that a clause to that effect was omitted through mutual mistake, *held* that reformation of the deed by adding such a clause was proper.

2. Reformation of Instruments ¶8—Deed for school purposes held not voluntary.

As respects the right to reformation, a deed of land to a school district for the purpose of erecting a schoolhouse for white children was not voluntary, where grantor would secure a school on his land for the benefit of his own family, his tenants and his neighbors, thus enhancing the value of his land.

Appeal from Common Pleas Circuit Court of Lancaster County; Edward McIver, Judge.

Action by S. Agnes Sims and others against Camp Creek School District No. 15 of Lancaster County. Decree for plaintiffs and defendant appeals. Affirmed.

The decree of the court below was as follows:

The plaintiffs, as the only heirs at law of J. Bart Sims, deceased, bring this action to reform a deed executed by him to two of the trustees of the defendant on July 29, 1907. The material allegations of the complaint are: That this deed for 1½ acres of land was made by Sims to the school district for the purpose of erecting thereon the schoolhouse for the benefit of the white children of that district, which condition was sufficiently expressed in the deed in the following language: "This land is conveyed for the purpose of erecting thereon a public schoolhouse for white children for the benefit of this school district situate in Gills Creek township." But that it was also agreed between the grantor and grantees that if said district ceased to use said land for the purpose of maintaining thereon a school for white children the land and any buildings thereon should revert to the grantor or his estate, and that this condition was left out of the deed by the scrivener, he and the contracting parties being mutually mistaken in thinking that the language used was sufficient, inasmuch as it specified the use for which the property was conveyed, and that it could not be used for any other purpose than that specifically mentioned. In other words, that the grantor, grantee, and scrivener were all laymen, and

(193 S.E.)

did not know that a forfeiting clause was necessary to revert the property to Sims in the event it should be abandoned for school purposes. Another clause of the deed is, "But if said schoolhouse is not erected within the next three years from date then this deed shall be null and void and title to said land shall remain in said Sims and his heirs." The complaint said further that a schoolhouse was erected on said land in 1911, a public school taught therein until the autumn of 1915, when the defendant abandoned said school and threatened to sell the land and schoolhouse in violation of the rights of plaintiffs. This action was brought in March, 1916, following a consent demurrer to a complaint in a case between the same parties, asking that the property be declared forfeited on the terms of the deed as it then stood, unless the defendant should continue the school. This action was brought within a few days after the demurrer was consented to in the first case. That demurrer was that the complaint did not state facts sufficient to constitute a cause of action, in that the deed sued on did not contain a forfeiting clause in the event the property was abandoned for school purposes, but on its face showed the defendant to be the owner in fee.

The defendant admits the execution of the deed, admits its abandonment for school purposes, admits its intention to sell the entire property and use the proceeds thereof elsewhere, contends that it is the owner in fee of the property, and denies that there were any stipulations or agreements between the grantor and grantees than those mentioned in the deed. It also sets up various special defenses, viz. ultra vires, in that the trustees were without authority to accept a deed with the limitations set out in the complaint; former judgment, in that the demurrer to the first complaint was an adjudication against the plaintiffs of the issues here; statute of limitation, in that the cause of action did not accrue within six years before the commencement of the action; the statute of frauds, in that no writing other than the deed was signed by either party, stipulating any agreement other than those in the deed; that the complaint does not state mutual mistake as to the facts of the transaction or as to the terms of the deed, and therefore states no equity; and, last, that in the year 1915 the school trustees decided to abandon this schoolhouse and erect a larger one elsewhere in the district as a consolidated school. The plaintiff moved to amend the complaint by more specifically alleging mutual mistake, conforming to the facts proved in certain minor particulars, and striking out a certain clause, to wit, "And especially agreeing to maintain a school thereon," from paragraph 6 and also moved to strike out from the answer the entire seventh defense on the ground that it is redundant and constitutes no defense. A separate order defines the amendment to the complaint. The motion to strike the seventh defense from the answer is allowed. What the trustees did in 1915 could have no bearing on the agreement between the grantor and grantee in 1907, when the deed was made.

The special defenses herein enumerated are overruled. I do not think any of them go to the real issues in the case, or in any event can

affect their decision. What are the issues? What is the law governing their decision? The issues are: Did J. Bart Sims, on July 29, 1907, before and when he signed the deed, say that he was conveying the land for the purpose of the school authorities erecting a schoolhouse thereon for white children, but that if said authorities should cease to use said land for the purpose of maintaining thereon a school for white children the lands and any buildings thereon should revert to him, or in the event of his death to his estate? Did he say that to the scrivener that drew the deed; did he say it to the representative of the defendant there, and did they all believe that the language of the deed expressed the terms of his grant? Without reciting the testimony I hold that it overwhelmingly proves that Sims made these statements, that the scrivener heard them, that the party de jure and de facto, representing a school district, heard them, and subsequently told the grantor's wife, when she renounced her dower, that the deed fully covered the condition, and that it was the intention to put into the deed the terms necessary to state legally these conditions, and that it was a mistake of Sims, of the scrivener he was not a lawyer and of the person Long, there publicly recognized as representing the district, that they were not put there.

Sims represented himself, who represented the school district? Having accepted the benefit of what he did, can the district repudiate any of his acts, even if detrimental, and retain the benefit secured by him. The plaintiff alleges that M. J. Long, was a trustee of the school district, every witness for the plaintiff swears that he was, and that he was everywhere recognized to be such, and Hallman says that, he (Long) asked him to see Sims about getting the land for a school; that Sims told him how he would grant the land; that he told Long, and Long agreed to all conditions prescribed by Sims. Long was present when the land was surveyed; he was present when the deed was drawn; he took charge of the deed for the district; if he did not, who did?

The defendant went into possession of the land, the deed was recorded; the defendant brings it into court. If Long did not represent the school district, who did? The deed was made to W. T. Morris and L. N. Montgomery as trustees. Only two are mentioned; the law requires three. Plaintiff suggests that Long's name was left out because he as a notary intended taking Mrs. Sims' renunciation of dower. Be that as it may, the witnesses testify that he was publicly acknowledged as trustee; that he negotiated the transaction as such. The records in the office of the county superintendent of education show that he was trustee in the first half of the year 1907; that he was again trustee in 1908; that he signed pay vouchers in 1907; that the district paid for surveying the land, thus showing ratification of his act in having it surveyed. It is true that the book of trustees, in the office of the county superintendent of education, shows that Sims was appointed trustee on July 1, 1907, but A. M. L. Hallman subsequently a trustee says that Sims refused to act or that he thinks so. I am forced to the conclusion that Sims refused to serve; that Long, the trustee appearing on the books

in 1907, simply held over, and was again formally appointed in 1908. If Sims had served, his term would have been three years; Long's name again appears on the books in 1908. This fact, with Hallman's testimony, indicates that Sims never served at all, but that Long continued to act. The testimony is that neither Morris or Montgomery were present when the deed was drawn; Long was. Montgomery says Sims never met the board of trustees nor acted as one. The law says that they shall at once meet and organize their board. I am therefore of the opinion that Long was *de jure* or *de facto* a trustee; that he represented the school district; that he accepted the deed, and that he represented the school district in so doing; and that he and Sims were mutually mistaken in believing that the terms of the deed sufficiently expressed all the conditions of Sims' grant. Montgomery says he never saw the deed until after this action was brought. At the time the schoolhouse was built in 1911, Sims was dead. The trustees were L. N. Montgomery and W. T. Morris, the two named in the deed and A. M. Hallman, a witness to the deed, and one of the witnesses testifying to Sims' statement when the deed was drawn. Montgomery testified on cross-examination: (a) That he understood before and at the time the schoolhouse was built that Sims had given the land for school purposes for white children only; and (b) that from reading from the deed he would so construe it, thus showing his understanding of the terms of the grant, and that he would have construed the deed just as Sims and Long did, thus also showing that if he had been present when it was drawn he would have also been mistaken as to the legal import of its terms. Hallman, the other building trustee, said that he had personal knowledge of the terms of the grant; that he contributed heavily to the building of the house under such knowledge, so that we see that two of the building trustees personally knew of the terms of the grant before the schoolhouse was built in 1911. The defendant cannot therefore claim that it did not have actual knowledge of what Sims had granted it when it built the house, and until that time it had done no act affecting it in any way. What was in the deed did not influence Montgomery when the house was built; he had never seen it, Hallman knew what was in it, and believed it expressed the agreement between Sims and Long. Morris is now dead. Had he seen the deed? Long is also dead, but witnesses tell us what he said.

[1] Having concluded that Long represented the district, and that he and Sims were mutually mistaken in believing that the deed expressed the agreement between them, ought the deed to be reformed? I so hold. The law is clear as laid down in the following authorities: *Byrd v. O'Neal*, 106 S. C. 348, 91 S. E. 293; *Cook v. Knight*, 106 S. C. 810, 91 S. E. 312; *Hutchison v. Fuller*, 67 S. C. 284, 45 S. E. 164; *Forrester v. Moon*, 100 S. C. 157, 84 S. E. 532; *Austin v. Hunter*, 85 S. C. 472, 67 S. E. 734; *Brock v. O'Dell*, 44 S. C. 22, 21 S. E. 976; *Sullivan v. Moore*, 92 S. C. 307, 75 S. E. 497; *Hopkins v. Mazyck*, 1 Hill, Eq. 250; *Desell's Ex'rs v. Casey*, 3 Desaus. 34; *Amer. & Eng. Enc. Law*, 1st Ed. vol. 15, 638, and 639, and cases cited in

notes; 2 Pom. Eq. 845; Pom. Eq. Jur. § 1376; *Amer. & Eng. Enc. Law* (1st Ed.) vol. 20, 713, and cases cited 714-716, and 770; *Railway v. Jones*, 73 Miss. 110, 19 South. 105, 55 Am. St. Rep. 492; *Lawrence v. Beaubien*, 2 Bailey, 623, 23 Am. Dec. 155; *Lowndes v. Chisolm*, 2 McCord, Eq. 455, 16 Am. Dec. 667; *Cunningham v. Cunningham*, 20 S. C. 319. The evidence is competent to reform the deed. *Marshall v. Railway*, 73 S. C. 241, 53 S. E. 417; *Earle v. Owings*, 72 S. C. 362, 364, 51 S. E. 980; *Whitman v. Corley*, 72 S. C. 410, 52 S. E. 49.

[2] The deed here is not a voluntary one. There were certain stipulations and agreements moving Sims to its execution; among them the securing of a school on his land for the benefit of his own family, his tenants and his neighbors, thus enhancing the value of his land and benefiting him in various other ways. In the absence of these benefits, it is inconceivable that he would have carved out 1¼ acres of his most valuable land on the public highway, his most desirable house seat, and given it to the school district so that it could abandon the school at its pleasure and sell the land to any one for any purpose the purchaser might see fit to use it. He would not knowingly have assumed the risk of having a gin or a mill or a negro dwelling placed upon his farm in such a prominent and desirable location.

I am of the opinion that the plaintiffs are entitled to the relief demanded in the complaint as to the reformation of the deed. It is therefore on motion of J. Harry Hines, plaintiffs' attorney, ordered, adjudged, and decreed that the said deed to wit, that executed by J. Bart Sims to W. T. Morris and L. N. Montgomery, trustees, on July 29, 1907, and recorded in Deed Book Q, p. 117, in the office of R. M. C. for Lancaster county, be, and the same is hereby, reformed by adding after the clause therein, "This land is conveyed for the purpose of erecting thereon a public schoolhouse for white children for the benefit of this school district situated in Gills Creek township," the following additional clause: "Provided that if said school district shall ever cease to use said land for the purpose of maintaining thereon a public school for white children in said school district, then and in such event the title to said land and all buildings thereon shall thereby immediately revert to me or in the event of my death, to my estate"—and that there be added to the habendum clause of said deed the following: "For the uses and purposes herein mentioned and no other." Ordered, further, that clerk do enter upon the record of the said deed the judgment of this court that it is reformed as herein ordered.

Williams, Williams & Stewart and Jones & Jones, all of Lancaster, for appellant.

Harry Hines and John T. Green, both of Lancaster, for respondents.

COTHRAN, J. This court is entirely satisfied with the conclusions of the circuit judge, and for the reasons assigned by him the decree is affirmed.

GARY, O. J., and WATTS and FRASER, JJ., concur.

(117 S. C. 251)

FAUST v. RICHLAND COUNTY.**KELLY v. SAME. (No. 10752.)**

(Supreme Court of South Carolina. Nov. 11, 1921.)

Eminent domain — 293(1)—Highways — 120(4)—Complaint held to state cause of action for damages against county and for taking of private property for public use.

Complaint in action against county, alleging that defendant in repairing highway filled ditch and diverted water on plaintiff's premises, to his damage, held to set forth a cause of action for damages against the county and a good cause of action for the recovery of compensation for taking of private property for public use, under Const. art. 1, § 17.

Cothran, J., and Rice and Mauldin, Circuit Judges, dissenting.

Appeal from Common Pleas Circuit Court of Richland County; M. S. Whaley, Judge.

Actions by J. H. Faust and Ben L. Kelly, respectively, against Richland County. Judgments for plaintiffs, and defendant appeals. Affirmed.

The complaint alleged, inter alia:

"(2) That a certain highway, known as the Two-Notch or Camden road, and leading from Columbia, S. C., to and beyond Camden, S. C., is one of the highways under the management, control, and supervision of the defendant, it being the defendant's duty to keep the said highway in proper and suitable repair.

"(3) That the plaintiff herein did, at the time hereinafter mentioned, own, and now owns, a lot of about three acres of land, upon which his dwelling stands, situate on the right-hand side of the said Two-Notch road about a mile northeast of the city of Columbia, plaintiff's land and his dwelling being situated on the side of an elevation or hill which slopes toward the east, so that all the waters accumulating from rainfall upon a considerable area of land, lying west of plaintiff's lot, flows upon and over the plaintiff's property, first, however, crossing or flowing under the highway hereinabove mentioned.

"(4) That, previous to the making of the repairs on said highway, hereinafter referred to, there extended along both sides of the said highway which passes in front of the plaintiff's premises a drainage ditch, into which the rainwater which fell on lands in that immediate vicinity was caught and conveyed to another ditch which intersects the said highway at right angles, and which passes through and over the plaintiff's premises, and by means of which the said water was conveyed away, without doing injury to plaintiff's premises.

"(5) That on or about the 1st day of December, 1920, the defendant herein, through its servants and agents, while engaged in making repairs to said highway, carelessly and negligently, and in utter disregard of the rights of the plaintiff, filled in the said drainage ditches, which ran along the side of the road in front of plaintiff's house, and elevated the roadbed to

such an extent and in such a way as to cause the rain which falls upon the road, and lots adjacent thereto on the southern side of the plaintiff's premises, to accumulate in great volume and to flow with great force across plaintiff's yard, under his house and through his premises, said water carrying with it great quantities of trash, leaves, litter, and such filth as accumulates upon a public road, and depositing the same on plaintiff's premises; and the plaintiff alleges that the said rainwater, which has been caused to flow through his premises as aforesaid, has washed great holes in his garden and yard, and has undermined the pillars of his house, and has caused him great damage to repair the same.

"(6) And the plaintiff further alleges that the defendant herein, by elevating the roadbed in front of the plaintiff's premises, has built a dam which prevents the natural flow of the rainwater that accumulates on the land adjacent to plaintiff's premises, and which ponds the same up in front of plaintiff's premises, where the said rainwater is accumulated in great volumes, and from which it flows in great volume and with great force, through a ditch and culvert leading through the said highway and through the plaintiff's premises; and the plaintiff alleges that, by reason of its carelessness and negligence in elevating the said roadbed and ponding the water in front of the plaintiff's premises, and causing the same to flow in great and unnatural volume through the plaintiff's premises, the defendant has washed away a large part of the top soil of the plaintiff's garden, and has washed great holes therein and rendered the same unfit for use."

W. O. McLain, of Columbia, for appellant.
J. H. Hammond and J. S. Verner, both of Columbia, for respondents.

EUGENE B. GARY, C. J. The only question properly and specifically raised is by the second exception. The cases of *Lawton v. Railway*, 61 S. C. 548, 39 S. E. 752, *Brandenberg v. Zeigler*, 62 S. C. 18, 39 S. E. 790, 55 L. R. A. 414, 89 Am. St. Rep. 887, *Cain v. Railway*, 62 S. C. 25,¹ and *Hopkins v. Clemson College*, 221 U. S. 636, 81 Sup. Ct. 654, 55 L. Ed. 890, 35 L. R. A. (N. S.) 243, clearly show that if an individual, instead of the defendant, had flooded the lands of the plaintiff in the manner alleged in paragraph 6 of the complaint, he would have subjected himself to an action for damages.

But there is even a stronger reason why the demurrer was properly overruled, to wit: The overflowing of the plaintiff's lands in the manner alleged in the complaint was in violation of the constitutional provisions prohibiting the taking of property without due process of law, and likewise without just compensation being first made.

In *Hopkins v. Clemson College*, 221 U. S. 636, 31 Sup. Ct. 654, 55 L. Ed. 890, 35 L. R. A. (N. S.) 243, the plaintiff sued the defendant for damages to his farm resulting from

the college having built a dyke, which forced the waters of the Seneca river across his land, whereby the soil was washed away and the land rendered unfit for agricultural purposes.

The Supreme Court of the state dismissed the complaint, on the ground that the state was a necessary party, and had not consented to be sued. Thereupon the plaintiff sued out a writ of error to the United States Supreme Court. In that case the United States Supreme Court said:

"Neither a state nor an individual can confer upon an agent authority to commit a tort, so as to excuse the perpetrator. In such cases the law of agency has no application—the wrongdoer is treated as a principal and individually liable for the damages inflicted and subject to injunction against the commission of acts causing irreparable injury. * * *

"Neither public corporations nor political subdivisions are clothed with that immunity from suit which belongs to the state alone by virtue of its sovereignty. In *Lincoln County v. Luning*, 133 U. S. 520, 530, the court said that: 'While the county is territorially a part of the state, yet politically it is also a corporation, created by and with such powers as are given to it by the state. In this respect it is a part of the state only in that remote sense in which any city, town, or other municipal corporation may be said to be a part.' The court there held that the Eleventh Amendment was limited to those cases in which the state is the real party, or party on the record, but that counties were corporations which might be sued. * * * Undoubtedly counties, cities, townships, and similar bodies politic often have a defense which relieves them from responsibility where a private corporation would be liable. But they must at least make that defense. They cannot rely upon freedom from accountability, as could a state. * * * If the state had in so many words granted the college authority to take or damage the plaintiff's property, for its corporate advantage without compensation, the Constitution would have substituted liability for the attempted exemption. But the state of South Carolina passed no such act, and attempted to grant no such immunity from suit, as is claimed by the college. * * *

"But an examination of the cases cited, in any respect similar to this, will show that they involve questions of liability in a suit, rather than immunity from suit. Most of them were actions for torts committed, not by the public corporation itself, but by officers of the law. * * * That general rule is of force in South Carolina, as appears from *Gibbes v. Beaufort*, 20 S. C. 213, 218, cited in the opinion of the court below, where it was said that 'a municipal corporation, instituted for the purpose of assisting the state in the conduct of local civil government, is not liable to be sued in an action of tort for nonfeasance or misfeasance of its officers, in regard to their public duties, unless expressly made so by statute.' But the plaintiff is not seeking here to hold the college liable for nonfeasance or misfeasance either of its own officers or officers of the public. This is a suit against the college itself for its own corporate act in building a dyke, whereby the

channel had been narrowed, the swift current had been diverted from the usual course across the plaintiff's farm, and, as is alleged, destroying the banks, washing away the soil, and for all practical purposes as effectually depriving him of his property as if there had been a physical taking. * * *

"For protecting the bottom land, the college, for its own corporate purposes and advantage, constructed the dyke. In so doing it was not acting in any governmental capacity. The embankment was, in law, similar to one which might have been built for private purposes by the plaintiff on the other side of the river. If he had there constructed a dyke to protect his farm, and in so doing had taken or damaged the land of the college, he could have been sued and held liable. In the same way, and on similar principles of justice and legal liability, the college is responsible to him if, for its own benefit and for protecting land which it held and used, it built a dyke which resulted in taking or damaging the plaintiff's farm. * * * These suggestions, though made in a plea to the jurisdiction, afford no reason why the college should be granted immunity from suit, when it is claimed that, in violation of the Constitution, it has taken private property for its corporate purposes without compensation. * * * And, if the facts hereafter warrant it, the college may be enjoined against further acts looking to the maintenance or reconstruction of the dyke."

The judgment of the state court was reversed. We have quoted somewhat at length from the case of *Hopkins v. Clemson College*, supra, for the reason that its authority is binding upon the courts of the several states; and it is contended that our decisions are in irreconcilable conflict.

In the cases of *Irvine v. Greenwood*, 80 S. C. 511, 72 S. E. 228, 36 L. R. A. (N. S.) 363, and *Triplett v. Columbia*, 111 S. C. 7, 96 S. E. 676, 1 A. L. R. 349, this court has cited the *Hopkins Case* with approval.

The facts in the *Triplett Case* alleged by the plaintiff were, in substance, as follows: That the defendant, through its negligence and mismanagement, permitted a large pool of stagnant water, containing large quantities of decaying matter, to remain upon one of the streets of Columbia; that the plaintiff, who resided near the said pool, was caused to contract colitis, whereby she was made sick, to her damage in an alleged amount mentioned in her complaint.

A motion was made to dismiss the complaint, and the sole question was whether the municipality was liable under section 3053 of the Code of Laws 1912. The circuit court ruled that she was not, and dismissed the complaint. On appeal to the Supreme Court the judgment of the circuit court was affirmed. In delivering the opinion of the Supreme Court, Mr. Justice Hydrick reviewed the decision in the case of *Mayrant v. Columbia*, 77 S. C. 281, 57 S. E. 857, 10 L. R. A. (N. S.) 1094, saying:

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"Though the decision in the Mayrant Case was right, it was not put upon the right ground. In the Mayrant Case the wrong was alleged to have been caused by negligence in raising the level of the street, closing up the existing surface drains, and so negligently installing drain pipes of insufficient size and fall to carry off the surface water (which had theretofore been carried off by the surface drains) that it was thrown and ponded upon plaintiff's lot. * * * If we follow our previous decisions construing section 3053, the conclusion is inevitable that the decision in the Mayrant Case was rested upon an untenable ground. It might have been rested upon * * * section 3026 of the Civil Code of 1912. The decision might have also been rested upon the principle upon which the decision of this court in Hopkins v. Clemson College, 77 S. C. 12, was reversed by the Supreme Court of the United States (221 U. S. 636), in which liability was imposed on the ground that the diversion of the waters of Seneca river upon the plaintiff's land was tantamount to a taking thereof without compensation."

He then refers to the consideration of that ground in Irvine v. Greenwood, supra. Turning to that case, we find that Mr. Justice Woods, who delivered the opinion of the Court, used this language:

"In Hopkins v. Clemson College, 77 S. C. 12, 57 S. E. 853, the question was whether Clemson College, a corporation created for a public purpose, was liable for overflowing plaintiff's land in constructing a dyke to protect the crops on the college lands from the floods in the Seneca river. This court held that the case fell within the rule laid down in Gibbes v. Beaufort, 20 S. C. 213, Dunn v. Barnwell, 43 S. C. 398, 21 S. E. 315, and the other cases decided in this state cited above, and that therefore the plaintiff could not recover. On appeal the Supreme Court of the United States reversed the judgment of this court holding that the flooding of plaintiff's land was the taking of private property without due process of law, and that the taking was by the corporation itself for corporate purposes, and not by its officers or agents. As we understand, it was on these grounds that the case was distinguished from Gibbes v. Beaufort, supra, and other like cases decided in this state. The doctrine of the decision, however, is not applicable to this case, for the reason that here there is no taking of private property by the corporation, but an injury resulting in death from the alleged failure of an employee of the municipality to perform the duties imposed on him by the municipality."

It will thus be seen that this court recognized the fact that the case of Dunn v. Barnwell, 43 S. C. 398, 21 S. E. 315, 49 Am. St. Rep. 843, and other cases announcing the same doctrine, are inapplicable to cases involving the taking of property without due process of law or just compensation being first made, and, in this respect, that they were practically overruled by the case of Hopkins v. Clemson College.

We call attention also to the fact that Mr. Justice Hydrick, in the Triplett Case, did not mention the case of Hopkins v. Clemson College as applicable to the facts in the Triplett Case, but stated that the judgment in the Mayrant Case could be sustained by the Hopkins Case, on the ground that in the Mayrant Case there was a taking of private property without compensation. The right to throw surface water upon the lands of another was involved, both in the Mayrant Case and the Triplett Case. The reason why he did not apply the same doctrine as to taking property without due process of law to both cases, was because the facts in the Mayrant Case were sufficient to constitute a cause of action against an individual, and brought the case within the doctrine announced in Brandenburg v. Zeigler, 62 S. C. 18, 39 S. E. 790, 55 L. R. A. 414, 89 Am. St. Rep. 887, while the facts in the Triplett Case were not sufficient to constitute a cause of action, even if the defendant in that case had been an individual, which is the true test, as the case of Hopkins v. Clemson College shows that, in cases involving the taking of property without due process of law, the governmental subdivisions of the state are to be regarded as if they were individuals. The case of School District v. Marion County, 114 S. C. 382, 103 S. E. 767, is sustained by the Hopkins Case.

If these were not the reasons which governed Mr. Justice Hydrick, then he was in error in stating that the judgment in the Mayrant Case was right, as otherwise, the judgment in both cases should have been the same.

Affirmed.

WATTS, J., concurs.

FRASER, J. I concur, under School District v. Marion County, 114 S. C. 382, 103 S. E. 767.

SHIPP, MEMMINGER, DEVORE, FRANK B. GARY, and PEURIFOY, Circuit Judges, concur.

MOORE, Circuit Judge (concurring). Concurring in the opinion of Associate Justice OOTHRAN that the complaints in these two cases cannot be sustained as setting forth a cause of action for damages against the county for negligent construction or repair of a highway under the provisions of section 1972 of the Civil Code, nevertheless, upon a fair consideration of the complainants' allegations in each of these cases, it is concluded that each of these complaints contains a statement of facts sufficient to constitute a cause of action for the recovery of compensation for the alleged taking of private property for public use under the statutes of this state passed in pursuance of the declaration of the state Constitution that such property shall not be

so taken without just compensation being made therefor.

In the exhaustive opinion herein pronounced by Mr. Justice COTHRAN, the common-law doctrine in force in this state as to surface water is correctly stated to the effect that such water is regarded as a common enemy which each landed proprietor may keep off his own premises by any reasonable means, even though he should thereby throw or keep it on his neighbor's land. See *Lawton v. Railway*, 61 S. C. 548, 39 S. E. 752. But the learned justice in this opinion has failed to give due consideration to the well-settled exception to or qualification of this rule clearly set forth by Justice Gary, now Chief Justice, in the case of *Touchberry v. Railway Co.*, 87 S. C. 415, 69 S. E. 877, in the holding there made, which is fully sustained by well-settled authority, that it is an actionable injury for one to collect surface water into an artificial channel, and thence cast the same in concentrated form upon adjacent lands. See *Brandenberg v. Zeigler*, 62 S. C. 18, 39 S. E. 790, 55 L. R. A. 414, 89 Am. St. Rep. 887; *Cain v. Railway*, 62 S. C. 25, 39 S. E. 792.

These cases proceed upon the principle that the owner has a property right in his lands which is invaded by the act of another in casting surface water in concentrated form upon such lands. It is therefore manifest that, if the defendant has invaded the rights of the plaintiff by so casting surface water upon the lands of the latter in concentrated form, such act would amount to the taking of the property of the plaintiff pro tanto; and such a taking being charged in the complaint to have been done by the defendant for the construction, alteration, or repair of a public highway, the defendant would thereby be taking private property for public use, for which taking just compensation must be paid as required by section 17 of article 1 of the state Constitution.

Rejecting as surplusage the averments of the complaints in the cases here at bar in so far as they charge negligence by the defendant in the construction of the highway, there still remains allegations sufficiently charging the taking of the property of the plaintiff for public use by the defendant, and a consequent liability of the defendant to make compensation therefor. It is well established in this state that such an action for compensation for the taking of private property for public use may be maintained in this state where the right to compensation is denied by the defendant. See *Cureton v. Railway*, 59 S. C. 371, 37 S. E. 914; *Railway v. Reynolds*, 69 S. C. 481, 48 S. E. 476, and cases there cited.

For these reasons, the circuit orders overruling the demurrers to these complaints should be affirmed.

SEASE, BOWMAN, and TOWNSEND, Circuit Judges, concur.

COTHRAN, J. (dissenting). These two actions were heard together upon demurrers by the defendant to the complaints. The demurrers were overruled by the county judge and from his orders the defendant has appealed. In each case the plaintiff claimed damages by reason of injury to his premises on account of the elevation of the roadbed of a highway and the filling in of parallel drains, resulting in the throwing back of surface water upon his premises.

The complaints in the two cases are practically identical; an analysis of one will apply equally to the other, as will also the determination of the legal questions involved. We adopt the trial judge's statement of the facts constituting the alleged cause of action in the case of J. H. Faust:

"Plaintiff's land and his dwelling are situated upon a hillside which slopes toward the east, so that waters accumulating from a rainfall over a considerable area to the west naturally flow over his land. Previously much of the water was caught by ditches alongside of the public road, and finally conveyed away in a ditch intersecting said road, without any injury to plaintiff's property. By elevating the roadbed and filling in the said drainage ditches, the defendant is alleged to have caused the rain-water to accumulate and be forced in great volume onto plaintiff's property, corroding the surface soil, weakening the foundations to his dwelling, and otherwise causing damage. All such results are alleged to have been due to defendant's negligence in repairing the said highway."

We adopt also his statement that the complaint concerns surface water only, and presents a case, not of draining surface water by a ditch onto the lands of a lower proprietor, "but of preventing the flow of surface water upon your own," "even if in so doing he throws it back upon a coterminus proprietor to his damage." As he declares: "We are now dealing with a case of the latter class."

The defendant demurred to the complaint in each case upon the ground that it does not state facts sufficient to constitute a cause of action; the specification will be reported.

The demurrers were heard by the Honorable M. S. Whaley, county judge, who filed an order, which will be reported, overruling the same. From this order the defendant has appealed.

Under the interpretation of the complaint placed upon it by the trial judge, to which the respondent has made no objection, and which we therefore assume to be correct and adopt, the case presented is one of a lower proprietor fighting off surface water and throwing it back upon the upper proprietor to his injury. If, under these circumstances, the defendant were a private person or corporation, and not a municipal corporation, as the trial judge holds, the case of *Baltzeger v. Ry. Co.*, 54 S. C. 245, 32 S. E. 359, 71 Am. St. Rep. 789, would be "conclusive of the

issue here against the plaintiff." that case holds that—

"No legal right of any kind can be claimed, *jure nature*, in the flow of surface water, so that neither its detention, diversion, nor repulsion is an actionable injury, even though damage ensue." "The only exception to the rule that, surface water being a common enemy, every landowner has the right to deal with it in any such manner as he may see fit, is that it is subject to the general law in regard to nuisances. * * *"

To which should be added the further exception that he may not, by artificial means, pond surface water upon his own premises, and by ditches, drains, or other channels, discharge it thus concentrated upon the lands of the lower proprietor to his injury. *Brandenburg v. Zeigler*, 62 S. C. 18, 39 S. E. 790, 55 L. R. A. 414, 89 Am. St. Rep. 887.

The doctrine declared in the *Baltzeger Case* is sustained by the following cases: *Edwards v. R. Co.*, 39 S. C. 472, 18 S. E. 58, 22 L. R. A. 246, 39 Am. St. Rep. 346; *Lawton v. Ry. Co.*, 61 S. C. 548, 39 S. E. 752; *Brandenburg v. Zeigler*, 62 S. C. 18, 39 S. E. 790, 55 L. R. A. 414, 89 Am. St. Rep. 887; *Johnson v. Ry. Co.*, 71 S. C. 241, 50 S. E. 775, 110 Am. St. Rep. 572; *Touchberry v. R. Co.*, 87 S. C. 415, 69 S. E. 877.

Notwithstanding this apparently insuperable obstacle to the plaintiff's alleged cause of action, he insists that he is entitled to recover upon either of two grounds:

(1) That the immunity referred to, which extends to every class of proprietors at common law, whether they be private individuals, private corporations, or municipal corporations, is annulled by the provisions of section 1972, vol. 1, Code of Laws A. D. 1912.

(2) That the exercise of the common-law right of a lower proprietor to detain, divert or repel surface water, for the protection of his own property, when injury results to an upper proprietor, constitutes a taking of, or damage to, his property without compensation, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, and of a similar provision in the Constitution of South Carolina.

As to the first proposition: It being the settled law of this state that surface water, in contradistinction to the waters of a natural water course, is regarded as a common enemy, *hostis humani generis*, and that a lower proprietor has the legal right to fight it back from his land, even if in so doing injury may result to the upper proprietor, it is clear that, if the plaintiff can obtain relief under section 1972, that section must be construed to have accomplished a double result: (1) To render a county liable for an injury resulting from a defect in, or the negligent repair of, a highway, etc., a liability which did not theretofore exist against a county; and (2) To render a county liable for throwing back surface water upon an

upper proprietor by means of the elevation of the roadbed, a liability which did not theretofore exist against a county or against any other class of proprietors.

The section as variously amended, which we take from the advance sheets of the Revisal of 1922, there numbered 8163, is as follows:

"Any person who shall receive bodily injury or damage in his person or property through a defect or in the negligent repair of a causeway, or bridge, or of any ferry operated by the county, may recover in an action against the county the amount of actual damage sustained by him by reason thereof: Provided, such person has not in any way brought about such injury or damage by his own act or negligently contributed thereto. If such defect in any road, causeway, or bridge, or in any ferry operated as aforesaid, existed before such injury or damage occurred, such damage shall not be recovered by the person so injured if his load exceeded the ordinary weight: Provided, further, that such county shall not be liable unless such defect was occasioned by its neglect or mismanagement: Provided, further, that if in any case brought under this section it is made to appear that before the damage occurred the supervisor or other officer or officers of such county, who is or are thereunto charged by law, had been notified in writing, by any citizen, that the highway, causeway, or bridge, or ferry operated as aforesaid, at or on which the damage occurred, was defective, or needed repair, the burden of proof as to the negligence of county officials shall not be upon the county to show, either that such defect did not in fact exist, or that it had been properly repaired, or that a reasonable time had not elapsed since such notice within which to make such repairs."

Attention is called to the fact that in the amendatory act of 1920 [31 St. at Large, p. 1021], and in this Revisal, the word "highway" has been omitted. A serious question might arise as to the effect of this omission as a repeal of the prior law. Our conclusion upon other grounds, however, renders a discussion of this question unnecessary at this time.

Section 1972 is a process in the evolution of the law. The act of which it is a reproduction was intended to provide a remedy (under certain prescribed conditions) which did not theretofore exist; to remove the immunity which a county enjoyed under the common law, from liability in damages, on account of an injury sustained by a person "through a defect in the repair of a highway."

It is very true that it was intended to create a liability in the county which did not theretofore exist, but which did exist in every tort-feasor not clothed with a governmental attribute, in other words, to place the county, so far as the particular duty of keeping highways in repair was concerned, upon the same plane of liability as that occupied by every other tort-feasor; it clearly was not

intended, in addition to this, to make a discrimination against the county and create a liability in it which did not, and does not, exist in any other lower proprietor. This is apparent from a further consideration: If the conditions were reversed and the plaintiff were throwing back surface water upon the property of the county, an upper proprietor, he would be entitled to the immunity on this account accorded to all lower proprietors. The plaintiff can therefore get no relief from this section, so far as it may be claimed to create a liability in the county, which therefore did not exist in any lower proprietor similarly situated.

But assume for the sake of argument that no such manifest injustice appears as to hold the county liable for fighting back surface water (an immunity enjoyed by every other class of proprietors, including the plaintiff, should conditions be reversed), and that the facts present a case of liability against any other proprietor for ponding surface water upon his own land and discharging it, concentrated in a ditch, upon a lower proprietor; we are of opinion that they do not present a case of liability under the Statute against a county, for the reasons: (1) That the alleged injury is not shown to have resulted from a defect in or the negligent repair of a highway; (2) that the plaintiff is not shown to have been at the time of the injury in the exercise of his right to the use of the highway as such.

As the court says in *Chick v. Newberry*, 27 S. C. 419, 8 S. E. 787:

"Prior to its adoption, the disability was general, and still remains as to all except such as are taken out by the act."

In that case it was held that a county was not liable for injuries caused by a defective flatboat on a ferry operated by the county commissioners, the court declaring:

"The act in question undertakes to enumerate the cases in which the right to sue the county is given, viz., 'for defects in the repair of a highway, causeway, or a bridge.' This enumeration, as it seems to us, excludes matters not enumerated"

—which illustrates with what strictness the statutory liability is limited. There it was conceded that the ferry connected the two termini of the highways at the river; that it was owned and controlled and operated by the county commissioners; that the flatboat was defective, and that injury resulted.

There are two sections of the Code of Laws which come under consideration in the discussion of the question: Section 1972, relating to the liability of counties; and section 3053, to the liability of cities and towns. There are some slight differences in the provisions of the two sections, but in the main the purpose is the same, and is expressed in practically the same language. Hence the

decisions concerning the one are instructive in the consideration of the other.

It will be noted that the phrase, "mismanagement of anything under the control of the corporation," occurs in section 3053, relating to cities and towns, but does not occur in section 1972, relating to counties.

It will also be noted that section 3026, prescribing the duty of a city or town in reference to the drainage of its streets, and prohibiting the turning of water upon a property owner, applies only to cities and towns, and not to counties. This is important, for the reason that in some of the cases involving section 3053 the liability of the city is sustained under section 3026, and not 3053.

There are certain principles applicable to both sections which have been thoroughly established. They are:

(1) A municipal corporation, being a governmental agency, charged with the duty of keeping its avenues of travel in proper repair, is not liable, in a civil action, for damages on account of injuries sustained in consequence of a breach of this duty on the part of the agents of the corporation, in the absence of a statute imposing such liability, and only then upon a substantial compliance with the requirements and conditions upon which such liability is predicated. *Bryant v. City Council*, 70 S. C. 137, 49 S. E. 229; *Gibbes v. Beaufort*, 20 S. C. 218; *White v. City Council*, 2 Hill, 572; *Coleman v. Chester*, 14 S. C. 290; *Black v. Columbia*, 19 S. C. 412, 45 Am. Rep. 785; *Young v. City Council*, 20 S. C. 116, 47 S. E. 827; *Dunn v. Barnwell*, 43 S. C. 398, 21 S. E. 315, 49 Am. St. Rep. 843; *Bramlett v. Laurens*, 58 S. C. 60, 36 S. E. 444.

(2) The statutes create a liability upon a municipal corporation for a breach of this duty only where the injury has resulted from a defect in or the negligent repair of said avenues of travel. *Hutchison v. Summerville*, 66 S. C. 442, 45 S. E. 8; *Irvine v. Greenwood*, 89 S. C. 511, 72 S. E. 228, 36 L. R. A. (N. S.) 363; *Creps v. Columbia*, 104 S. C. 371, 89 S. E. 316; *Burnett v. Greenville*, 106 S. C. 255, 91 S. E. 203, Ann. Cas. 1918C, 363; *Dunn v. Barnwell*, 43 S. C. 398, 21 S. E. 315, 49 Am. St. Rep. 843.

Mr. Justice Hydrick, in his dissenting opinion in the case of *School District v. Marion*, 114 S. C. 382, 103 S. E. 767, correctly declares the law to be:

"The language of the section makes it almost too plain for argument that the negligence for which the county is made liable must result in such a defect in, or defective condition of, the highway, as makes it unsafe for travel, and such has been the uniform construction of it by this court."

Acker v. Anderson, 20 S. C. 495: The plaintiff was injured in consequence of the mule that he was driving taking fright at an advertisement board upon a bridge and backing the buggy down the embankment. The

court held that the case did not fall within the statute, declaring:

"Even if the commissioners had allowed it to be placed there, it is more than doubtful whether the county could have been made liable. The only matter for which the act gives an action against the county is 'a defect in the repair of a highway, causeway or bridge.'"

Duncan v. Greenville, 71 S. C. 170, 50 S. E. 776: The leaving of a wagon on the public road so as to put travelers in peril was held under section 1972 a failure to keep the road in repair, a defect in the road. See, also, Stone v. Florence, 94 S. C. 375, 78 S. E. 23.

Moss v. Aiken, 114 S. C. 147, 103 S. E. 520: A negligent collision between a motor truck operated by an employee of the county and an automobile operated by one lawfully on the highway, and using it as such, was held within the provisions of section 1972, evidently upon the ground that the negligent interposition of the truck, in the pathway of the automobile was a defect in the highway, and obstruction of the free passage to which the operator of the automobile was entitled. The case of Burnett v. Greenville, 106 S. C. 225, 91 S. E. 203, Ann. Cas. 1918C, 363, was relied upon as decisive of the question.

In Dunn v. Barnwell, 43 S. C. 398, 21 S. E. 315, 49 Am. St. Rep. 843, the court declares:

"There is nothing whatever in the act indicating an intention on the part of the Legislature to make a municipal corporation liable for any other nonfeasance or misfeasance on its part, except such as was connected with the keeping of the streets, etc., in proper and safe repair."

(3) Those only who at the time of the injury are making use of said avenue of travel for the legitimate purposes of travel are entitled to the benefit of the statutes.

That the section was intended to cover only an injury sustained by a person who was at the time using the highway as a highway of travel is apparent from the terms of the section: An injury through a defect in the highway; an injury through the negligent repair of the highway; no liability where the load of the person injured exceeded the ordinary weight; no liability where a reasonable time had not elapsed since notice to the county officials, within which to make the repairs. There is not an expression in the section which indicates that the section was intended to cover any other injury than that sustained by one using the highway as such.

Discussing the Mayrant Case, 77 S. C. 281, 57 S. E. 857, 10 L. R. A. (N. S.) 1094, Mr. Justice Hydrick, for the court, says:

"In the Mayrant Case the wrong was alleged to have been caused by negligence in raising the level of the street, closing up the existing surface drains, and so negligently installing drain pipes of insufficient size and fail to carry off the surface water (which had thereto-

fore been carried off by the surface drains) that it was thrown and ponded upon plaintiff's lot. In this case, the negligence alleged consists in failing to drain the surface water off the street, and thereby allowing a cesspool to be created and remain in the street which caused plaintiff's sickness. In neither case was the injury caused by any defect in the street which interfered with or affected the use of it for legitimate street purposes."

Burnett v. Greenville, 106 S. C. 255, 91 S. E. 203, Ann. Cas. 1918C, 363: A collision between an automobile which was negligently allowed by the city to use a main thoroughfare as a place of practice for hill climbing, racing at great speed, and an automobile operated by one lawfully entering the street from a cross street, was held within the provisions of section 3053, which contains provisions applicable to cities and towns similar to those of section 1972. The ground of the decision was:

"That the street thus dedicated by the authorities to a hazardous use was not then reasonably safe for prime purposes;" and "these words [through a defect in any street] * * * include the keeping of a street in such physical condition that it will be reasonably safe for street purposes."

Irvine v. Greenwood, 89 S. C. 511, 72 S. E. 228, 36 L. R. A. (N. S.) 363: Allowing a chain to hang down from an electric light, charged with electricity, in easy reach of a boy playing in the street, was held within the provisions of section 3053. The ground of the decision was that such act constituted a defect in the street:

"To keep a street in repair means to keep it in such physical condition that it will be reasonably safe for street purposes. It is not enough that its surface should be safe; a street is not in repair when poles or wires or other structures are so placed in or over it as to be dangerous to those making a proper use of the street."

The court, construing the statute further, says:

"In the case of Dunn v. Barnwell, 43 S. C. 398, 21 S. E. 315, the court, construing the statute in the light of its title, held that the liability created by it was limited to misfeasance or nonfeasance connected with the keeping of 'any street, causeway, bridge or public way' in proper repair."

Creps v. Columbia, 104 S. C. 371, 89 S. E. 316: A pedestrian was injured by a fire engine belonging to the city, alleged to have been negligently operated. The act was held within the statute (section 3053) upon either ground, that the negligent operation of the fire engine constituted a defect in the street, in not keeping it "in repair and reasonably safe for street purposes," and also was the "mismanagement of anything under the control of the corporation," a clause which appears in section 3053, relating to

cities and towns, but not in 1972, relating to counties.

The question is concluded by the decision of this court in the case of *Triplett v. Columbia*, 111 S. C. 7, 96 S. E. 675, 1 A. L. R. 349 (which distinctly overrules a contrary conclusion in the case of *Mayrant v. Columbia*, 77 S. C. 281, 57 S. E. 857, 10 L. R. A. (N. S.) 1094, unless this court is prepared to hold that the case of *School District v. Marion County*, 114 S. C. 382, 103 S. E. 767, overrules the *Triplett Case*. The two cases are in direct opposition to each other; both cannot stand. The *Triplett Case* is in harmony with a long line of decisions of this court; the decision commends itself to our judgment; the other is not, and does not. The former is accordingly reaffirmed, and the latter overruled.

In the *Triplett Case*, 111 S. C. 7, 96 S. E. 675, 1 A. L. R. 349, the court held, construing section 3053, affecting cities and towns, that it was applicable only to injuries sustained by a person using the street as such through a defect in or negligent repair of the street or negligent mismanagement of something under the control of the corporation, and that it does not apply to the case of a property owner made ill by a depression in the street filled with stagnant water. This presents really a stronger case for the plaintiff than the one at bar, for the reason that there the depression in the street which caused the formation of the pool of water was a defect in the street itself, an instance of negligent repair, while here there is no such claim; in fact, here, the more perfect in construction and repair the elevated highway may be, the more efficient it becomes in throwing the water back upon the plaintiff.

The facts in that case upon which the plaintiff relied were, in brief, as follows: The city through neglect and mismanagement permitted a large pool of stagnant water, 15x25 feet, and in places 4 feet deep, filled with trash, refuse, and decaying matter, to remain in a street, which caused the illness of the plaintiff. The city demurred to the complaint upon the ground that the action was not justified by section 3053. The demurrer was heard by Circuit Judge Mendel L. Smith, who in an elaborate and convincing decree sustained the demurrer, or motion to dismiss, as it is termed. This court unanimously, with the exception of the Chief Justice, who did not sit in the case, sustained not only the conclusions, but the reasoning, of Judge Smith, and filed an opinion for the purpose only of overruling a contrary conclusion in the *Mayrant Case*, 77 S. C. 281, 57 S. E. 857, 10 L. R. A. (N. S.) 1094.

It is impossible to differentiate this case from the case at bar, unless it be determined that top soil, fruits and vegetables must be accorded a more favorable consideration than health and life.

The case of *Heape v. Berkeley*, 80 S. C. 82,

61 S. E. 203, is a stronger case for the plaintiff than the case at bar, in that the act there complained of was that of the road overseer in opening a ditch parallel with the highway and extending it at right angle across the highway and through the school lot to the land of the plaintiff, by which surface water collected in the highway was concentrated and emptied upon the plaintiff's land. This presented a case of ponding surface water by an upper proprietor, and by means of ditches throwing it in concentration upon the lower proprietor, which is inhibited under the *Brandenburg Case*, *supra*. It was not suggested in the case that the plaintiff had a cause of action under section 1972. The circuit court held that the county was not liable for the acts of the overseer; that there was no statute in this state which authorized the action and dismissed the action against all of the defendants, the overseers having been joined. This court sustained the order below upon the authority of *Matheny v. Aiken*, 68 S. C. 163, 47 S. E. 56, and *Parks v. Greenville*, 44 S. C. 168, 21 S. E. 540.

There are also certain well-established principles applicable to injuries sustained in cities and towns, which by reason of the absence of corresponding statutory provisions, are not applicable to injuries sustained in the county:

(1) In addition to liability for injuries arising from defects in or the negligent repair of streets, cities and towns are made liable by section 3053 for injuries sustained by reason of "mismanagement of anything under the control of the corporation."

(2) The phrase "mismanagement of anything under the control of the corporation" is construed to mean mismanagement in making repairs on the streets.

Hutchison v. Summerville, 66 S. C. 442, 45 S. E. 8: This was a clear case of a defect in the street. The town had maintained a sidewalk which ended abruptly in a ditch, unguarded, into which the plaintiff fell. It is cited to show how carefully the court has confined the liability of the municipality under section 3053 to cases of defects in or negligent repair of a street. The court holds that the clause "mismanagement of anything under control of the corporation" was limited, as was done in the case of *Dunn v. Barnwell*, 43 S. C. 401, 21 S. E. 316, 49 Am. St. Rep. 843, to "mismanagement in making repairs on the streets, so that the corporation should be held liable not only for neglect in making repairs on the streets, but also for mismanagement of anything under the control of the corporation in making such repairs." (Italics by the court.) This clause does not appear in section 1972. See, also, *Barksdale v. Laurens*, 58 S. C. 413, 36 S. E. 661.

(3) Under section 3026, it is made the duty of a city or town to provide sufficient drainage for surface water so as to prevent the

passage of such water over the private property of adjacent owners. For a breach of this duty, the city or town is liable for resulting damages.

Reviewing now the cases in this state, some apparently, and others actually, in conflict with the foregoing conclusions:

Mayrant v. Columbia, 77 S. C. 281, 57 S. E. 857, 10 L. R. A. (N. S.) 1094: It was held that, where a city so negligently constructed its drainage pipes and raised the street that the surface water was ponded and caused the collection of filth, rendering the premises unsanitary and uninhabitable, it was liable in damages to the owner under section 3053. No further discussion of the case is necessary than to refer to the case of *Triplett v. Columbia*, 111 S. C. 7, 96 S. E. 675, 1 A. L. R. 349, where the ruling is expressly repudiated, and the case, so far as referring the liability of the city to section 3053, is distinctly overruled. The court, however, held that the action was maintainable under section 3026, which, as we have noted, has no application to counties.

Columbia v. Melton, 81 S. C. 356, 62 S. E. 245, 399; *Id.*, 85 S. C. 558, 67 S. E. 902: Mrs. Melton owned a lot in the city; by means of pipes the city was discharging collected surface water on her lands; she instituted condemnation proceedings to assess her damages; the city brought an action to enjoin the proceedings; she answered justifying the proceedings; the city demurred to the answer, alleging that her remedy was an action for damages; this court sustained the order below overruling the demurrer (Mr. Justice Woods dissenting) holding that the appropriate remedy was an action for damages under section 3053 or under 3026; the case was then called for trial and an issue submitted to a jury whether the city had acquired by prescription the right to turn water on the lot, which was answered in the affirmative; the circuit judge set aside the verdict, and refused the city's prayer for injunction against the condemnation proceedings; on appeal the court adopted the dissenting opinion of Mr. Justice Woods on the first appeal, holding that the property owner's remedy was an action for damages, and not a proceeding in condemnation, and enjoined the condemnation proceeding. This case is not authority to sustain the plaintiff's action in the case at bar against a county under the statute for two reasons: The action there was sustained upon either ground: (1) That the injury was due to the "mismanagement of anything (something) under control of the corporation," which clause does not appear in the county act, section 1972; (2) that the injury was due to the failure of the city to comply with the requirements of section 3026 in the matter of providing drains to prevent the passage of water upon private lands. There is no corresponding statute as to a county.

Scott v. Richland, 83 S. C. 506, 65 S. E. 729: The plaintiff alleged that the defendant, in working upon the highway in front of his house, removed the drains and raised the roadbed, in such a way as to turn the water from the road and neighboring land upon his land to his injury. The defendant interposed a demurrer to the complaint—upon what grounds does not appear—though it may be assumed from the opinion that the ground of the demurrer was the failure to allege that the defect which caused the injury was occasioned by neglect or mismanagement on the part of the county. The court held that, while the complaint was defective in this respect, there was enough alleged to save it from the demurrer. The question under discussion upon this appeal was not suggested or discussed, and we do not regard the case, though quite similar in its facts, as at all bearing upon such question.

The case of *School District v. Marion County*, 114 S. C. 382, 103 S. E. 767, is in direct conflict not only with the provisions of the section, but with the previous decisions of this court, and should be overruled. It was decided by a divided court, Mr. Justice Watts delivering the opinion, concurred in by the Chief Justice and by Mr. Justice Gage (upon a matter of policy as to pleadings), and attacked by a convincing dissenting opinion of Mr. Justice Hydrick, concurred in by Mr. Justice Fraser. The case as made by the complaint was one where the agents of the county, while engaged in the repair of a highway, went outside of the limits of the highway and destroyed certain shade trees upon the schoolhouse lot, which fronted on the highway. It was decided upon a demurrer to the complaint not upon the ground that the acts complained of were within the terms of section 1972, but upon one ground:

"There is no doubt that the hands employed by the county in repairing the road were under the control of the county, acting within the scope of their employment. For any negligent act on their part in building or making repairs on the highway, by which a party is injured, they must respond in actual damages."

If the expression, "they must respond in actual damages," refers to the employees guilty of negligence, the declaration is entirely correct, but it is no ground for sustaining an action against the county; if it refers to the county, it is the declaration of a doctrine that the county is liable for the negligent act of its employees, independently of section 1972, which cannot be sustained, for under the law the county is liable only under the conditions specifically enumerated in the statute.

As to the second proposition. It has been suggested that the plaintiff's action may be sustained upon the ground that to declare the county's immunity from liability for the

injury inflicted upon the plaintiff would amount to a deprivation of his property without due process of law, without just compensation, in violation of the Constitution of the United States; and that this proposition is sustained by the case of *Hopkins v. Clemson College*, 221 U. S. 636, 31 Sup. Ct. 654, 55 L. Ed. 890, 35 L. R. A. (N. S.) 243.

Of course, if the plaintiff's case can be brought within the principles declared in that case, the position is well taken.

It must be borne in mind however: (1) That the act relied upon to constitute a taking of or damage to the plaintiff's property was committed by the defendant in the exercise of the common-law right of a lower proprietor to detain, divert, or repel surface water, for the protection of his own property, a right out of which no cause of action could arise; it is impossible to conceive that a case of taking or damage can be born of the exercise of a legal right. (2) That the act complained of was committed, not by the corporation, the county, but by its agents and servants, for whose nonfeasance or misfeasance the county cannot be held legally responsible, in the absence of a statute so providing.

These constitute material points of discord between the *Hopkins Case* and the case at bar, neither of which facts, as we shall see, appear in the *Hopkins Case*; the result of which discord renders the *Hopkins Case* entirely inapplicable.

The facts in that case were these: *Hopkins* owned a body of bottom land on the west side of Seneca river, immediately opposite a similar body owned by *Clemson College* or by the state of South Carolina; in order to protect its own bottom land from disastrous overflows, the college, by its trustees, erected and maintained a high embankment on the eastern bank of the river, the construction of which, as was perfectly natural, so narrowed the customary overflow channel of the river as to force the water in flood time across the land of *Hopkins*, destroying the natural bank of the river, washing away the rich soil and practically ruining the bottoms for agricultural purposes. *Hopkins* sued the college, a corporation, for damages and injunction. There was no demurrer, but the college filed what was treated as a plea to the jurisdiction, in which it was averred that it owned no property and had constructed the dyke as a public agent only, by authority of the state, on land belonging to the state. The circuit decree was in favor of the college. Upon appeal to this court, it was decided that the action was one in tort against the state, that the state was a necessary party to the equitable cause of action for injunction, and that the action could not be maintained without the consent of the state. The circuit decree was accordingly affirmed, and the complaint dismissed. The case was then taken to the Su-

preme Court of the United States by writ of error.

The main question discussed and decided by that court is thus expressed in the opinion of Justice Lamar:

"Whether a public corporation can avail itself of the state's immunity from suit, in a proceeding against it for so managing the land of the state as to damage or take private property without due process of law?"

In this main question are involved two questions, the main question in fact being a composite of the two:

(1) Was the action really an action against the state?

(2) If not, was the property of the plaintiff damaged or taken without due process of law, in consequence of the construction and maintenance of the dyke by the college, the agent of the state?

In discussing the first question, the court seems to have considered it a federal question, and declares:

"With the exception named in the Constitution, every state has absolute immunity from suit. Without its consent it cannot be used in any court by any person, for any cause of action whatever."

From this statement it would naturally be inferred that this guaranty of immunity was secured by some provision in the Constitution of the United States. As a matter of fact, the only guaranty of immunity is contained in the Eleventh Amendment, which relates to actions in the federal courts and actions between a state and citizens of another state or subjects of a foreign state. The question of the immunity of a state from an action by a citizen of that state is essentially a state question and not a federal one, as seems to have been considered.

Attention is called to this matter, not with any inclination to disregard the conclusions of the court which are binding upon this court, but that we may not be misled into the erroneous conception that the question of the state's immunity from suit in an action by a citizen of that state is a federal question.

The questions of the state's immunity from suit, and whether or not certain alleged facts constitute a suit against the state, are entirely distinct. It is conceded that, in passing upon the question of the deprivation of the plaintiff's property without due process, in violation of the federal Constitution, the question is open to the federal court whether or not the facts alleged really constitute a suit against the state; the federal Supreme Court was therefore within its rights in determining that question, and following it with a discussion and determination of the second question stated above.

It is worthy of notice that the opinion draws a distinction between the immunity of a state from suit and the immunity of a

political subdivision from liability, conceding that, while the latter cannot claim the immunity from suit accorded to the state, it may claim, under well-recognized principles, immunity from liability when sued. It is said:

"If they were indeed agents, acting for the state, they—though not exempt from suit—could successfully defend by exhibiting the valid power of attorney or lawful authority under which they acted."

Again:

"Undoubtedly counties, cities, townships, and similar bodies politic often have a defense which relieves them from responsibility where a private corporation would be liable. But they must at least make that defense. They cannot rely on freedom from accountability as could a state."

And, referring to cases holding that certain boards have been held to be agents of the state, not liable to suit unless expressly made so by statute, the court adds:

"But an examination of the cases cited, in any respect similar to this, will show that they involve questions of liability in a suit rather than immunity from suit."

We do not quite appreciate the practical results of the distinction between immunity from suit and immunity from liability; yet, following up the line of thought suggested, and applying it to this case, the county may not be immune from suit, but, being sued, it may set up the defense which is obliged to prevail that it is not liable for the nonfeasance or misfeasance of its agents while in the performance of governmental duties, unless expressly so made by statute.

It will be observed that the first point of distinction between the two cases adverted to above plainly appears. In the Hopkins Case the tort complained of consisted in the diversion of the waters of a natural water course, the Seneca river. The right to have it flow as it was accustomed to flow was a right incident to the proprietorship of the plaintiff's land as a riparian owner, and interference with that right was an actionable wrong, which was none the less so because committed by an agent of the state; if it was a wrong, the legal right to do so was necessarily denied. In the case at bar the tort complained of is the throwing back of surface water by a lower proprietor upon the land of the upper proprietor, a privilege which, under the unbroken line of decisions in this state, the lower proprietor has the right to exercise, without accountability for consequent damage; it is *damnum absque injuria*. Being the exercise of a legal right, and not the commission of a wrong, as in the Hopkins Case, it is impossible to make out of it a taking or damage without compensation in the sense of the constitutional inhibition.

The court further sustains the liability of the college by a kind of reciprocal argument thus:

"The embankment was in law similar to one which might have been built for private purposes by the plaintiff on the other side of the river. If he had there constructed a dyke to protect his farm, and in so doing had taken or damaged the land of the college, he could have been sued and held liable. In the same way, and on similar principles of justice and legal liability, the college is responsible to him," etc.

By analogy, if the positions were reversed, and the plaintiff, to fight back surface water, should construct an embankment along his line and throw the surface water back upon his neighbor, an upper proprietor, who might be the county, he would be immune from liability for resulting damage, under the Edwards and other cases cited above. If so, why, upon the same principles "of justice and legal liability," should not the defendant be likewise immune from liability to him?

The second point of distinction adverted to above appears with equal clearness. After deciding that the action was not one against the state, out of which would have arisen absolute immunity from suit or liability, the court holds that the destruction of the plaintiff's property amounted to an unlawful taking, upon the ground that the act complained of was committed by the college itself, and not by its officers or by the officers of the public; that it was the corporate act of the college, distinguishing the case from *Gibbes v. Beaufort*, 20 S. C. 213, and recognizing that case to correctly declare the law, in this state, at least, that—

"A municipal corporation, instituted for the purpose of assisting a state in the conduct of local self-government, is not liable to be sued in an action of tort for nonfeasance or misfeasance of its officers in regard to their public duties, unless expressly made so by statute."

In other words, in effect holding that, if the college had not, as the act of the corporation, directed the construction of the dyke, and the tort complained of had been the result of the unauthorized negligent acts of its employees, the college as an instrumentality of the government, an agent of the state, would not have been held liable.

In *Mullinax v. Hambricht*, 115 S. C. 76, 104 S. E. 309, the plaintiff sued the Cherokee county highway commission for the wrongful death of his intestate caused by the negligent act of the individuals composing the commission. The order of the circuit court sustaining a demurrer to the complaint was affirmed by this court, upon the ground that the commission, being a governmental agency, was not subject to an action for tort. This principle was reaffirmed in the second appeal in the same case, recently decided, when the order of the circuit court sustaining

a demurrer to the complaint so far as the individual members of the commission were concerned was reversed.

"It is a well-settled rule that a public officer is not responsible for the acts or omissions of subordinates properly employed by or under him, if such subordinates are not in his private service, but are themselves servants of the government, unless he has directed such acts to be done or has personally co-operated in the negligence." 23 A. & E. 382.

"A public officer or agent is not responsible for the misfeasances or positive wrongs, or for the nonfeasances * * * or omissions of duty, of the subagents or servants or other persons properly employed by or under him, in the discharge of his official duties." *Robertson v. Sichel*, 127 U. S. 507, 8 Sup. Ct. 1236, 32 L. Ed. 203.

"Public officers are not, as a general rule, liable for the acts of subordinates, even where such subordinates are employees rather than officers, except where the negligence of such subordinates is attributable to the superior." 29 Cyc. 1445.

"Public officers and agents of the government are not liable for the acts or defaults, negligence or omissions of subordinate officials in the public service, whether appointed by them or not, unless they direct the act complained of to be done, or personally co-operate in the negligence from which the injury results. Where the subordinates have been appointed by them it is sufficient if they have employed trustworthy persons of suitable skill and ability, and have not been negligent in selecting such subordinates." 22 R. C. L. 487.

This principle was held inapplicable in the *Hopkins* Case, for the reason that the action was brought, not against the agents of the college, but against the college itself, the perpetrator of the tort, the corporate act of the college, as these extracts from the opinion show:

"The Eleventh Amendment was not intended to afford them freedom from liability in any case where, under color of their office, they have injured one of the state's citizens. To grant them such immunity would be to create a privileged class free from liability for wrongs inflicted or injuries threatened. Public agents must be liable to the law, unless they are to be put above the law."

"The many claims of immunity from suit have therefore been uniformly denied, where the action was brought for injuries done or threatened by public officers."

"Besides, neither a state nor an individual can confer upon an agent authority to commit a tort so as to excuse the perpetrator. In such cases the law of agency has no application—the wrongdoer is treated as a principal and individually liable for the damages inflicted and subject to injunction against the commission of acts causing irreparable injury."

"Plaintiff was denied a hearing, not on the ground that his complaint did not set out a cause of action, but solely for the reason that, even if the college did destroy his farm, the court had no jurisdiction over a public agent."

"If the state had in so many words granted the college authority to take or damage the

plaintiff's property for its corporate advantage without compensation, the Constitution would have substituted liability for the attempted exemption."

"Most of them [cited cases] were actions for torts committed, not by the public corporation itself, but by officers of the law. These public corporations were held free from liability in the suit."

And, as declared by this court, in commenting upon the *Hopkins* Case, in *Irvine v. Greenwood*, 89 S. C. 511, 72 S. E. 228, 36 L. R. A. (N. S.) 363:

"On appeal the Supreme Court of the United States reversed the judgment of this court holding that the flooding of plaintiff's land was the taking of private property without due process of law, and that the taking was by the corporation itself for corporate purposes, and not by its officers or agents. As we understand, it was on these grounds that the case was distinguished from *Gibbes v. Beaufort*, *supra*, and other cases decided in this state."

It is said in the opinion in the *Hopkins* Case:

"Undoubtedly counties, cities, townships, and similar bodies politic often have a defense which relieves them from responsibility where a private corporation would be liable."

That defense is not specified, but it can refer to no other than that sustained in *Gibbes v. Beaufort*, namely, that, being governmental agencies, they are not responsible in damages for the nonfeasance or misfeasance of their agents in the performance of governmental duties.

The distinction is this: If the tort complained of was an act done or specifically directed by the defendant not in the line of its governmental duties, or improperly done, and resulted in the damaging or taking of the property of the plaintiff, without compensation, the defendant, even though a political subdivision of the state or an agent of the state, is responsible in damages to the plaintiff. The state cannot authorize its agent or a political subdivision to deprive a citizen of his property without just compensation. But if the tort complained of was the result of the nonfeasance or misfeasance of the officers of the political subdivision in regard to their public duties, the political subdivision is not liable, unless expressly made so by statute; the liability is that of the offending officers alone.

It is alleged in the complaint that the injury was sustained in consequence of the negligent conduct of the agents and servants of the county of Richland, and therefore comes within the second alternative of the rule just stated. Even if the work was directed by the corporation in the line of its governmental duties, and carefully done, the corporation is not responsible.

"Authority to establish grades for streets, and to grade them, involves the right to make

changes in the surface of the ground, which may affect injuriously the adjacent property owners; but where the power is not exceeded, there is no liability, unless created by special constitutional provision or by statute (and then only in the mode and to the extent provided), for the consequences resulting from the power being exercised and properly carried into execution. On the one hand, the owner of the property may take such measures as he deems expedient to keep surface water off from him, or turn it away from him, or turn it away from his premises onto the street; and, on the other hand, the municipal authorities may exercise their lawful powers in respect to the gradation, improvement, and repair of streets, without being impliedly liable for the consequential damages caused by surface water to adjacent property." 4 Dillon, M. C. (8d Ed.) § 1738.

The observations of Mr. Justice Hydrick in the Triplett Case as to the applicability of the Hopkins Case to the facts of the Mayrant Case are easily reconcilable with the principle above announced, upon the ground that in the Mayrant Case the act complained of was the corporate act of the city, and did not result simply from an act of nonfeasance or misfeasance of its officers and agents. As thus construed the remark is entirely correct; but if it was intended to state that under the Hopkins Case the city could be liable for the negligent act of its officers and servants, such conclusion is disapproved.

It is a mistake to suppose, as has been suggested, that the case of Dunn v. Barnwell, 43 S. C. 398, 21 S. E. 315, 49 Am. St. Rep. 843, and other cases announcing the same doctrine, are inapplicable to cases involving the taking of property without compensation, and that in this respect they are overruled by the case of Hopkins v. Clemson College. On the contrary, the Hopkins Case distinctly recognizes the authority in this state of the Gibbes Case, which is but an earlier expression of the doctrine declared in the Dunn Case, both of which were cases of attempted imposition of liability upon the municipality for the torts of the agents and servants. The effect of the Hopkins Case is not to interfere in the least with the doctrine of these cases, for they present different grounds of attempted liability; in them liability is sought to be imposed on the corporation for the negligent act of its agents, while in the Hopkins Case the liability is imposed upon the ground that the tort was that of the corporation itself. What we recognize to be the doctrine of the Hopkins Case is that where the tort was committed by or under the specific direction of the corporation, it cannot claim immunity from

suit or immunity from liability, for the reason that neither the state by statute nor the courts by decision can authorize a political subdivision or an agent of the state to damage the property of a citizen without compensation, but that, where the tort was committed by the agents of the political subdivision, whether it amounted to a taking of property without compensation or not, the plaintiff's remedy is alone against the offending servant, unless the state has by statute provided otherwise.

Another consideration is conclusive of the question at issue: If liability upon the county can be predicated upon the negligent act of its servants, it can only be done upon the principle of "respondeat superior," in the absence of a statute providing otherwise. Unlike the principle "Qui facit per alium facit per se," the principle of "respondeat superior" is based upon public policy, a matter with which the courts, in the absence of a statute, have a right to deal, and which they have the right to construe. The liability of a master for the negligent act of his servant is an imputed, not an absolute, liability, and is referable to this principle. The liability of a master for his own acts and those delegated to a servant is an absolute one, referable, so far as the acts of the delegated servant are concerned, to the principle of "Qui facit per alium facit per se." In the application of this principle the courts have no latitude. It does not depend upon public policy, but upon substantive law. In the application of the other they have great latitude. It is for them to divine what is public policy, and declare whether it demands the application of the principle in certain cases or not.

In the case of Lindler v. Hospital, 98 S. C. 25, 81 S. E. 512, the court declined to extend the doctrine of respondeat superior to a case brought against a charitable corporation for the negligence of an employee, and reaffirmed the principle in Vermillion v. College, 111 S. C. 156, 97 S. E. 619.

In view of the decisions of this court denying liability in municipal corporations for the nonfeasance or misfeasance of their agents, in the absence of a statute providing otherwise, we may safely, in construing and applying the public policy of the state, decline to extend the doctrine in such cases.

The judgment of this court is that the orders appealed from be reversed, and that the complaint in each of the cases above stated be dismissed.

RICE and MAULDIN, Circuit Judges, concur.

(27 Ga. App. 480)

HOLBROOK, Sheriff, v. JAMES H. PRICHARD MOTOR CO. (No. 12512.)(Court of Appeals of Georgia, Division No. 2.
Oct. 7, 1921.)*(Syllabus by the Court.)*

1. Contempt \S 21—Courts \S 1—Jurisdiction depends upon right to decide case, and not on merits of decision.

"The jurisdiction of a court depends upon its right to decide a case, and never upon the merits of its decision. If it makes an order in a cause over which it has no jurisdiction, or, having jurisdiction of the cause, makes an order in it beyond its power, the order in either case is a nullity, and no one is bound to obey it or liable for disobeying it; but if it makes an order within its jurisdiction and power, it must be obeyed, however clearly it may be erroneous, and a disobedience of it is a contempt of the court."

2. Contempt \S 21—Sheriff disobeying order held guilty of contempt.

Where a sheriff has made a seizure of an automobile for violation of the prohibition laws of this state, and, following this seizure, condemnation proceedings have been instituted by the solicitor general, and one claiming to be the owner of the automobile intervenes in the proceedings, the sheriff is compelled to obey any order issued by the court in which the proceedings are pending. The case being clearly within the jurisdiction and power of the court, he must obey the order, however clearly it may be erroneous, and his disobedience of the order, whether as a ministerial officer of the court or as a party to the suit therein pending and in which the order was passed, is a contempt of the court.

Error from Superior Court, Forsyth County; D. W. Blair, Judge.

Proceedings by the State to condemn an automobile seized by R. L. Holbrook, Sheriff, in which the James H. Prichard Motor Company intervened. From an order requiring him to deliver the automobile to the intervenor, the Sheriff brings error. Affirmed.

This case arose on the following state of facts:

The sheriff of Forsyth county seized a Ford automobile containing, for transportation 21 gallons of whisky. Subsequently the solicitor general instituted condemnation proceedings under the provisions of section 20 of the act of the General Assembly approved March 28, 1917 (Laws [Ex. Sess.] 1917, p. 16). The James H. Prichard Motor Company filed an intervention, wherein it set up that it held the legal title to the automobile, by virtue of a duly recorded contract retaining title, and it had no knowledge or notice of the illegal use to which the automobile had been put, and prayed that it be allowed to intervene in the cause and be made a party thereto in order that it might set up its

title to the automobile, and that it be permitted to give bond in a sum to be fixed by the court for the final condemnation money, and that upon the giving of such bond it be allowed to have possession of the automobile. The court passed an order permitting the intervention to be filed, and providing that—

"Upon the giving of bond by the within intervenor in the sum of \$400 for the eventual condemnation money, as provided by law, the sheriff is ordered to deliver to said intervenor the property described in the within intervention, said bond to be approved by the sheriff or the solicitor general of this court."

Subsequently, by a petition for a rule against the sheriff, the intervenor set up the provisions of the order quoted above, and that the sheriff had failed and refused to comply with the order and accept the bond, although the intervenor had tendered to the sheriff a good and solvent bond as required by the order of the court, and the sheriff had refused to deliver the automobile to the intervenor. Rule nisi was granted, and the sheriff interposed a demurrer and a motion to dismiss the rule, upon the following grounds: (a) Under the facts set forth in the original petition, the intervention, and the rule, as applicable to the act of the General Assembly, approved March 28, 1917, it is the duty of the respondent, as sheriff, to retain possession, custody, and control of the car in question until the issue made on the intervention is determined, and, if the intervention is determined against the claimant, to sell the car as provided by the act. (b) Under the facts set up in the original petition, the intervention, and the rule, and the law applicable thereto, it is the duty of the respondent in any event to sell the interest owned in said car by the person unlawfully using the same, or to sell the car and pay over to the claimant any balance of the purchase money the jury might find was due him. (c) The court was without authority of law to pass any order, under the allegations of fact made in said proceedings, to require the respondent to deliver the car in question to the intervenor on the giving of the bond. (d) The order of the court requiring the respondent to accept the bond was without authority of law, and is therefore nugatory. The court overruled the demurrer, and the sheriff excepted.

Morris & Hawkins, of Marietta, for plaintiff in error.

Mallet & Bell, of Atlanta, and Howard Tate, of Canton, for defendant in error.

HILL, J. (after stating the facts as above). [1, 2] Reduced to its last analysis, the position of the sheriff, the plaintiff in error, before this court, is that the order passed by the trial court, requiring him to accept the bond and deliver possession of the auto-

mobile to the intervener, was without authority of law and was therefore nugatory, and that his failure to comply therewith did not subject him to attachment for contempt. This court does not agree with the position of the plaintiff in error. It is of the opinion that the sheriff, as the ministerial officer of the court, has no right to question the validity of an order passed by the court in a case in which the court has unquestionably unlimited jurisdiction. The superior courts of this state, under the Constitution and laws, have jurisdiction of all suits in cases of a civil character. The superior court of Forsyth county had jurisdiction both of the parties and the subject-matter of the case involving the seizure and title to the automobile in question, and any order passed by the judge of that court was within its jurisdiction, although the order might have been erroneous, and the only question for the sheriff, who was a party to the suit as well as a ministerial officer of the court, was one of obedience.

The jurisdiction of a court depends upon its right to decide a case, and never upon the merits of its decision. The distinction between want of jurisdiction and error is clear. When a court makes an order in a cause over which it has no jurisdiction, it is a nullity. No one is bound to obey it or is liable for disobeying it. Similarly if a court have jurisdiction of a cause and yet make an order in it beyond its power, the order is void. In the one case there is action without any authority; in the other, action in excess of authority. In both cases the order is a nullity, and affords no foundation for contempt proceedings. *Ex parte Fisk*, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117; *In re Sawyer*, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402.

But if the court has jurisdiction to make an order, it must be obeyed, however wrong it may be.

"The principle is of universal force, that the order or judgment of a court having jurisdiction is to be obeyed, no matter how clearly it may be erroneous." *People v. Sturtevant*, 9 N. Y. 263, 266, 59 Am. Dec. 536.

Errors must be corrected by appeal, and not by disobedience. The sheriff proceeded against for disobeying an order of the court in a case in which it had full jurisdiction can never set up as a defense that the court committed an error in issuing the order. He must go further and make out that in the law there was no authority because the court had no right to issue the order or to adjudicate the case.

"Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But, if it act without authority, its judgments and orders are regarded as nullities. They are not

voidable, but simply void." *Elliott v. Peirsel*, 1 Pet. 328, 340, 7 L. Ed. 164.

In the case of *Rogers v. Silas*, 42 Ga. 541, the court, by a majority, held that the sheriff was not in contempt because of his refusal to levy an execution issued from the superior court because the court, under the Constitution of 1868 (article 5, § 17), had no jurisdiction to give any judgment or enforce any debt the consideration of which was a slave, and the *fi. fa.* that he refused to execute was of this character; that the court had no jurisdiction to issue the judgment upon which the *fi. fa.* was based, the judgment was therefore invalid, null, and void, and was not binding upon the sheriff or any one else. Judge Warner dissented from this view and held that this defense set up by the sheriff in answer to the rule constituted no legal defense; that the sheriff could not go behind the judgment or execution and attack its legality. In other words, the distinguished jurist held that the duty of the sheriff was simply one of obedience.

To sum up the whole matter, it is perfectly clear and well settled that if a court makes an order in a case within its jurisdiction and power, that order must be obeyed, however clearly it may be erroneous, and disobedience of it is contempt of court. Therefore it followed that as the superior court of Forsyth county had jurisdiction of the case in which the order against the sheriff was issued the order was valid until reversed. Whether as a ministerial officer of the court or as a party to the case, it was the sheriff's duty to obey, regardless of whether the order was erroneous or not, and his failure to do so placed him in contempt of the court's order. The contention of the plaintiff in error that officers of courts or parties to cases in courts are only called on to obey valid orders and judgments of the courts in such cases or against such officers, if true, would render many judgments nugatory. Officers and parties must obey, where the court has jurisdiction. And admitting for the sake of the argument, and only for the sake of the argument, that the position of the plaintiff in error is correct as to the law in reference to the seizure of automobiles engaged in the transportation of intoxicating liquors, and the rights of all the parties before the court, either original or by intervention, and that the court did not have authority, under the law, to grant to the intervener the right to give bond and take possession of the automobile, yet the order was within the constitutional jurisdiction and power of the court, although it may have been erroneous. There is a vast distinction between a judgment invalid and a judgment erroneous. We therefore do not pass upon the question made by counsel for the plaintiff in error as to the legality of the order passed by the judge in the present

case. This court simply holds that the order, whether erroneous or not, was within the jurisdiction of the court and demanded implicit obedience, without question, not only by the sheriff as an officer of the court, but by the sheriff as a party to the suit in which the order was passed, and of which the court had full jurisdiction both of the subject-matter and of the parties.

Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(27 Ga. App. 496)

GREATER SAVANNAH CO. v. OLIVER & OLIVER. (No. 12139.)

(Court of Appeals of Georgia, Division No. 2. Oct. 24, 1921.)

(Syllabus by the Court.)

1. Pleading \S 248(3)—Amendment striking items held not to add new cause of action.

Where plaintiffs, as copartners engaged in the practice of law, sued upon a quantum meruit for a certain amount on account of services rendered to the defendant corporation, the bill of particulars showing that part of the services were rendered by the firm as attorneys, and part by the respective members of the firm as officers of the defendant corporation, an amendment to the bill of particulars, striking therefrom the items for services rendered as such officials, was not subject to the objection that it added a new and distinct cause of action, notwithstanding that by the terms of the amendment the amount originally sued for remained the same, and the amount claimed for the stated legal services was in this way increased. *Huger v. Cunningham*, 126 Ga. 684 (4), 56 S. E. 64; *Danielly v. Cheeves*, 94 Ga. 263 (1), 267, 21 S. E. 524; *Wilson v. Bush*, 22 Ga. App. 88 (2), 95 S. E. 817.

2. Attorney and client \S 140—Suit on quantum meruit for services may be based on monthly valuation.

The ground of demurrer that, as the suit for legal services was based upon a quantum meruit and not upon an express contract, a recovery could not be had on the basis of a monthly valuation of such services, and that consequently the bill of particulars was inadequate, was not well taken. For general advice and services of the nature and character indicated by the petition and shown by the evidence, the plaintiffs were entitled to recover ordinary and reasonable charges, fixed according to the mode usually observed by members of the legal profession. *Marshall v. Bahnsen*, 1 Ga. App. 485, 486, 57 S. E. 1006.

3. Verdict supported by evidence.

The verdict was supported by the evidence.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Action by Oliver & Oliver against the Greater Savannah Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

The plaintiffs, as a copartnership engaged in the practice of law, sued for \$2,350, for services rendered to the defendant corporation, as shown by an itemized statement attached to the petition. The itemized statement read as follows:

To services rendered to said company as attorneys, in all matters requiring legal attention since February 3, 1915, to January 1, 1919, a period of 47 months, such as conferences with and advice to the president relative to controversies which have arisen from time to time between the company and the lessee, the Newcomb Hotel Company, conferences with and advice to the president in the matter of renewal and reduction of indebtedness due by the company to the Citizens' & Southern Bank, advising Citizens' & Southern Bank on all matters requiring legal attention in behalf of the company, conferring with and advising president in the matter of claim made by the mayor and aldermen of the city of Savannah relative to defect in pavement and sidewalk due to alleged improper method of construction, during the construction of the hotel, and correspondence with the chief engineer of the city of Savannah relative thereto, conferences with and advice given to the president and Mr. Quinan in the preparation of income tax and corporation returns, both state and federal, conferences with the president and advice given relative to complaints of lessee in the matter of alleged defects in roofing, flashing, and skylights as against leakage that might develop, conferences with and advice given to president, and letter written Newcomb Hotel Company, Mr. J. H. Benton, manager, relative to obedience by the Newcomb Hotel Company, as lessee, to the prohibition laws of Georgia, which took effect on and after May 1, 1916, and services of Mr. E. J. Oliver, as acting secretary of the company for said period of time, 47 months, all for the monthly charges of \$25 per month.... \$1,175 00
Services of F. M. Oliver, as vice president of the company, acting upon all matters requiring the attention of the president during his absence or disability, at \$25 per month, for said period of time..... 1,175 00
\$2,350 00

In response to a demurrer entered by the defendant's attorney, plaintiffs, over objection of the defendant, were allowed to amend their petition—

"by striking out of the first paragraph of Exhibit A, attached to said petition, the words 'and services of Mr. E. J. Oliver, as acting secretary of the company for said period of time, 47 months, all for the monthly charge of \$25 per month, \$1,175,' and by striking out the second paragraph of said Exhibit A, to wit, 'services of F. M. Oliver, as vice president of the Company, acting upon all matters requiring the attention of the president during his absence or disability, at \$25 per month, for said period of time, \$1,175,' and substituting, in lieu

of the words so stricken, the words 'all for the monthly charge of \$50 per month, \$2,350.'

After this amendment the defendant's demurrer as renewed was overruled. The jury returned a verdict in favor of the plaintiffs for the amount sued for.

In his order overruling the motion for new trial, the judge said:

"The difficulty I have in deciding the motion arises out of the want of clearness in the original petition and in the amendment thereto. The petition averred that the plaintiffs were attorneys at law, and that they had rendered certain services to the Greater Savannah Company, a corporation. The action seems to be on account for services, and the plaintiffs aver that the amount set out, \$2,350, is reasonable. An 'Exhibit A' is attached and made part of the petition. After stating the services rendered, we find the following words, 'and services of Mr. E. J. Oliver, as acting secretary of the company for said period of 47 months, *all* [italics mine] for the monthly charge of \$25 per month, \$1,175.' Then follows another paragraph: 'Services of F. M. Oliver, as vice president of the company, acting upon all matters requiring the attention of the president during his absence or disability, at \$25 per month for said period of time, \$1,175—\$2,350.'

"It will be noted that the \$1,175, set out as due to Mr. E. J. Oliver as acting secretary and a like amount to Mr. F. M. Oliver, as vice president, aggregate \$2,350, the exact sum claimed to be due to plaintiffs for 'services rendered to said company as attorneys.' The original petition averred that the plaintiffs were attorneys at law and as such had rendered services to the defendant. I therefore allowed an amendment, striking out the amount as to the \$25 per month to Mr. E. J. Oliver as secretary and the like amount to Mr. F. M. Oliver as vice president. The petition thus amended was for services rendered by the plaintiffs to defendant *as attorneys*. At the end of the amendment are these words, 'all for the monthly charge of \$50 per month.' The verdict was for \$2,350. The defendant moves for a new trial. There are no objections to evidence and no complaints as to the charge. The movant's contention is that the verdict is unauthorized by the pleadings and evidence.

"The principles of law applicable to the case are few and simple. Thus, the evidence should sustain the allegations and the verdict should be supported by the evidence. If the contract were express—that is, if the defendant agreed to pay a fixed sum of \$50 per month—then the plaintiffs cannot recover in this action. In the view which I take of the case, the action was not on an express contract, but was quantum meruit. There is evidence tending to show that there was no express contract, but that valuable services were rendered by plaintiffs and accepted by defendant. I have reached the conclusion that the averment 'all for the monthly charge of \$50 per month' should be regarded as the expression of an opinion as to the value of the services—an estimate or measure of value. The issue of fact was clearly submitted, and that issue was thus stated: 'The plaintiffs, if they recover, must recover

as attorneys for the services rendered as attorneys to the defendant company.'

"Plaintiff's attorney in open court stated that the suit was for quantum meruit, and I expressly ruled that there could be no recovery on an express contract. There was no averment of an express contract and no evidence of one. The jury found that services had been rendered by the plaintiffs and accepted by the defendant. They found the value of the services to be \$2,350, which is equal to 47 months, at \$50 per month.

"I cannot say that the verdict is not authorized by the pleadings and evidence. The motion is overruled."

F. H. Saffold, of Swainsboro, for plaintiff in error.

Travis & Travis, of Savannah, for defendants in error.

JENKINS, P. J. (after stating the facts as above). [1,2] The original petition, as we construe it, was not brought solely for the recovery of reasonable compensation rendered by plaintiffs in their respective capacities as vice president and secretary of the company, although this seems to be the theory on which the argument by counsel for plaintiff in error is based. Had the items in the bill of particulars definitely made it to appear that half of the amount sued for was for services rendered solely by E. J. Oliver as secretary, and that the other half was for services rendered solely by F. M. Oliver as vice president, then it would seem very doubtful whether the mere general statement in the petition that plaintiffs were a legal copartnership would be sufficient to indicate that the suit was in any wise brought for legal services. And it is the opinion of the writer that, if the original petition had been thus limited to a suit for services rendered by the plaintiffs solely in their respective official capacities, it could not be amended by setting up services rendered as attorneys, since to do so would be to change altogether the relationship of the parties to the suit. *Central of Ga. Ry. Co. v. Williams*, 105 Ga. 70, 72, 31 S. E. 134. But not only, as is indicated in the judgment of the trial judge, the petition set forth that plaintiffs were a legal copartnership composed of F. M. Oliver and E. J. Oliver, engaged in the practice of law, and that the defendant is indebted to the *firm* in the sum sued for, but, as we construe it, the suit as originally brought, and as is shown by the bill of particulars itself, was not only in part for services rendered by one of the members of the firm as secretary of the corporation, but was partly for attorneys' fees for services rendered in all matters requiring legal attention within a designated period, such as conferences and advice to the president relative to various specified legal matters, and such as certain other designated legal services rendered for and accepted by the defendant corporation,

"a3 for the monthly charge of \$25." It will thus be seen that, even by the original bill of particulars, this charge of \$25 per month was in part for attorney's fees on account of legal services rendered; and the effect of the amendment was therefore but to eliminate the other kind of service and to increase the amount sued for as attorney's fees, and this would seem not to be prohibited, since "an allegation in a petition, that under the facts pleaded the plaintiff is entitled to recover a certain amount, is not an estoppel in judicio which precludes an amendment that under the same facts the plaintiff is entitled to a larger recovery." *Wilson v. Bush*, 22 Ga. App. 83, 86, 95 S. E. 317, 318; *Huger v. Cunningham*, 126 Ga. 684 (4), 56 S. E. 64. Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(27 Ga. App. 506)

PAYNE, Agent, v. SIMMONS. (No. 12262.)

(Court of Appeals of Georgia, Division No. 2.
Oct. 24, 1921.)

(Syllabus by the Court.)

1. Master and servant \S 258(1), 278(18)—
Liability for injuries to track worker shown
by petition and evidence.

The portion of the amendment to the petition to which, by the charge of the court, the plaintiff was expressly limited as a ground of recovery, was not subject to demurrer; and the allegation of negligence therein set forth being sustained by the evidence, the verdict will be allowed to stand.

2. Appeal and error \S 1050(1)—Admission of
evidence not reversible error where similar
evidence admitted without objection.

If, under the ruling made in *Dowdy v. Georgia Railroad Co.*, 88 Ga. 726(2), 16 S. E. 62, the court should have excluded, as a conclusion of the witness, the testimony set forth in the first and second grounds of the amended motion, relative to whether or not there was sufficient time to have removed the car if the plaintiff's fellow servant had not dropped his hold, this does not afford cause for a reversal, since other testimony to the same effect was subsequently introduced both by the plaintiff and defendant without objection. *Matthews & Son v. Richards*, 19 Ga. App. 489(2), 91 S. E. 914.

3. Instructions held fair.

The remaining assignments of error, relating to alleged inadequacies and want of completeness in the charge, are not well taken. The principles of law governing the issues raised by the evidence under the pleadings were fully and fairly submitted.

Error from Superior Court, Habersham County; J. B. Jones, Judge.

Action by Seaborn Simmons against J. B. Payne, agent, etc. Judgment for plaintiff, and defendant brings error. Affirmed.

E. J. Kimsey, of Cornelia, I. H. Sutton, of Clarkesville, and Edgar A. Neely, of Atlanta, for plaintiff in error.

J. J. & Sam Kimzey, of Cornelia, and W. A. Charters, of Gainesville, for defendant in error.

JENKINS, P. J. [1-3] A previous verdict in behalf of the plaintiff was set aside by a judgment rendered by this court. *Southern R. Co. v. Simmons*, 24 Ga. App. 93, 100 S. E. 5. Before the second trial of the case in the superior court, the petition was amended by setting forth additional grounds of negligence. While exception is taken to the order of the court overruling the demurrer to each of the additional allegations of negligence as set forth in the amendment, the court in its charge plainly and expressly limited the right of plaintiff to recover to the one ground of the amendment setting up the negligence of a fellow servant. The amendment showed that Dalton Lovell was the foreman in charge of the plaintiff, and was in control of the kind, place, and manner of work to be performed by the plaintiff: that it was his duty to give orders to the plaintiff, and the plaintiff was bound to obey such orders; that when it became apparent that the locomotive which struck the lever car, as set out in the original petition, was approaching that car, Lovell commanded the plaintiff and plaintiff's coemployees, by direct and immediate order, to remove the lever car from the railroad track, and in pursuance of this order, given in the emergency stated, the plaintiff and his coemployee, one Buchannon, took hold of the front end of the lever car to remove it but Buchannon turned the car loose and caused its wheel to hang on the rail; that if Buchannon had not thus turned the lever car loose it would have been removed from the track, and would not have been struck by the locomotive, there being ample time for its removal, but for the negligence of Buchannon in turning it loose: that, when the order was given by Lovell to remove the lever car, the plaintiff believed Buchannon would perform his part of the labor in doing so, and Buchannon did undertake to aid in removing the car, but negligently turned it loose, and the plaintiff not being able unassisted to lift the front end of the car from the track, the wheel of the car caught and hung on the rail, and the car was struck by the locomotive, and the plaintiff was injured; that the plaintiff relied upon Buchannon's assistance in removing the lever car, and, knowing that if the train should strike the lever car a wreck would probably ensue, and imperil the passengers on the train, did his utmost to remove the

car from the track, and, being thus absorbed in the performance of his duties, did not observe that Buchannon had ceased to assist him, until it was too late for the plaintiff to escape from the peril brought upon him by this emergency; that there was ample time to have removed the lever car before being struck by the locomotive if Buchannon had not ceased to assist plaintiff in removing it; and that, after the plaintiff discovered that Buchannon had turned the car loose, it was too late for the plaintiff to avoid the consequences of Buchannon's negligence. By another amendment the plaintiff set forth that the injury was caused to him by the locomotive striking the lever car after he had ceased to undertake to remove the car, and while he was undertaking to escape from his perilous situation, the locomotive striking the car and demolishing it, and causing a part thereof to strike his leg while he was some distance away in his effort to escape.

The evidence before the jury was not altogether the same as that set out in the previous decision of this court, there being additional testimony particularly relating to the negligence of the fellow servant. In brief, the evidence showed that when the plaintiff and his coemployees were ordered by the foreman, Lovell, to remove the lever car from the track, the approaching train was some 250 yards away. There were four men on the lever car, including the foreman, and they united in the opinion that there was ample time for the car to have been removed before it was struck by the locomotive. On direct examination, Lovell, the foreman, testified as follows:

"As to whether or not there was time to have moved the car off before the train got there, I say, Yes, sir; if we all had stayed there, there was time enough to have moved it off."

Buchannon, the defendant's witness, whose negligence is alleged to have caused the injuries to plaintiff, testified as follows:

"We all thought there was ample time to take the lever car out of the way before he (the engineer) reached that point; we thought we did, and we went to work at it to do it."

Buchannon contended that the plaintiff let the load down on him, and testified that "the reason it couldn't be got off was because the weight was let down on me." He further testified, on redirect examination, as follows:

"When my wheel got next to that rail, the thing that prevented me from lifting the rest of the lever car over the rail—I could have lifted my part all right—Simmons gave his weight down and I had to turn mine loose."

Simmons, the plaintiff, testified, however, that the lever car could have been removed

but for Buchannon turning loose. There was thus a conflict between these two as to which turned loose first, each agreeing that the car could have been removed but for the other's fault. The jury was warranted in deciding that the car was not removed because of the negligence of Buchannon rather than plaintiff, because Lovell, the foreman, testified that Buchannon turned loose first, and that the plaintiff was the last man to turn loose. Lovell further testified without objection as follows:

"You ask me if we would have got it off if Buchannon had not let loose his hold. I answer, if the rest of us had not also turned loose. Buchannon let loose his hold a little bit before we did. It all happened in a little bit. Buchannon was the first man that let loose. If he had not let loose, we could have got the lever car off the track without it being struck."

It is not necessary to add anything further to the headnotes.

Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(27 Ga. App. 412)

PAYNE, Director General of Railroads, v.
MEADOWS. (No. 12421.)

(Court of Appeals of Georgia, Division No. 1.
Oct. 6, 1921.)

(Syllabus by the Court.)

1. Carriers ~~§~~271.—Sick passenger entitled to recover for injuries occasioned by being carried past station.

The petition, as amended, set out a cause of action, and the court did not err in overruling the demurrer.

2. No error in instructions.

Under the evidence in the case, and when read in connection with the remainder of the charge, there is no error in the excerpts from the charge of which complaint is made in the motion for new trial.

3. Verdict supported by evidence.

The verdict is not without evidence to support it and is not excessive in amount, the trial judge found no fault with it, and this court will not disturb it.

Error from City Court of Oglethorpe; R. L. Greer, Judge.

Action by Lila B. Meadows against John Barton Payne, Director General of Railroads. Judgment for plaintiff, and defendant brings error. Affirmed.

The original petition, among other things, alleged:

"That at the time plaintiff purchased said ticket and mounted said train she was sick and

in an emaciated condition and that she forthwith notified the conductor who was in said train, of her condition. That she boarded said train at Valdosta, Ga., and after traveling some few miles she reached Thomasville where she, on account of her sickness and feeble condition changed cars from a day Pullman to a night Pullman. That the said train with its regular line of cars and passengers operated over the line of railroads known as the Atlantic Coast Line to the city of Albany, where its Pullman coaches were attached to the train operated from Albany to Macon over what is known as the Central of Georgia track. * * * She was assured by said conductor and porter that she would be given plenty of time and assistance at Montezuma in alighting from said train.

"Petitioner further avers that when said train reached the station of Montezuma it failed and refused to stop at said station for said plaintiff and her aged mother to alight therefrom, and in fact failed to stop at all, but pulled on through the station only slowing up at the road crossing and finally coming to a stop some several hundred yards beyond said station.

"That her said husband, C. H. Meadows, had been notified of her sick condition and the date and time of her arrival at Montezuma and that in obedience to said notice he had an inclosed automobile awaiting the arrival of said train; said auto having been stationed at the usual place for the Pullman car to stop.

"That when said train passed its usual place and stopped some several hundred yards up the track, the said husband, C. H. Meadows, drove the said inclosed car back to his home, and she, the petitioner, in the sick and feeble condition, alighting from said car, together with her aged mother, who was unable to render any assistance under such conditions, in a very dark and impassable place, up some 100 yards from the usual stopping place; the cross-ties upon which the rails rested being entirely upon the surface, and what few clinkers present were only stumbling blocks; that it was severely cold; that petitioner was hardly able to walk; that the cold and excitement was extremely damaging to her physical and mental condition; that just prior to her boarding said train at Valdosta she was rapidly recuperating from an attack of influenza; that on account of being exposed to the severe cold for an hour or more, together with the excitement attending thereto, she had a severe relapse of the influenza, which lasted for six weeks, together with a menstrual trouble from which she has not yet recovered, and which is likely to grow worse as the years go by, on account of the severe cold to which petitioner was exposed on the night aforesaid.

"Your petitioner further shows that said defendant, in not stopping his train at the usual

place, did negligently carry her by and put her off some several hundred yards up the track at midnight in the severe cold weather, and on account of the negligence of said defendant in not stopping said train the said plaintiff was seriously and permanently damaged, to wit: That the injuries to her health on account of the negligence of the defendant aforesaid; that she has suffered and will suffer in the future great mental pain and anguish on account thereof; that she was greatly annoyed and suffered great inconvenience because of being carried by the station at Montezuma, as hereinbefore stated—all to her damage in the sum and amount of \$5,000.

Plaintiff, with leave of the court first had, amended her petition, and for amendment said:

"A. That the said defendant was further negligent in not stopping the said train on which your petitioner was a passenger a reasonable length of time at the station at Montezuma, Ga., said county, in which to give her time in which to alight in safety therefrom.

"B. That the defendant was further negligent in not furnishing the plaintiff a safe place to alight from said train.

"C. That said defendant was further negligent in not assisting your petitioner to alight from said train at said station.

"D. That said defendant was further negligent in putting your petitioner off and causing her to leave and alight from said train at a dangerous and unsafe place, and at a place other than the destination called for by her contract of passage.

"E. That said defendant was further negligent in failing to back said train to the station at Montezuma, Ga., so that plaintiff could have a place to alight in safety from said train, when the said defendant discovered the presence of petitioner on the train after it had passed or was leaving the said station at Montezuma, Ga.

"G. That said defendant was further negligent in not announcing to your petitioner the approach of said train to said station at Montezuma, Ga., and in not notifying her when said train had reached said station."

—Statement by editor.

Felton & Felton, of Montezuma, and Yeomans & Wilkinson, of Dawson, for plaintiff in error.

G. O. Robinson, of Montezuma, and T. S. Felder, of Macon, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, O. J., and LUKE, J., concur.

(27 Ga. App. 470)

REED OIL CO. v. SMITH. (No. 12483.)

(Court of Appeals of Georgia, Division No. 2.
Oct. 7, 1921. Rehearing Denied
Oct. 24, 1921.)

(Syllabus by the Court.)

1. No error.

A careful examination of the record discloses no error of law, and sets out sufficient evidence to support the verdict.

(Additional Syllabus by Editorial Staff.)

2. Explosives ⇐8—Petition held to state cause of action.

A petition for death occasioned by taking cap off of dome of tank car, resulting in explosion, held not subject to demurrer.

3. Trial ⇐178—Court may overrule motion without hearing argument.

Court may even in presence of jury, overrule a motion for directed verdict without hearing argument thereon.

4. Carriers ⇐83—Before payment of draft, or without shipper's permission, oil company not entitled to possession of tank car shipped "order notify."

An oil company was not authorized to take possession of a tank car for any purpose without first having paid a draft drawn on it, or without having obtained the permission of the shipper; the shipment being what is ordinarily called an "order notify" shipment.

5. Trial ⇐260(1)—Instructions as to matters fully covered need not be given.

Refusal to give requested instructions was not erroneous, where the given charge fully and clearly applied the law to the facts of the case.

6. Explosives ⇐8—Liability of oil company for explosion held for jury.

In an action against an oil company for death occasioned by an explosion, when an employee of the oil company removed the cap from a dome on a tank car containing gas and vapors reached a furnace 10 feet from the car, whether defendant was negligent held for the jury, even though it be assumed that carrier was negligent in placing the car in such location.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Mrs. E. S. Smith against the Reed Oil Company and others. Judgment for plaintiff, and the named defendant brings error. Affirmed.

Mrs. E. S. Smith sued the Director General of Railroads, the Western & Atlantic Railroad Company, and the Reed Oil Company for damages on account of the death of her minor son. On demurrer the trial court struck the Western & Atlantic Railroad Com-

pany as a defendant, and the case proceeded to trial against the Director General and the Reed Oil Company. At the conclusion of the evidence a nonsuit was awarded as to the Director General of Railroads, and this judgment was affirmed by this court. *Smith v. Payne*, 26 Ga. App. 685, 107 S. E. 70. On the trial of the case against the Reed Oil Company alone the jury found a verdict for \$7,000. The defendant's motion for a new trial was overruled, and the case came to this court on exception to that judgment.

The material parts of the evidence, which are not in conflict, make the following case against the Reed Oil Company:

In January, 1918, that company ordered from the Motor Gas Company, located in Muskogee, Okl., several tank cars of gasoline, and in February thereafter the Western & Atlantic Railroad Company received two tank cars of gasoline from the consignor, C. O. S. X. 1470 and C. O. S. X. 1459, for delivery to the Reed Oil Company in the city of Atlanta. One of these cars, to wit, C. O. S. X. 1470, was subsequently found to contain a gasoline fluid known as casing head gas, which was exceedingly unstable and volatile, vaporizing and disintegrating rapidly, pouring off fumes and vapors which were exceedingly combustible when escaping, and easily carried by the winds for several hundred yards or more. This car was brought to Atlanta by the Western & Atlantic Railroad, which was then being operated by the Director General of Railroads, and placed on the track of that railroad within a few feet of the rear of a building occupied by one Thomas, in which was an open furnace, where a fire was burning day and night, and the dome of this tank car was within about five feet of the rear of the building, and about 10 feet or less from the open furnace containing the fire. While the tank car was in this situation an employee of the Reed Oil Company acting under instructions of R. N. Reed, its president, went upon the top of the tank car for the purpose of getting samples of its contents for inspection and delivery to the state authorities, under the law. A safety valve was on each side of the cap or dome covering of this car, for the purpose of being used in ascertaining the contents of the car and detecting the presence or absence of vapor pressure, if any, in the car. This employee succeeded in opening one of the safety valves, but could not open the other. He thereupon took up an iron bar, and with this instrument forcibly hammered and unscrewed the dome cover and removed the cap thereof. Immediately upon this removal a quantity of vapor escaped and was carried by the wind into the vulcanizing plant of Thomas, coming in contact with the fire in the open furnace, and an explosion resulted, which wrecked and destroyed the building

of Thomas and killed both him and the plaintiff's son, who at the time was in the plant on a matter of business with Thomas.

The car in question, 1470, was properly labeled according to the rules and regulations of the Interstate Commerce Commission, showing that it contained gasoline, which rules and regulations contained direction that the car be kept away from fires, stoves, radiators, or lighted matches, and direct sunlight, and admonished the carrier to see that all precautions were taken to prevent accidents and to quickly isolate the car in case of fire. It was charged in the petition and shown by the evidence that the rules and regulations of the Interstate Commerce Commission expressly prohibited any person from beating or hammering upon the cap or dome of any gasoline car, or railroad car which contained gasoline, and required a person, before opening any car containing gasoline fluid or mixture, to test the contents of the cars by means of the safety valves and ascertain what the pressure was therein, so as to determine whether or not the opening of the car would be dangerous.

In 16 different paragraphs the petition alleged negligence. In view of the disposition of the case as to the other two defendants, it is only necessary to state those allegations which refer to the act and conduct of the Reed Oil Company, either as sole tort-feasor or as a joint tort-feasor. Summarizing these allegations, they allege that the oil company was negligent: (1) In instructing its agent to enter the premises and to open and inspect the contents of the tank car while the car was adjacent to the vulcanizing plant containing the open furnace with fire, the company, through its president, as well as through its employee who attempted to make the inspection, having full knowledge of the nearness of said vulcanizing plant containing fire; (2) in giving its employee, through the president of the company, instructions to take the cap of the dome off the car while it was so near to the building containing the fire, of which both the president and the employee had notice; (3) in permitting any employee of the defendant company to inspect the contents of the tank car by unscrewing the cap of the dome, without having ascertained the absence of vapor pressure through the valves provided for that purpose, in distinct violation of the rule of the Interstate Commerce Commission; (4) in opening, through the act of its employee, the dome of the car containing gasoline, without first removing the car from the proximity of the fire. The oil company, before the trial upon the merits, presented general and special demurrers to the petition, all of which were overruled, and exceptions pendente lite were duly preserved.

Besides the general grounds the motion for a new trial contains the following special grounds:

(1) Because, at the conclusion of the evi-

dence of both plaintiff and defendant, this defendant desired to and did make a motion for the direction of a verdict in favor of the defendant. The following colloquy occurred between the court and counsel for the Reed Oil Company:

"The Court: Proceed with the argument for the plaintiff.

"Mr. Neufville: I have a motion, your honor.

"The Court: I will overrule it."

This took place in the presence of the jury and while the said jury was in the box. The defendant contended that the counsel for the Reed Oil Company had a right to be heard on the motion to direct a verdict, and the overruling of the motion, without allowing counsel to state the grounds of the motion, was error and prejudicial to the right of the defendant.

(2) Objection was made to the following excerpt from the charge of the court:

"The defendant specifically contends that it had a right to go on this car, by its agent, for the purpose of obtaining samples of the contents, to be submitted to the state inspector of gases and oils. Well, under the undisputed evidence in this case it appears that this car was shipped by the shipper, not to the Reed Oil Company, but to itself, under what is designated as an 'order notify' bill of lading—that is, it retained the title to the car of gas and drew a draft with the bill of lading attached, to a bank in the city, with direction to the railroad company, or to the Director General, to notify the Reed Oil Company. That sort of shipment is called ordinarily an 'order notify' shipment, and under it the Reed Oil Company did not have the right to take possession of this car for any purpose without first having paid the draft, or without having obtained permission from the shipper. Under the law covering such shipments the Reed Oil Company would not have had such right."

It is insisted that this portion of the charge was tantamount to the direction of a verdict for the plaintiff. Several other grounds of error are set out in the motion, which it is deemed unnecessary to set out in this statement.

Neufville & Neufville, of Atlanta, for plaintiff in error.

Hewlett & Dennis, and Virlyn B. Moore, all of Atlanta, for defendant in error.

HILL, J. (after stating the facts as above).

[2] 1. No error appears in the rulings of the trial court on the demurrers filed to the petition. The allegations of the petition clearly, fully, and distinctly set forth a cause of action against the Reed Oil Company, either severally or jointly with the other two defendants, and were entirely sufficient to withstand a general demurrer, and there was no merit in any of the special demurrers of that company.

[3] 2. The colloquy between the court and counsel, set out in the motion for a new trial.

was not cause for a new trial. Trial judges have the right to overrule motions without hearing argument, if they do not desire to hear argument. While the overruling of the motion to direct a verdict for the defendant, without hearing argument in support of the motion, may tend to prejudice somewhat the case of the movant before the jury, such prejudicial consequence must be attributed to the conduct of the attorney in making the motion in the presence of the jury. Any prejudicial effect from the ruling on a motion can be easily prevented by counsel before he presents the motion to the court, by requesting that the jury be ordered to retire while the motion is being submitted or argued.

[4] 3. The charge of the court, in effect that the defendant oil company was not authorized to take possession of the car in question for any purpose without first having paid the draft or without having obtained the permission of the shipper, the shipment being what is ordinarily called an "order notify" shipment, was correct. *Southern Ry. Co. v. Hodgson Brothers Co.*, 148 Ga. 851, 98 S. E. 541; *Southern Ry. Co. v. Massee & Felton Lumber Co.*, 23 Ga. App. 309, 98 S. E. 106; *Merchants' & Miners' Transportation Co. v. Moore*, 124 Ga. 482, 52 S. E. 802.

[5] 4. The refusal to give the requested instructions was not erroneous for any of the reasons stated; the charge having fully and correctly applied the law to the facts of the case.

[1, 6] 5. This leaves in the case only the main question, as to whether there is evidence in the record sufficient to support the verdict. The negligence alleged against the Reed Oil Company, upon which the verdict is probably based, was, first, the act of the president instructing its employee to take possession of the tank car and inspect the contents before it was delivered by the railroad company in accordance with the bill of lading, and the manner in which that unauthorized act was performed by the employee. The evidence is undisputed that in attempting to enter the car and find out its contents this employee violated the express order of the Interstate Commerce Commission that—

"The dome cover should not be hammered and should not be unscrewed until the absence of vapor pressure in the tank is verified by lifting the safety valve."

The employee himself testified that, being unable to lift the safety valve, he took a piece of iron and hammered and loosened the cap of the dome, permitting the vapor to

escape. While this court is of the opinion, as before ruled, that the defendant had no right to take possession of this car at all, under the facts, or to make an inspection of its contents in any manner or for any purpose, in view of the fact that the car had not been delivered to the oil company in accordance with the bill of lading, yet it must be admitted that the method of entering the tank car, in violation of the express rule of the Interstate Commerce Commission, constituted negligence which imposed upon the oil company responsibility for all of the reasonable, natural, usual, and ordinary consequences. From this evidence the jury were authorized to find that the vapor would not have escaped, with the resulting damage, except for this negligent act of the employee of the company.

Even, therefore, conceding, as contended by the plaintiff in error, that the act of the shipper in loading this highly volatile and inflammable gas into the tank car, in violation of the instructions of the consignee and without notifying either the railroad or the consignee of that fact, constituted negligence, yet the jury could have inferred that the intervening agency, which did in fact cause the death of the plaintiff's son, and permitted the gas to escape from the tank car, was due to the negligent conduct of this employee. However negligent the act of the shipper may have been, it would have been harmless, but for the negligent act of the oil company, through the conduct of its employee. Whether, if the tank car had been loaded with ordinary gasoline, this negligent conduct would have itself caused the explosion, is a matter of pure speculation.

But the orders and rules of the Interstate Commerce Commission clearly indicate that gasoline of any sort is dangerous when in the proximity of an exposed flame. The tank car was within about 5 feet of the vulcanizing plant, which contained an open furnace, itself only about 10 feet from the car, and according to the testimony of the president of the defendant, as well as the employee in question, both had knowledge of the proximity of the fire to the car. The case having been fully and fairly submitted to the jury after an able and exhaustive charge, and there being evidence to support the verdict against the defendant oil company, the judgment overruling the motion for a new trial is affirmed.

Judgment affirmed.

STEPHENS, J., concurs.

JENKINS, P. J., disqualified.

(27 Ga. App. 485)

McKENZIE v. PATTERSON. (No. 12484.)(Court of Appeals of Georgia, Division No. 2.
Oct. 7, 1921.)*(Syllabus by the Court.)***1. Brokers** \S 82(1)—Petition held to allege cause of action for commission.

The allegations of the petition as amended plainly and distinctly set forth a cause of action arising from the failure of the defendant to perform her contract to pay the plaintiff for services rendered in the sale of real estate under an express contract for a definite amount. The demurrers thereto were properly overruled.

2. Trial \S 68(1)—Judge has discretion to reopen and permit introduction of evidence.

The trial judge has the discretion to reopen a case after the plaintiff has announced closed, and to allow the plaintiff to introduce relevant and material evidence to avoid a nonsuit. *McColgan v. McKay*, 25 Ga. 631; *Cushman v. Coleman*, 92 Ga. 772, 19 S. E. 46.

3. Husband and wife \S 138(2)—Only slight evidence necessary to charge wife for services rendered by broker.

The evidence is sufficient to show the agency of the husband for the wife (the defendant) in making the contract with the real estate broker (the plaintiff) for the sale of her property. Besides, she ratified the contract and received the benefit of it. Only slight evidence was necessary to charge her. *Akers v. Kirke*, 91 Ga. 590, 18 S. E. 368.

4. New trial \S 75(1)—Recovery of less amount than that due not ground for new trial.

The plaintiff having recovered apparently less than he was entitled to under the evidence, there was no cause for granting a new trial at the instance of the defendant. *Smith v. Lee*, 82 Ga. 674, 10 S. E. 201.

Error from City Court of Savannah;
Davis Freeman, Judge.

Action by W. H. Patterson, Jr., against Mrs. L. McKenzie. Judgment for plaintiff, and defendant brings error. Affirmed.

The petition as amended alleged:

"First—That petitioner is a duly licensed real estate agent and is actually engaged in the said business in the city of Savannah.

"Second—That on the 15th day of October, 1920, Charles B. McKenzie, the husband of the said Mrs. L. McKenzie, defendant herein named, acting as agent for his wife, employed petitioner to sell the following described property, the same being the property of the defendant, to wit: Lots Nos. 26 and 28, Fennell subdivision, Thunderbolt, Ga., with improvements thereon.

"Third—That a sales ticket was drawn, signed by petitioner and Charles B. McKenzie, as agents for defendant. This sales ticket contained, among other things, that the said property should be sold for the sum of five thousand (\$5,000.00) dollars, and further stipulat-

ed that commission be paid to petitioner for his services to be $7\frac{1}{2}$ per cent. on the purchase price, this being the commission rate adopted by the Real Estate Association of Savannah and now in force on all sales of improved property outside of Savannah city limits.

"Fourth—That subsequent to this the amount specified in the sales ticket was changed, the sales ticket was destroyed, and never another made.

"Fifth—Petitioner further shows that, pursuant to the agreement above stated, petitioner found prospective purchasers in the persons of Matthew J. and Catherine Reed. Petitioner took these purchasers to the property to be sold and to the house of the defendant numerous times, and worked along between the parties to arrange all details of the sale.

"Sixth—That the defendant, Mrs. L. McKenzie, went out with purchasers and showed the premises, thereby approving and confirming the actions and doings of her agent, Mr. Charles B. McKenzie, as aforesaid.

"Seventh—That after petitioner had procured the purchasers, taken them, and shown the premises, taken them to the house of defendant, and done all other work preliminary to the sale of said property in his capacity as real estate agent, defendant or her agent, without notice to petitioner, on the 29th day of October, 1920, sold the said premises to the said Matthew J. and Catherine Reed for a cash consideration of four thousand six hundred and twenty dollars (\$4,620.00), upon which sum petitioner claims commission of $7\frac{1}{2}$ per cent. as aforesaid, being the sum of three hundred and forty-six dollars and fifty cents (\$346.50), which sum defendant refuses to pay."

—Statement by editor.

F. A. Tuten, of Savannah, for plaintiff in error.

Paul Fusillo, of Savannah, for defendant in error.

HILL, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(27 Ga. App. 496)

TERRY SHIPBUILDING CORPORATION v. GRIFFIAN. (No. 12680.)(Court of Appeals of Georgia, Division No. 1.
Oct. 8, 1921.)*(Syllabus by the Court.)***Master and servant** \S 258(11)—Petition held to state cause of action for injuries to ship worker.

The petition in this case set out a cause of action, and the court did not err in overruling a demurrer thereto.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Action by Q. A. Griffian against the Terry Shipbuilding Corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

The petition, among other things, alleged:

"(2) That on July 14, 1920, said defendant was constructing at its plant at Port Wentworth in said county a large iron vessel known as No. 1395.

"(3) That on said July 14, 1920, your petitioner was in the employ of said defendant, and was working in the lower forehold of said vessel No. 1395, engaged in constructing a tank.

"(4) That about 8:30 o'clock a. m. on said July 14, 1920, your petitioner had occasion to leave said forehold of said vessel and proceed to the anglesmith shop of said defendant for the purpose of obtaining a staple for use in building said tank; that to get to the main deck of said vessel from said forehold your petitioner had to climb a scaffolding through hatchways in two decks to get to the main deck of said vessel; that about eight feet above the main deck of said vessel in the fore part thereof is what is known as the forecastle deck; through the forecastle deck and directly above the hatchway in the main deck through which your petitioner had climbed was a circular or oval hole or aperture about 28 inches in diameter, known as the hawse pipe hole.

"(5) That at the time that your petitioner was injured, as hereinafter fully set out, there was standing on said forecastle deck, and within two or three feet of said hawse pipe hole, a portable forge, which was being used for heating rivets to red hot temperature, and said rivets were being passed through said hawse pipe hole to be used by workmen of said defendant on the main deck of said vessel. * * *

"(6) That in some manner unknown to your petitioner said portable forge hereinafter described was upset, and the heavy iron ring, glowing coals, and hot rivets were precipitated through said hawse pipe hole upon your petitioner as he stepped upon the main deck below, said heavy ring striking him upon the head, rendering your petitioner unconscious and injuring him as hereinafter set out. * * *

"(10) That it was known to said defendant that said portable forge had been located in the position where it was immediately before your petitioner was injured for several days before said July 14, 1920.

"(11) Your petitioner further shows that the proximate cause of his injuries hereinbefore described was due to the negligence and carelessness of said defendant company in permitting said portable forge to be in the position in which it was at the time that it was upset, and your petitioner injured, as hereinbefore set out, there being no necessity for its being placed so near to said hawse pipe hole, and to the neglect and carelessness of said defendant company in failing to notify or warn your petitioner that said forge was located where it was at the time that it was upset, said defendant well knowing that your petitioner would necessarily in the scope of his employment be many times during the day immediately under said hawse pipe hole and liable to be injured should said forge or part thereof fall through said hawse pipe hole.

"(12) That your petitioner did not know that said forge was in the position where it was at the time he was injured as hereinbefore

set out, and in the exercise of ordinary care could not have known."

—Statement by editor.

Hitch, Denmark & Lovett and David S. Atkinson, all of Savannah, for plaintiff in error. Gignilliat & O'Neal and J. S. Harrison, all of Savannah, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 431)

HOLMES v. VENABLE. (No. 12127.)

(Court of Appeals of Georgia, Division No. 2.
Oct. 7, 1921.)

(Syllabus by the Court.)

1. Judgment ~~on~~ 570(2)—Dismissal of traverse in garnishment proceedings held not adjudication upon question of indebtedness.

Where a creditor of a contractor sued out garnishment against an owner of real estate who had employed the contractor to construct improvements thereon, and the owner answered not indebted, and where a mechanic employed by the contractor sought to intervene by traversing the answer, but failed to give bond to the plaintiff as provided by the Civil Code of 1910, § 5282, and in consequence the traverse was dismissed on the creditor's motion, and where the contractor filed, as a traverse of the garnishee's answer, a denial of the debt and judgment alleged in the garnishment affidavit, which traverse was disallowed by agreement of counsel in the garnishment proceeding, and where the mechanic subsequently claimed and caused to be recorded a lien upon the property of the owner, under sections 3352 and 3353 of the Civil Code, and to enforce it brought suit jointly against the contractor and the owner, praying a general judgment against the contractor and a special lien against the property, a plea of *res adjudicata* by the owner, setting up the previous dismissal of the plaintiff's traverse in the garnishment proceeding as an adjudication against his rights, and the previous disallowance of the contractor's traverse in that proceeding as an adjudication that the owner was not liable, could not properly be sustained, since the dismissal of plaintiff's traverse because of his failure to give bond to the plaintiff in *fi. fa.* did not amount to an adjudication upon the question of indebtedness between any of the parties concerned. *Gordon v. Wilson & Grady*, 99 Ga. 354(1), 27 S. E. 762; *Ware & Owens v. Laird*, 93 Ga. 342(1), 20 S. E. 635. Moreover, the contractor, defendant in *fi. fa.*, was not a party to such former proceeding on the issue of indebtedness between the creditor, plaintiff in *fi. fa.*, and the owner garnishee. *Leake v. Tyner*, 112 Ga. 919, 38 S. E. 343; *Teft v. Booth*, 104 Ga. 590, 591, 30 S. E. 803.

2. **Mechanics' liens** \S 271(6)—Petition on foreclosure held to show that plaintiff was "mechanic" or laborer.

Where a petition to enforce a mechanic's lien under sections 3352 and 3353 of the Civil Code of 1910, alleges that the plaintiff's employer, a contractor, agreed with the owner "to repair the premises" of the latter, that the contractor, "with the knowledge and consent" of the owner, employed the plaintiff "to work on said house in repairing said house under said contract," that the plaintiff earned the sum sued for, "working under said employment," and that the contractor "earned" the amount sued for, or more—"a sufficient amount to pay petitioner—which has not been paid," and there is attached to the petition, as an exhibit, a copy of the contract between the owner and the contractor, showing that the work to be done was "to refinish by rescraping, smoothing, filling, and polishing the entire first floor, except the cook-room, of the residence" of the owner, the facts alleged are sufficient to constitute the plaintiff a "mechanic" or laborer, within the meaning of the statutes, and the petition is good as against a general demurrer.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mechanics.]

3. **Mechanics' liens** \S 249, 263(9)—Judgment against contractor must precede mechanic's judgment against owner; contractor and owner may be joined in one foreclosure suit.

While there can be no valid judgment of foreclosure of a mechanic's lien upon real estate improved for labor done for a contractor employed by the owner, in the absence of a judgment in favor of the mechanic against the contractor, yet the contractor and the owner may be joined in one foreclosure suit, with prayers for a general judgment against the former and for the establishment of a special lien against the property. *Columbian Iron Works v. Crystal Springs Bleachery Co.*, 145 Ga. 621(1), 624, 89 S. E. 751; *Griffin Bros. v. Gainesville Iron Works*, 144 Ga. 840, 842, 88 S. E. 201; *Mass. Bonding Co. v. Realty Trust Co.*, 142 Ga. 499, 500(5), 83 S. E. 210.

4. **Mechanics' liens** \S 111(1)—Mechanic entitled to lien where his work has been properly performed, although contractor has not performed entire contract.

Where the evidence for the mechanic in his foreclosure is sufficient to authorize a finding that his particular part of the work has been properly performed for the contractor under the latter's contract with the owner, and that the amount due the mechanic does not exceed the amount earned by the contractor under the latter's contract with the owner, the mere fact that the owner may be able to show that the contractor has not performed his entire contract will not authorize a reversal of a judgment setting up the mechanic's lien.

(Additional Syllabus by Editorial Staff.)

5. **Mechanics' liens** \S 95—Not affected by private arrangement between owner and contractor.

The lien of a mechanic is statutory, and is not affected by any private arrangement between the property owner and contractor.

6. **Mechanics' liens** \S 115(1)—Incumbent upon owner to see that contractor pays claims.

Under the mechanic's lien statute, it is incumbent upon the owner to see that payments to the contractor are to the full amount of the contract price appropriated to outstanding claims of materialmen and laborers.

7. **Mechanics' liens** \S 253—Claims of third persons no defense in action to foreclose.

Owner cannot defend against a suit of a mechanic or materialman, under Civ. Code 1910, §§ 3352, 3353, to foreclose a lien, by showing that others are claiming liens against the property, and thus proving merely a possible, or even probable, future liability.

Error from Superior Court, Fulton County: J. T. Pendleton, Judge.

Action by J. W. Venable against Nina Holmes. From judgment for plaintiff, the defendant brings error. Affirmed.

The main defense of the owner to the foreclosure suit was that the written contract executed by the plaintiff's employer, the contractor, and herself had never been completed. The amount of the lien claimed was \$65. The agreed price for the work to be done on the floors of the owner was \$115, and the contract provided that this work was "to be done in a first-class workmanship manner"; that certain fillers, varnish, and floor polish were to be used; that the owner should not be liable for labor or material furnished on the work to any one whomsoever; but that when the contract was completed by the contractor, the work accepted by the owner, and affidavits and receipts showing the payment for all labor and material should be submitted by the contractor to the owner, the contract price would become due. The evidence showed that plaintiff was employed and earned his wages by the hour, but was not a party to the owner's contract with his employer, and had no knowledge of its conditions until after completion of his work. Under the contractor's evidence the contract had been fully performed, but under the owner's evidence this was a disputed issue of fact. There was also evidence that the plaintiff mechanic had properly and fully performed his own particular duties. There was no proof that the owner had anyone else perform work not done by the contractor.

A new trial was refused by the judge of the municipal court of Atlanta, who tried the case, certiorari was sued out, and the certiorari was overruled by the judge of the superior court.

R. R. Jackson, of Atlanta, for plaintiff in error.

Carl B. Copeland and G. N. Bynum, both of Atlanta, for defendant in error.

JENKINS, P. J. (after stating the facts as above). [1-7] The ruling upon the ques-

tion as to whether the plaintiff is entitled to foreclosure his lien until the contractor shall have first fully performed his obligations under his contract with the owner may properly be somewhat elaborated. It is the general rule that, where an owner of real estate engages a contractor to construct or improve a building thereon, and, under employment of the contractor, a mechanic performs labor in constructing or improving the building, there is sufficient privity between the mechanic and the owner to support a lien on the property. *Logue v. Walker*, 141 Ga. 644 (1), 81 S. E. 849. But while the contract between the owner and the contractor furnishes the basis of the laborer's or materialman's lien, where the work is done or the material furnished upon the employment of the contractor, these liens are not entirely as of subrogation to the right of the contractor to his lien. *Prince v. Neal-Millard Co.*, 124 Ga. 894, 53 S. E. 761, 4 Ann. Cas. 615. The lien of such a mechanic is itself statutory, and is not affected by any private arrangement between the property owner and the contractor (*Tuck v. Moss Mfg. Co.*, 127 Ga. 729 [2], 56 S. E. 1001), but it is subject to the exceptions and requirements imposed by the statute, such as that "in no event shall the aggregate amount of liens set up hereby exceed the contract price of the improvements made" (Civil Code 1910, § 3352 [2]). To this extent the statutory rights of the mechanic to his lien are controlled by the contract between the owner and the contractor, and the mechanic or laborer must show that the amount for which he asserts a lien comes, in whole or in part, within the contract price agreed between the contractor and the owner of the property improved. *Stevens v. Ga. Land Co.*, 122 Ga. 317 (1), 50 S. E. 100. Under the statute it is incumbent upon the owner to see that payments to the contractor are, to the full amount of the contract price, appropriated to outstanding claims of materialmen and laborers. *Green v. Farrar Lumber Co.*, 119 Ga. 30, 46 S. E. 62. The owner may defend by showing that the lien "has been waived in writing" by the materialman or mechanic, or that the owner has taken from the contractor the statutory affidavit that such material and labor claims have been paid, or that the money paid the contractor actually went to the discharge of liens created by the contractor in the purchase of material or the employment of labor. But he cannot defend against the suit of a mechanic or materialman to foreclose such a lien by showing that others are claiming liens against his property, and thus proving merely a possible or even probable future liability. *Tuck v. Moss Mfg. Co.*, 127 Ga. 733, 56 S. E. 1001.

The lien of the mechanic and the procedure for its enforcement being statutory, it

is not necessary to allege or prove that the contractor completed his contract with the owner; but the mechanic need only show a compliance on his part with the statute, and that he comes under its protection. *Arnold v. Farmers' Exchange*, 123 Ga. 731, 733, 51 S. E. 754. Still he cannot, in any event, recover an amount greater than the amount for which the owner has become liable to the contractor under their contract; and thus it would seem that on a foreclosure of a mechanic's lien the owner might be able to defend completely by showing that the contract was an entire one, and that the contractor, by abandoning his contract before its completion, has necessitated its completion through another contractor at an amount exceeding the original contract price and therefore at a loss to the owner. *Rowell v. Harris*, 121 Ga. 239, 48 S. E. 948; *Prince v. Neal-Millard Co.*, 124 Ga. 884, 893, 894, 53 S. E. 761, 4 Ann. Cas. 615. The evidence does not, however, bring the instant case within the exception made by this rule.

Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(27 Ga. App. 502)

WEINMAN et al. v. WOMACK. (No. 12177.)

(Court of Appeals of Georgia, Division No. 2.
Oct. 24, 1921.)

(Syllabus by the Court.)

1. Mechanics' liens §249, 271 (1)—Foreclosure of materialman's lien entitled to proceed on proper amendment; no foreclosure in absence of judgment against contractor.

While there can be no valid judgment of foreclosure of a materialman's lien for material furnished to a contractor upon the real estate improved with it, in the absence of a valid judgment in favor of the materialman against the contractor for the price of the material, and while in such a foreclosure suit, where the contractor is not a party, unless the petition alleges that the plaintiff has a judgment against the contractor, it should be dismissed on general demurrer (*Baldwin v. Shields*, 134 Ga. 221, 67 S. E. 798; *Holmes v. Venable*, 109 S. E. 176, yet, where, as here, an amendment setting up such fact was allowed without objection, the foreclosure of such a special lien is entitled to proceed.

2. Appeal and error §195—Objection to amendment not raised first on appeal.

An objection to the allowance of an amendment cannot, for the first time, be raised in the brief of counsel appearing in this court.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by M. H. Womack against H. Weinman and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Walter A. Sims, of Atlanta, for plaintiffs in error.

W. G. Shearer and W. C. Hendrix, both of Atlanta, for defendant in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(27 Ga. App. 551)

GEORGIA LUMBER & TURPENTINE CO. v. MILLTOWN LUMBER CO. (No. 12305.)

(Court of Appeals of Georgia, Division No. 2, Nov. 1, 1921.)

(Syllabus by the Court.)

Evidence \Leftrightarrow 433(5), 461(3)—Lease describing timber sold not to be varied by parol agreement except in certain cases.

Where a lease in terms describes the timber sold and conveyed as being the timber upon certain land described as being lots of certain numbers in a certain numbered district, and contains no further words of description, but thus plainly and unambiguously identifies the property, covered by its terms, evidence that the vendor or its agent, prior to the purchase, had pointed out a certain tract of timber as being within the boundaries of the lots so numbered, and that it was understood by both vendor and vendee, prior to the preparation of the lease, that such tract was so included, is inadmissible to vary the terms of the instrument. The mere fact that both parties were in error as to the correct location of some of the true lines of the numbered lots, and were mistaken in thinking that such lines embraced timber which in fact was not included, is not a mistake that can be pleaded as such by the vendee in defense to a suit by the vendor under the contract. *Thompson v. Hill*, 137 Ga. 308(3), 73 S. E. 640; *Harries v. Brandon*, 135 Ga. 131, 68 S. E. 1040; *Hall v. Davis*, 122 Ga. 252(2), 253, 50 S. E. 106; *Weaver v. Stoner*, 114 Ga. 165, 166, 39 S. E. 874; *Bell v. Redd*, 133 Ga. 5, 8, 65 S. E. 90; *Haley v. Ray*, 142 Ga. 390(1), 82 S. E. 1058.

(a) The rule is different in a case where the plea does not attempt to show a different consideration from that constituting a part of the expressed terms and conditions of the written instrument, but where it is sought to avoid the contract as being without any sort of legal consideration, on account of its whole consideration or subject-matter being the outgrowth of a mutual mistake, or mutual misunderstanding as to its legal effect. *Phillips v. O'Neal*, 87 Ga. 727(2), 13 S. E. 819; *Dolvin v. American Harrow Co.*, 125 Ga. 699(3), 704, 54 S. E. 706, 28 L. R. A. (N. S.) 785; *Hawkins v. Collier*, 101 Ga. 145(1), 147(1), 28 S. E. 632.

(b) Likewise, the rule is otherwise where, by mistake of the scrivener or oversight of the parties, the writing itself does not express the intended agreement. *Kitchens v. Usry*, 121 Ga.

204(2), (8), 48 S. E. 945; *Brown v. Davenport*, 76 Ga. 799, 800(b); *Bridwell v. Brown*, 43 Ga. 180, 181, 182. In the instant case such does not seem to be the purport of the plea, although in one part it is alleged that the strip of timber in question "was intended by the plaintiff and the defendant to be included in the description of said lots of land." In any event, neither by the evidence admitted nor by the evidence excluded could it be taken to be shown that the instrument itself was written otherwise than as had been intended by the parties.

Error from City Court of Valdosta; J. G. Cranford, Judge.

Action by the Milltown Lumber Company against the Georgia Lumber & Turpentine Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Dan R. Bruce, of Valdosta, for plaintiff in error.

E. K. Wilcox, of Valdosta, for defendant in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(27 Ga. App. 553)

MANER v. CLARK-STEWART CO. (No. 12329.)

(Court of Appeals of Georgia, Division No. 2, Nov. 1, 1921.)

(Syllabus by the Court.)

1. Certiorari \Leftrightarrow 70(7)—First grant of new trial not disturbed.

"The first grant of a new trial upon certiorari will not be disturbed, unless the judgment under review by the certiorari was absolutely demanded." *Loftin v. Great Southern Assn.*, 9 Ga. App. 121(1), 70 S. E. 353; *Chas. W. Tway Co. v. Hedenberg*, 24 Ga. App. 520(8), 101 S. E. 199.

2. Contracts \Leftrightarrow 296—Contractor must use material specified.

Where a contract provides that a job shall be done by the use of specified materials, the owner for whom the work is to be done and for whom the material is to be used is entitled to stand upon the express terms of the agreement; and the fact that other and different materials, which were to some extent substituted, may be shown to have been just as good as those specified by the contract, or that it was usual and customary to thus make use of such other materials in good and workmanlike jobs of similar kind, would not be sufficient to show a substantial compliance with the terms of the contract, but, upon proof of such a variation therefrom, the owner would be entitled to damages. *Cannon v. Hunt*, 116 Ga. 452(3), 456, 42 S. E. 784.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action between P. L. Maner and the Clark-Stewart Company. From an adverse judgment, the former brings error. Affirmed.

Lawton Nalley, of Atlanta, for plaintiff in error.

Madison Richardson, of Atlanta, for defendant in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(27 Ga. App. 558)

GRAY v. PAYNE, Director General of Railroads. (No. 12623.)

(Court of Appeals of Georgia, Division No. 2. Nov. 1, 1921.)

(Syllabus by the Court.)

1. Commerce §27(5)—Employee demolishing trestle of abandoned track held not engaged in interstate commerce.

This was a suit by an injured employee against the Director General of Railroads. The petition contained two counts—the first under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665); the second under the state law. The injury occurred while the plaintiff, with other employees, was engaged in demolishing an old trestle which was a part of an abandoned spur track. This spur track

was not a part of any other track, served no purpose, and performed no function in connection with the operation of the railroad, and was not intended for future use in its operation. *Held* not a case within the federal Employers' Liability Act: *Payne v. Demott*, 28 Ga. App. 314, 106 S. E. 9; *Minneapolis & St. Louis R. Co. v. Winters*, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. 358, Ann. Cas. 1918B, 54.

2. Appeal and error §1097(1)—Decisions on former appeal control.

As to all the other points in the record, the case is controlled by the decision of this court when the case was previously here on the same allegations and substantially the same evidence, and by authority of that decision the judgment of nonsuit is affirmed. *Gray v. Hines*, 25 Ga. App. 794, 104 S. E. 925.

Error from City Court of Albany; Clayton Jones, Judge.

Action by W. H. Gray, by next friend, against J. B. Payne, Director General of Railroads. Judgment for defendant and plaintiff brings error. Affirmed.

E. E. Cox, of Camilla, and Lippitt & Burt, of Albany, for plaintiff in error.

Pope & Bennet and H. A. Peacock, all of Albany, for defendant in error.

HILL, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(131 Va. 142)

HOLSTON CORPORATION v. WISE COUNTY.

(Supreme Court of Appeals of Virginia. Sept. 22, 1921.)

1. Counties \S 153½ — County guaranty of payment for rock furnished contractors on roads not within inhibition of Constitution, as granting aid and credit.

A county guaranty of payment for stone furnished contractors to be used in paving county roads is not within Const. § 185, providing that "the credit of the county shall not be granted."

2. Highways \S 109 — Contract for stone by county engineer ratified by board of supervisors held binding on county.

Since, under Acts 1910, c. 47, the county supervisors might have guaranteed payment for crushed stone furnished contractors for use on county roads, such a contract by the county engineer was binding on the county, where ratified by the supervisors, and where the benefits of the contract were accepted.

3. Highways \S 109 — Contract between quarry company and road contractor held not to release county from guaranty of stone furnished contractor.

Where a quarry company contracts with a county to furnish crushed stone to contractors on the roads of the county, the county guaranteeing payment for the stone, the contract embraced all the stone which the quarry company might supply to any and all contractors, and an agreement between the quarry company and a contractor that in no way increased the liability of the county did not operate to release the county.

4. Guaranty \S 46(2) — Notice to county that quarry company claimed under its guaranty of payment for stone furnished bankrupt contractor held sufficient.

Where a county contracted with a quarry company and in consideration of a low fixed price, the county guaranteed payment for stone furnished contractors on the roads and one of the contractors was adjudged bankrupt in August, 1913, and in May, 1914, the quarry company notified the county that stone furnished contractor in July and August of 1913 was not paid for, without expressly notifying the county that the quarry company held it liable under the guaranty, such notice was sufficient that the quarry company claimed under its contract of guaranty, notwithstanding the county had money owing the bankrupt's trustee at the time of the notice and did not protect itself, but paid it to trustee.

Appeal from Circuit Court, Wise County.

Action by the Holston Corporation against Wise County. An appeal from a decision of the Board of Supervisors was dismissed, and plaintiff appeals. Reversed and ordered.

In this case there was an appeal to the circuit court by appellant from a decision of the board of supervisors of Wise county, disallowing a claim of appellant against the

county for the amount of \$2,425. A jury being waived, the case was submitted to the court upon the following agreed statement of facts:

"(1) On or about the — day of —, 1911, the county of Wise entered in a very extensive enterprise of building in the said county a system of public roads, and to that end the county and the different districts thereof voted a bond issue of over \$1,000,000, which was subsequently expended in the building of the said roads, the said system of roads being completed on or about the — day of —, 1914, a very considerable portion of the whole of the roads constructed, which was approximately 130 miles, having been constructed with limestone macadam, there being approximately 45 miles of such construction.

"(2) That the board of supervisors of Wise county duly appointed and employed one William Cocke as county engineer, to whom was given over, in large part, the preparation of forms of bids to be submitted to the board for the construction of various different sections of the said road construction, and the form of contract to be executed by the respective bidders, when their bids should be accepted, and to produce for the county and through it the contractors, after they became such, limestone to be used by the contractors in the construction of the said sections of macadam road, and to procure, in advance of the letting of the contracts, the lowest bid that responsible producers of limestone material proper for the construction of such roads would give to the county.

"(3) That in pursuance of the authority thus conferred upon him by the board of supervisors of Wise county the said William F. Cocke, county engineer, as aforesaid, wrote numerous letters to the end set out in the last preceding paragraph, and among which he, on the 7th day of August, 1911, wrote to the appellant a letter as follows:

"Norton, Va., Aug. 7, 1911.

"Mr. J. S. Mackenzie, St. Paul, Virginia—Dear Sir: Your favor of August 5th received, and I too, am surprised to note that the price of 50 cents per ton f. o. b. Quarry, Va., has already been made to Wise county, as I have known nothing of it before receiving your letter. As you say this is a most satisfactory price and I wish to express my appreciation of same to yourself and C., C. & O. R. R. Co., of giving the contractor the benefit of this price, but I presume that this is the case. This, of course, with the understanding that the county guarantees to your company payment for the stone furnished. Please advise me by return mail if this is your understanding, and if we may advertise that the contractor will be furnished with stone at 50 cents per ton f. o. b., also the minimum number of tons in any one contract for which stone will be furnished at this price.

"Yours truly,

"[Signed] Wm. F. Cocke, County Engineer."

"And that the following correspondence passed:

"Johnson City, Tenn., August 12, 1911.

"Mr. William F. Cocke, County Engineer, Wise County, Norton, Virginia—Dear Sir: In

answer to the proposition contained in your letter of August 11th: I beg to advise that this company will deliver stone at 50 cents per ton of 2,000 pounds f. o. b. cars at our flag stop at Quarry, 1½ miles south of St. Paul, with the understanding that stone delivered at this rate is to be used exclusively in the building of public highways in Wise county, Virginia, and the further proviso that Wise county will guarantee the payment for said stone.

"Yours truly, [Signed] M. J. Caples,
"Vice President and General Manager."

"Norton, Va., Aug. 15, 1911."

"Mr. M. J. Caples, Vice Pres. and Gen. Mgr. C. C. & O. R. R. Johnson City, Tenn.—Dear Sir: Your favor of the 12th inst. received, and I note that you will allow us the privilege of making the price of 50 cts. per ton on crushed stone f. o. b. Quarry flag stop, available to the contractors, with the understanding that the stone is to be used exclusively for Wise county highway work and that Wise county will guarantee payment for same.

"I will therefore publish in our "Instructions to Bidders" that stone may be had by contractors doing work on this Wise county highways at the above prices.

"Thanking you for your consideration and interest in our work, I am

"Yours truly,

"[Signed] Wm. F. Cocke, County Engineer."

"(4) That appellant was and is a corporation organized and existing under the laws of the state of Virginia, and was and is engaged under its charter powers, principally, in the manufacturing and making out of limestone railroad ballast and limestone material proper for the construction of limestone macadam roads, one of its plants for the purpose of such manufacturing being on the C., C. & O. Railway, in Russell county, Va., a short distance south of the town of St. Paul, in Wise county, Va., made to the county of Wise, through its said agent, William F. Cocke, the proposition to furnish limestone material for the construction of said roads in Wise county, or such parts thereof as the county might desire, at the price of 50 cents per ton f. o. b. cars at its said Russell county plant, as shown in said letter above quoted, dated August 12, 1911, from M. J. Caples, appellant's vice president and general manager.

"(5) The said proposition which appellant submitted was accepted by the county of Wise, the county agreeing to guarantee payment for the price of said material, as shown in said letters above quoted from W. F. Cocke, appellee's agent and engineer, and, after having completed said arrangements in reference to limestone material and other preliminary arrangements, advertised extensively for bids for the construction of various sections of the then contemplated public roads in Wise county, and in the said advertisements for bids announced the price that the county had been able to procure for limestone macadam, being the price which appellant had submitted, as aforesaid, and which had been accepted by the county, as aforesaid.

"(6) That in pursuance of all of the above, one D. J. Phipps became a contractor, after having duly complied with all the requirements of the county as giving bond, etc., for the con-

struction of two of the macadam sections of the said public roads in Wise county, one locally designated as the Coeburn section, and the other locally designated as the Wise section, and that in pursuance of the arrangement above stated, the appellant from time to time furnished to the said D. J. Phipps, contractor as aforesaid, limestone material for the construction of the said Coeburn section of said road, an itemized statement of which is hereto attached, marked 'A,' and that pursuant to the same arrangement the appellant furnished to the said Phipps, contractor as aforesaid, limestone material for the construction of the said Wise section of said public road, an itemized statement of which is hereto attached, marked 'B,' the aggregate of the two items for limestone material furnished said Phipps, contractor as aforesaid, being \$2,425, said material being furnished as of the dates specified in said itemized accounts, and if appellant is entitled to recover, interest on the claim should be allowed from September 21, 1915, till paid.

"(7) That the said D. J. Phipps never paid for said limestone material, as set out in said two itemized accounts, or any part thereof, but, on the contrary, the whole of the amount set out in each of said itemized accounts is justly due and owing to the appellant.

"(8) That the said D. J. Phipps, after the said material was furnished and delivered to him, to wit, on August 28, 1913, was duly adjudged a bankrupt in the District Court of the United States for the Eastern District of Virginia, at Norfolk, and although the claim of appellant against him was duly presented and proved and allowed in the said bankruptcy proceeding, it is now developed and is a fact that appellant will be unable to procure anything upon its claim against said D. J. Phipps out of his assets, said assets not being sufficient to pay the costs of the bankruptcy proceedings and certain preferred claims, and so far as D. J. Phipps is concerned, the claim of appellant is a total loss, the said Phipps being totally insolvent, and any further liability against him barred by his discharge in bankruptcy.

"(9) That after Phipps became a contractor for a portion of said road work, consisting of two sections thereof, to be constructed of limestone macadam, one locally designated as the Coeburn section, and the other locally designated as the Wise section, as aforesaid, and prior to the time the limestone macadam included in this controversy was furnished, and, in pursuance of the understanding between appellant and the appellee, set forth in the correspondence herein above set forth, the appellant from time to time furnished to the said D. J. Phipps, contractor, as aforesaid, limestone material which was used by the said Phipps in the construction of said sections of road up until the month of November, 1912, at which time the said Phipps was indebted to appellant for said limestone material to the amount of \$4,351.23; that at that time the appellant and the said Phipps became involved in a controversy in regard to the said account; that the appellant notified the board of supervisors of Wise county of the fact that the said Phipps was indebted to appellant in the amount above stated; that the said county was then indebted to the said Phipps on account

of work done under his said contract to the amount of \$4,239.95, which said amount the said board held pending the adjustment of the said controversy between appellant and the said Phipps; that appellant discontinued shipments of said limestone material to the said Phipps until after the 2d day of May, 1913, at which said date the appellant and the said Phipps agreed upon an adjustment and compromise of their differences, said adjustment being evidenced by a written contract between them, a copy of which is hereto attached marked 'Contract'; that thereafter, on the 9th day of May, 1913, when the said board of supervisors was in session, an attorney of said D. J. Phipps appeared before the said board and exhibited to the board the said contract, and informed the said board that the matters of difference between appellant and the said Phipps had been adjusted, and that the said board was at liberty to pay over to the said Phipps the amount owing to him by said county, and that thereafter the appellant resumed shipments of limestone material to the said Phipps, contractor as aforesaid, and furnished to the said Phipps from time to time for the construction of the said road, limestone material, as set forth in section six (6) thereof.

"(10) On or about the 10th day of September, 1913, after the development of the facts as above set forth as to the bankruptcy and insolvency of the said D. J. Phipps, appellant presented its said claim to the board of supervisors of Wise county for allowance, and the board then took time to consider of the same, and on the 21st day of September, 1913, at a special meeting, passed upon the said claim and disallowed it entirely, and from this decision of the board the appellant duly matured its appeal, which is now to be determined by the court.

"(11) That the appellants never gave to Wise county any notice of its account against the said Phipps, nor requested the said county to withhold payment to said Phipps of any amount due said Phipps by said county for the purpose of applying the same on appellant's said claim against said Phipps, until after the said Phipps had become insolvent and had been adjudged a bankrupt, except as appears from order of the board of supervisors, dated May 12, 1914, as follows:

"Virginia: At a regularly adjourned meeting of the board of supervisors begun and held for Wise county at the courthouse thereof on the 12th day of May, 1914, Present: Hon. E. J. Prescott, J. L. Addington, Wilburn Sparks, and Ira Mullins, gentlemen members of said board.

"The board hereby admits having received notice this day by Holston Corporation of the furnishing by said Holston Corporation to D. J. Phipps, subcontractor under T. Towles & Co., contractors for the macadam work at Coeburn and vicinity, the items of which claim for stone furnished are as follows:

July 21, 1913,	27 cars of stone.....	\$ 675 00
July 21, 1913,	3 cars of stone.....	75 00
July 21, 1913,	14 cars of stone.....	350 00
Aug. 2, 1913,	2 cars of stone.....	50 00
Aug. 8,	10 cars of stone.....	250 00
Aug. 14,	6 cars of stone.....	150 00

Total \$1,550 00

"And the board also acknowledged having received notice by said Holston Corporation of the furnishing of crushed stone by the said Holston Corporation to D. J. Phipps, contractor of the county, for the construction of the macadam roads in and about Wise, the items as follows:

July 21, 1913,	19 cars of stone.....	\$ 475 00
July 31, 1913,	17 cars of stone.....	425 00
Aug. 2, 1913,	1 car of stone.....	25 00
Aug. 8, 1913,	6 cars of stone.....	125 00
Aug. 14, 1913,	5 cars of stone.....	125 00
Aug. 25, 1913,	16 cars of stone.....	400 00

Total \$1,575 00

"That of the said accounts for stone furnished D. J. Phipps, subcontractor as aforesaid, for macadam work at Coeburn and vicinity, there should be a deduction amounting to 5 cars, \$125, and that of the said account for stone furnished D. J. Phipps, contractor as aforesaid, for macadam work at Wise and vicinity, there should be a reduction of 23 cars, amounting to \$575, the said reduction being for cars that, for one reason or another, did not reach the said Phipps.

"A copy, Teste:

"W. B. Hamilton, Clerk."

"On which date there remained unpaid on account of said work more than \$2,425, but this was claimed by and afterwards adjudged to belong to parties other than appellant, by the said bankruptcy court, but appellee, in answer filed October 27, 1914, made no mention of appellant's claim, nor did appellant file any petition or other pleading in said bankrupt court asserting any specific claim to said particular fund.

"(12) The foregoing are the facts and all the facts that are material to the determination of this controversy.

"(13) The parties hereto waive a jury, and upon the foregoing agreed statement of the facts submit the whole controversy upon the law, as well as the facts, to the court for its determination, each party reserving the right to except to the final judgment of the court, and, if so advised, to apply to the Supreme Court of Appeals for a writ of error to the judgment entered.

"Witness the following signatures, this the 18th day of March, 1919.

"E. M. Fulton.

"Attorneys for Appellant, Holston Corporation.

"C. R. McCorkle,

"Attorneys for Appellee, Wise County.

"A.

"Statement of crushed limestone delivered by Holston Corporation to D. J. Phipps for construction of section of macadam road at Coeburn, Virginia:

July 21, 1913,	27 cars of stone.....	\$ 675 00
July 21, 1913,	3 cars of stone.....	75 00
July 31, 1913,	14 cars of stone.....	350 00
Aug. 2, 1913,	2 cars of stone.....	50 00
Aug. 8, 1913,	10 cars of stone.....	250 00
Aug. 14, 1913,	6 cars of stone.....	150 00

Total \$1,550 00
Less 5 cars not delivered..... 125 00

Balance \$1,425 00

"B.

"Statement of crushed limestone delivered by Holston Corporation to D. J. Phipps for construction of section of macadam road at Wise, Va.:

July 21, 1913,	19 cars of stone.....	\$ 475 00
July 21, 1913,	17 cars of stone.....	425 00
Aug. 2, 1913	1 car of stone.....	25 00
Aug. 8, 1913	5 cars of stone.....	125 00
Aug. 14, 1913	5 cars of stone.....	125 00
Aug. 25, 1913,	16 cars of stone.....	400 00
Total		\$1,575 00
Less 23 cars not delivered.....		575 00
Balance		\$1,000 00

"Contract.

"This agreement, made and entered into this 2d day of May, 1913, by and between Holston Corporation, a corporation organized and existing under the laws of the state of Virginia, hereinafter called the company, party of the first part, and D. J. Phipps, of Norfolk, Virginia, hereinafter called the contractor, party of the second part, witnesseth:

"Whereas, the parties hereto desire (a) to settle and compromise a controversy respecting claim for damages asserted by the contractor against the company arising from the alleged failure of the company to deliver to the contractor certain crushed stone, during the years 1911-12 and until this date, which stone was to be used in the construction of county highways in Wise county, and (b) to enter into a new contract for the sale of crushed stone by the company to the contractor to be used by the contractor in the construction of county highways in Wise county, Virginia, in lieu of said contract now existing:

"Now, therefore, in consideration of the premises and of the agreements hereinafter set forth, and of other valuable considerations it is agreed by and between the parties hereto as follows:

"(1) That the said claim for damages is hereby settled and compromised as follows: The contractor agrees to pay the sum of fifteen hundred dollars (\$1,500), and the company agrees to accept that sum in full settlement of the amount now due by the contractor to the company, which amount is the sum of four thousand three hundred fifty-one and twenty-three hundredths dollars (\$4,351.23), and the contractor hereby releases and discharges the company and its predecessors and affiliated persons and corporations from any and all claims for damages arising out of the said transaction respecting the said crushed stone.

"(2) The company agrees to furnish from its quarry crushed stone to the amount and of the character herein specified and to deliver the same to the contractor f. o. b. cars at its plant at Quarry, Russell county, Virginia, in such quantity and such times as are required under this agreement, unless prevented by strikes, lockouts, fires, floods, car famines, unforeseen breakdowns or other causes beyond its control.

"(3) Based upon its present plant facilities and equipment the company agreed: (a) That it will use all reasonable efforts to produce

crushed stone that shall satisfy the specifications required for crushed stone in the contract between Wise county and the contractor; and (b) that it will use all reasonable effort to deliver the said crushed stone of the class and quality and in the proportions that may be reasonably necessary to enable the contractor to prosecute his construction work under his said contract economically. It is understood, however, that the classes and proportions of stone are governed by the character of the rock recovered from the quarry, and that, therefore, the class and proportion will vary within limits from day to day. Should the company fail to comply with the requirements of this clause, or if the contractor for any reason hereafter desires to do so, then he shall have the right to cancel this contract by giving the company forty-eight (48) hours' notice of his intention so to do without liability for damages hereunder.

"(4) The period through which said stone is to be furnished is from the 12th day of May, 1913, until December 1, 1913, unless the contractor desires to terminate the delivery of stone hereunder before that time and if he does so desire, then he can do so at any time he so desires by giving the company forty-eight hours' notice of his desire so to do.

"(5) The said crushed stone shall be delivered at the rate of four (4) cars per day, excluding Sundays, holidays and days on which weather conditions prevent the operation of said quarry. The company is willing, if it can do so with due regard to its obligations and commitments to the Carolina, Clinchfield & Ohio Railway, to ship more than said four cars per day, but shipment in excess of four cars per day shall be discretionary with the company.

"(6) For said crushed stone delivered at its quarry at Quarry, Virginia, in accordance with the terms and conditions of this contract, the contractor agrees to pay, and the company agrees to accept in full payment therefor, the sum of 50 cents per ton of two thousand (2,000) pounds. Railway weight to govern.

"(7) Payments for crushed stone shall be made to the company at Johnson City, Tennessee, on or before the 15th day of each month for all stone delivered during the preceding month, based upon invoices, and the contractor agrees that Wise county may, if the company so elects, retain from any amounts due or to become due him, and pay over to the company on said date each month an amount equal to said invoice price of said stone to be shipped during the preceding month. Should the contractor fail to settle for any one month as herein provided then the company may at its election declare this contract forfeited and thereafter the company shall be held released from its obligations.

"(8) Upon final settlement the difference, if any, between the price of the said stone at invoice weight and railway weight shall be adjusted.

"Witness the signature of the Holston Corporation, by its president, and its corporate seal attested by its secretary and the signature and seal of the party of the second part to this

agreement in duplicate, this the day and date first above written.

"Holston Corporation.

"By Mark W. Potter, President.

"Attest: Jno. A. Muse, Secretary.

"D. J. Phipps. [Seal.]"

The circuit court, by the order under review, dismissed the appeal, which had the effect of sustaining the action of the board of supervisors in disallowing the claim.

E. M. Fulton, of Wise, for appellant.

C. R. McCorkle, of Wise, for appellee.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

The questions presented to us for decision by the assignments of error will be disposed of in their order as stated below.

According to the agreed statement of facts the contract in question was made directly between the county and appellant before it had advertised for bids of contractors for the road work and the contract was that the appellant would furnish the crushed stone to any and all contractors to whom the road work was subsequently let, to be used for the road work for the county at the special price to the contractors of "50 cents per ton f. o. b. Quarry flag stop available to the contractors," and in consideration of such furnishing of the stone for such use at such price the county, on its part, guaranteed to the appellant payment for the same.

[1] 1. Does such contract fall within the inhibition of section 185 of the Constitution of Virginia?

This question must be answered in the negative.

Section 185 of the Constitution of Virginia, so far as material, reads as follows:

"Neither the credit of the state, nor of any county, * * * shall be directly or indirectly, under any device or pretence whatsoever, granted to or in aid of any person, association, or corporation. * * *

The contract in question did not directly or indirectly in any way whatsoever grant "the credit" of the county "to or in aid of any person, association or corporation." That would have been true if the object of the contract had been to benefit the contractors in any way, as, for example, to enable any of them to obtain the stone on the credit of the county, when upon their own credit they could not have obtained it, or to enable any of the contractors to make a greater profit by obtaining the stone at a reduced price because of the pledge of the credit of the county. But the contractors were not expected to, and could not in the nature of the case, derive any benefit from the contract, and it was not made for their benefit. It was made solely for the benefit to the county itself, and not for or in aid of any other.

The benefit to the county was that the bids of the contractors for the road work would embrace the item of the cost of the stone at the fixed price mentioned, so that nothing would be added thereto because of the possible fluctuation in price or of inability to obtain the stone at that price; and hence it was expected by the county that by reason of such contract with appellant it would receive a direct benefit in obtaining contracts with the contractors for the road work for a less total contract price than could have been otherwise secured. And doubtless this was the result. But, whether it was or not, this expected benefit to the county was the sole reason for its making the contract with appellant, and hence the credit of the county was used by itself and for its own benefit alone.

Lynchburg, etc., Ry. Co. v. Demeron, 95 Va. 545, 28 S. E. 951, is relied on by appellee as a holding contrary in principle to the conclusion which we have reached above. We do not so construe that case. The controlling principle upon which that case was decided is that a municipal corporation cannot, under legislative authority merely to make contracts of its own for its own benefit, become the surety for another corporation or individual for the benefit of the latter, although the municipality may indirectly be benefited thereby, for the reason that such benefit is indirect and uncertain; whereas, where the contract is authorized and made by the municipality directly for its own benefit, and not at all for the benefit of another, "the avails or consideration" for the contract cannot be diverted to any illegitimate purpose. The latter, precisely, is the situation with respect to the contract involved in the instant case, and hence it is apparent the case last cited has no application to the case now before us.

[2] 2. Is the contract aforesaid, made by its engineer and board of supervisors, binding upon Wise county?

This question must be answered in the affirmative.

The county under chapter 47, p. 62, Acts 1910, unquestionably had the authority to make such contract through its board of supervisors. According to the agreed statement of facts the county, through its board of supervisors, ratified and approved the action of the engineer in undertaking to act for the county in making the contract with the appellant; and the county subsequently through action authorized by the board of supervisors in advertising for bids of contractors and in securing the contracts for the road work at figures embracing those for the stone obtained by means of the contract with appellant, accepted the benefit of the latter contract. It is therefore immaterial whether originally the engineer did or did not exceed his authority. The county cannot

at the same time approbate and reprobate. It cannot at the same time hold the benefit of and repudiate the contract.

[3] 3. Did the second contract entered into between D. J. Phipps and appellant (which alone appears in the record), subsequently to the contract aforesaid between the county and appellant, operate to release the county from the obligation of the contract with appellant?

This question must be answered in the negative.

The contract of the county with appellant was not limited in its operation to stone furnished to Phipps under any particular collateral contract of appellant with him, nor, indeed, to stone furnished to any particular contractor. The contract with appellant embraced all the stone which appellant might supply to any and all contractors for use in the road work in and for the county of Wise embraced in the road building—undertaking of the county mentioned in the agreed statement of facts, under any and all contracts of appellant with such contractors covering the furnishing by appellant to them of the stone at the price stipulated as aforesaid. Further, the second agreement aforesaid in no way operated to increase the liability of the county under its contract with appellant, and so was of no detriment to the county.

For these reasons we are of opinion that the second agreement with Phipps did not operate to release the county from the obligation of its contract with appellant.

But one other question remains for our consideration, and that is this:

[4] 4. Was the action of appellant in merely notifying the board of supervisors of the county on May 12, 1914, that the bill for stone it furnished Phipps in July and August 1913 (which amounted to \$2,425, at the price stipulated in the contract between the county and appellant), was then (May 12, 1914) still unpaid, without expressly notifying the county that the appellant held it liable under the contract with him aforesaid, such action as released the county from the obligation of such contract, in view of the fact that Phipps had been adjudged a bankrupt on August 28, 1913, and the county did not file its answer in the Phipps bankruptcy proceeding until October 27, 1914, in which answer the county did not set up its liability to appellant under said contract with him, but might have done so, and (as is admitted in argument before us for the county) might have had it allowed against the balance then in the hands of the county due Phipps, which was in excess of said \$2,425 claim, whereas, not having done so, the county was required

to pay, and did pay, such balance over into the hands of the trustee in bankruptcy?

This question, too, must be answered in the negative.

We think that, in view of the fact that Phipps was adjudicated a bankrupt in August, 1913, the notice nine months thereafter, which was given by appellant to the board of supervisors of the county of the amount still due him and unpaid for the stone, which the board of supervisors knew appellant had furnished in accordance with his contract with the county, was sufficient notice to the county that the appellant claimed that the county was liable therefor under its contract with appellant. The notice could have had no other purpose or meaning, since Phipps was then and had been for nine months a bankrupt, with all of his assets under the control of the bankruptcy court. The notice to the county, under such circumstances could not have meant that appellant was looking to Phipps for payment independently of the money the county had in hand to the credit of Phipps. And it could not have meant that the appellant looked to the county to distribute the balance in its hands due Phipps, since the bankruptcy court alone had jurisdiction to do that. There was nothing in the conduct of the appellant, therefore, which justified the county in concluding that the appellants made no claim against the county under his contract with it. Hence we think there is no merit in the claim of the county that it was misled by such conduct, and for that reason failed to subsequently protect itself by the aforesaid course, which it might have taken when it filed its answer in bankruptcy. The county all along knew or should have known what was the obligation of its contract with appellant. On and after May 12, 1914, it knew that the \$2,425 due appellant for stone furnished by appellant under the contract with the county had not been and would not be paid by Phipps, and it knew that the only course it could pursue in order to save itself harmless from liability upon its contract obligation to appellant was to obtain leave from the bankruptcy court in the Phipps bankruptcy proceedings to retain out of the fund in its hands the amount of its liability to appellant. This it neglected to do, through no fault of appellant, so far as we can see from the agreed statement of facts in the record.

The order under review must therefore be reversed, and this court will enter an order in favor of the appellant for the \$2,425, amount of its claim, with interest thereon from May 12, 1914, and with costs.

Reversed, and final order entered.

(131 Va. 298)

RICE v. FREELAND.

(Supreme Court of Appeals of Virginia. Sept. 22, 1921.)

1. Wills \Rightarrow 249—Soldier who married while in service, and who regarded wife's home as his home, had his "residence" where wife's home was situated.

Where a soldier while stationed in the state married a resident under an agreement to reside in the state as soon as discharged from the army, and where after the marriage he regarded his wife's home as his home, and repeatedly stated in letters written from France that he intended to make such home his permanent residence, the corporation court of corporation in which the wife lived had jurisdiction of the probate of his will, under Code 1919, § 5247, giving such jurisdiction to court of corporation wherein deceased had a known place of "residence."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Residence.]

2. Wills \Rightarrow 72—Soldier's letter to wife in anticipation of being killed in service held a will, though not so intended.

Letter written by husband in military service in France during war to wife, stating that he expected and desired his wife to get his property, written, as shown by contents thereof, in contemplation of possibility of his being killed in action, held a will, even though he did not intend it to constitute a formal will.

Error to Corporation Court of Roanoke.

Action between Lucy M. Rice and Mary B. Oakes Freeland. To review judgment admitting certain letter to probate as the last will and testament of John C. Freeland, deceased, the former brings error. Affirmed.

Hall, Wingfield & Apperson, of Roanoke, for plaintiff in error.

A. B. Hunt and Staples, Cocke & Hazlegrave, all of Roanoke, for defendant in error.

KELLY, P. This is a writ of error to a judgment of the corporation court of the city of Roanoke, admitting a certain letter to probate as the last will and testament of John C. Freeland, deceased. Two errors are assigned: First, that the letter in question shows on its face that it was not a will and was not intended as such; and, second, that the court did not have jurisdiction because Freeland had no residence or estate in Roanoke, and did not die there. We will dispose of these assignments in their inverse order.

1. John C. Freeland came to Roanoke as a private in the United States army in August or September, 1917. Prior thereto he had been in Fredericksburg, but for how long a time does not appear. The record dis-

closes no other facts in respect to his previous residence. While stationed in Roanoke, on May 6, 1918, he was married to Mary B. Oakes. After the marriage, so long as he remained in Roanoke, he regarded the home of his mother-in-law, with whom his wife resided, as his home; and prior to the marriage he agreed with the latter that he would make his home in Roanoke after he was discharged from military service. Shortly after the marriage he went with his company to Chattanooga, where he was stationed for a short time, and then went to France. His wife remained with her mother, and received numerous letters from him, exhibiting great affection for her and an interest in the household. In one of these he wrote:

"My heart and prayers are with you and I hope my prayers will be answered and if they are I will be back to old Roanoke by Christmas or on the way."

In a letter to his wife's mother he said:

"I am always thinking about all of you and I hope that I will be back again soon for I long to see old Roanoke, Va., once more."

Again, in a letter to his sister, he said:

"The way the Allies are fighting the Germans they won't last very much longer and then I will return to Roanoke, Va., to live the rest of my days."

Freeland died in France from wounds received in action.

[1] Upon this evidence the corporation court held that it had jurisdiction in the matter of Freeland's will, and in this view we concur. The statute (Code 1919, § 5247), so far as material here, provides that the circuit and corporation courts "shall have jurisdiction of the probate of wills according to the following rules—that is to say: In the county or corporation wherein the decedent has a mansion house or known place of residence." Freeland was not originally a resident of Roanoke—he had formerly resided at some other place not disclosed by the record—but he of course had the right and power to adopt a new residence at will, by a union of intention and bodily presence—animus et factum. The evidence shows that before the marriage to Miss Oakes he agreed to reside at Roanoke as soon as discharged from the army; that after the marriage, and while still in Roanoke, he regarded that city as his home; and that he reiterated in his letters from France the purpose of returning to live there permanently. This, in our opinion, was sufficient to sustain the finding of the court in regard to his residence.

2. Under date of July 20, 1918, Freeland wrote to his wife a letter consisting of sev-

eral sheets apparently written in different sections or installments. This letter was offered by her for probate as his will and admitted by the court as such. So far as immediately pertinent, that letter was as follows:

"Now, sweetheart, don't worry about the lotment or insurance for you will get everything that is coming to me. We are so we can hear the guns roar most of the time and soon will be on the firing line, but the sooner we get there the sooner the war will be over, and then I will return to the one I love best. Tell little Mamie to write to me too and all the rest of the folks. * * * I will write to the New York bank and have them send my liberty loan bond money to you and you can do whatever you think best with it. * * * I am not coming back until this war is over and then I will return to you. I have fixed the insurance and lotment so you will get it alright."

A number of other letters were introduced in evidence for the purpose of showing the alleged testator's situation and surroundings, and his regard for his wife. They clearly show, as does the one of July 20, 1918, that she was the principal object of his concern and affection; and, while many of them express the hope on his part of an early return to Roanoke, they leave no room to doubt that they were written in contemplation of the probable fate which soon overtook him. For example, in September, 1918, he wrote her a letter in which he said this:

"I will always be trueful to you and keep you in my mind for I am coming back to you just as I came away from you if I live to get back, and if nothing happens I will be back alright."

Again, he wrote:

"I don't think this war will last only to Xmas. Anyway, I hope not, for I want to come back to you and I want to come back alive too, and I may have some wounds but I hope I won't have many, anyway, but I can't tell anything about it for the shells you know is some hot over here sometimes."

The case is not free from difficulty if we adhere strictly and rigidly to a literal application of the rule as generally expressed, that a paper to operate as a will must have been intended as such at the time it was written. We are frankly, and we believe properly, relaxing in some measure the ordinary rules of construction in this case, and we are doing so in recognition of the general tendency of the Legislatures and the courts to treat soldiers in actual service as belonging to a class of persons entitled to public gratitude and to special consideration in respect to their private and property in-

terests. It is said in *Schouler on Wills and Administration*, § 38, that—

"Seamen and soldiers are treated with peculiar indulgence in our law as a class of persons not only entitled to public gratitude but as requiring in a measure public protection against their own improvidence and the wiles to which they are exposed."

[2] While this is not a case in which there is any occasion to protect the estate of the soldier against "the wiles to which he was exposed," it is a case in which he appears to have been somewhat careless and improvident in the making of technically accurate and correct provision for the disposition of his estate. Upon a careful consideration of the letter which the court admitted to probate, and in the light of the circumstances above detailed, we have reached the conclusion that the corporation court was right in according testamentary effect thereto. We have no doubt whatever that the letter was written in direct contemplation of the fact that the writer might not survive the war, and was a definite expression of the disposition which in that event he desired to have made of whatever property he might leave behind. It is true, as argued for the plaintiff in error, that the allotment referred to was an allowance which Freeland was required by federal statute to make to his wife out of his pay; and it is also true that in referring to the insurance he said that he "had fixed" that as well as the allotment so that his wife would get it all right. This is not in itself testamentary language, but it is not in serious conflict with the general intention otherwise sufficiently expressed, as we think, in the same letter, that he expected and desired her to get all of his property.

In the case of *McBride v. McBride*, 26 Grat. (67 Va.) 476, relied upon for the plaintiff in error, the court through Judge Staples, in laying down the general principles applicable to cases involving questions of testamentary intent, said:

"It is not necessary to the validity of the will that it should have a testamentary form, or that the" testator "should know that he had performed a testamentary act, or that he should intend to perform such act."

And while there are expressions in that case which tend strongly to support the argument that the paper admitted here as Freeland's will ought not to be regarded as a testamentary document, we do not think, regarding the opinion as a whole, that there is any conflict therein with the decision of the lower court in this case. The testator, Freeland in all probability did not think he was writing a will, but he was expressing in

writing what he desired to be done with his property, including his insurance, which is admitted to be practically the only estate of consequence involved here, in case of his death in action.

The English case of *Gattwood v. Knee*, 4 B. R. C. 910, 1 Law Rep. 1902, Probate Div. p. 99, is somewhat in point. In that case William Knee, a private in a branch of the British army, wrote a letter to William Gattwood which, after Knee's death, was admitted to probate as a will. The letter, like the one involved in this case, spoke of other things, but contained this language:

"I am sending a box of things to you which I want you to look after for me until I come home. * * * They are a lot of curios and there is some things for you there; but if you have a letter saying that I am killed then the lot is for you. * * * You will receive the lot if I am killed in action for I shall make out my will in your favor; so you can keep this letter in case you want it for anything, but let us hope that I arrive home safe again."

The probate of this letter was resisted, and it was contended that the document ought not to be treated as a will because it contained the words, "I shall make out my will in your favor," thus showing that the writer did not intend that particular document to be the will. This contention was overruled and the letter was given testamentary effect. We are unable to see any very substantial distinction between that case and the one at bar. It is true that Knee's letter

expressly referred to a future will, but no other will was ever executed. In the instant case Freeland's letter said: "You will get everything that is coming to me," and later on added that he had fixed the insurance and allotment so his wife would get it all right. The record indicates that previous to his marriage he had named some other beneficiary in the insurance policy, and, so far as appears, he had not effectively "fixed" the insurance so his wife would get it. The point is, however, that neither in the *Knee Case* nor in this case did the writer of the letter in question believe that he was making a will, and yet the English court in the *Knee Case* and the corporation court of Roanoke in this case (properly, as we think) held that the writer had made a testamentary disposition of his property, because he had stated in writing what he intended and desired to be done with his property after his death.

In Virginia the policy of liberality and relaxation in favor of soldiers and seamen with respect to the making of wills of personal property finds legislative recognition in section 5231 of the Code. No real estate appears to have been owned by Freeland. Expressly limiting our decision to the facts of this particular case, we are of opinion that the judgment complained of was right, and the same will be affirmed.

Affirmed.

SIMS and BURKS, JJ., absent.

(131 Va. 364)

(193 S.E.)

WILSON BROS. et al. v. BRANHAM et al.

(Supreme Court of Appeals of Virginia. Sept. 28, 1921.)

1. Logs and logging ⚡3(1) — Fee owner of land may convey timber with unlimited time for entry and removal.

Fee owner of land may convey an absolute estate in standing timber with unlimited time for entry and removal.

2. Property ⚡11—Owner may dispose of as he sees fit unless contrary to public policy or positive rule of law.

Owner may dispose of property as he sees fit unless intended disposition is contrary to public policy or some positive rule of law.

3. Woods and forests ⚡1—Standing trees are realty.

Standing trees are realty.

4. Logs and logging ⚡3(7)—Different portions of timber deed reconciled, if possible.

In construing a timber deed, the court will take the whole contract together and reconcile, if possible, apparent conflicts between different portions, so as to make it, and every part, conform to and be in harmony with the manifest general intent.

5. Logs and logging ⚡3(7)—Grantor retains title until timber is cut and removed within specified time.

Where deed conveying standing timber fixes time for removal, the absolute title does not pass out of the grantor until grantee cuts and removes timber within the specified period; the rights of grantee to the standing timber terminating upon the expiration of the specified period.

6. Logs and logging ⚡3(11)—Deed held to give unlimited time for removal.

Warranty deed conveying specified number of branded trees on land largely nontillable and valuable principally for timber, for which there was no immediate market owing to lack of transportation facilities, giving grantee the right to enter "at any time" to build roads and mills and to cut, manufacture, and remove trees, and providing that grantee shall have 10 years in which to cut and remove the trees, and that grantor shall have the right to deaden the trees standing on expiration of such 10-year period and clear the land for cultivation, held to convey fee in standing timber with indefinite time for removal even after expiration of 10-year period.

7. Logs and logging ⚡3(5) — Evidence held not to prove abandonment.

In an action to enjoin removal of standing timber, evidence held not to prove abandonment of the right to the timber under timber deed.

Appeal from Circuit Court, Dickenson County.

Suit by William J. Branham and another against Wilson Bros. and another. Decree

for complainants, and defendants appeal. Reversed.

Sale & Harris, of Richmond, and Chase & McCoy, of Clintwood, for appellants.

A. A. Skeen, of Clintwood, Phipps & Phipps, of Clintwood, O. M. Vicars, of Wise, J. W. Flannagan, Jr., of Grundy, and Geo. C. Peery, of Tazewell, for appellees.

SAUNDERS, J. This is an appeal from a decree of the circuit court of Dickenson county, pronounced October 15, 1919. The main question presented for determination is the proper interpretation and true construction of a deed made by Felix Senter, M. L. Senter, and Winnie Senter, his wife, A. C. Senter and M. J. Senter, his wife, to Caroline Harris.

The pertinent facts necessary for an adequate understanding of the genesis and development of this controversy are as follows:

In the year 1904, M. L. Senter, A. C. Senter, and their wives, and Felix Senter, for value received, conveyed certain standing trees in the county of Dickenson to one Caroline H. Harris. This conveyance, so far as is needful, is herewith reproduced:

"The parties of the first part bargain, sell, grant, and convey unto the party of the second part, or assigns, with covenants of general warranty of title, freedom from all incumbrances, and peaceable and quiet possession, the following property, viz: Six hundred and forty-three (643) white oak trees 20 to 40 inches in diameter, six hundred and forty-three (643) white oak trees over 24 inches in diameter. All of said trees containing from 24 feet and over of straight trunk, or body, clear of limbs and visible defects, and are branded, or marked with letter H cut in the bark, and are standing and growing on the land of the said first parties, located on the waters of Cane creek of Pound river, and bounded and described as follows: * * *

"The parties of the first part grant unto said second party, his heirs and assigns, the right to enter on said land at any time free of charges or damages, for the purpose of cutting, manufacturing, and removing said trees or their products from the land, and for that purpose grant unto the party of the second part, or his assigns, the right to build and open all wagon roads, train roads, or station roads on, through or over said lands. The parties of the first part grant unto said second party, or assigns, free of cost, the right to erect mills on said land for the purpose of cutting said trees into lumber or into staves. The party of the second part, or assigns, has the right to use free of charge sufficient timber for necessary tramroads on said tract of land, so that no valuable, merchantable timbers shall be used for said tramroads. The party of the second part or his assigns are to have ten years from March 10, 1902, in which to cut and remove said trees from said lands, and if the party of the second part or his assigns shall fail to cut and remove said trees from said land within ten

years from March 10, 1902, then the parties of the first part, or the owners of the land, shall have the right to deaden such of said trees as may be standing upon said land, which the owner may clear for cultivation. The said first parties covenant with the party of the second part that their title to said tract of land is perfect, and that they have a perfect right to sell and convey said trees, together with rights and privileges herein set forth."

The rights, titles, and interest derived by Caroline Harris under this deed passed by successive conveyances, until finally they were lodged in W. H. and F. G. Wilson. It will be noted that under the Senter deed relating to the white oak trees on the lands of the Senters, Caroline Harris, the vendee of the Senters, was given the right to enter at any time upon the lands described in her deed, and cut and remove the trees therein conveyed to her. Title to the lands on which these trees were growing remained in the grantors.

The bill in this case is filed by W. J. Branham and William McKinley Phipps. These parties are the grantees in a deed bearing date September 5, 1917, from Josephine H. Stanley and John W. Stanley, her husband. W. J. Branham was the grantee in a deed from the same parties, of date September 4, 1916. This latter deed conveyed to the said Branham, with general warranty, the standing trees on the lands of the said Josephine Stanley, the same "being originally a part of the tract of land of the aforesaid Felix Senter, and a part of the land recovered by Josephine Stanley in the chancery cause of Josephine Stanley v. M. L. Senter and others." Some of the trees comprehended in this conveyance, to wit, 341 white oak trees branded H, were a part of the trees embraced in the deed supra from the Senters to Caroline Harris, and are referred to as the Caroline H. Harris timber. The timber conveyed by Josephine Stanley to Branham stood upon land which the said Josephine owned in fee, but it is not necessary to trace in detail her title in this respect. Suffice it to say that it was duly derived. The deed of September 4, 1916, gave the grantee full right to cut and remove during a specified period the timber conveyed.

Subsequent to the deed ubi supra, Wm. McKinley Phipps purchased from Branham a one-half interest in the 341 white oak trees branded H—that is to say, the Caroline Harris timber. Thereafter, on September 5, 1917, the said Josephine Stanley and her husband, by a deed which recited the trees sold to Branham, and the terms of sale, and the purchase from Branham by Phipps of a one-half interest in the said 341 trees, enlarged the period within which the said trees could be removed from Mrs. Stanley's lands by said Branham and Phipps.

Some time in June, 1919, Branham and

Phipps filed a bill in chancery in the circuit court of Dickinson county, claiming to be the owners of the 341 branded trees aforesaid, and alleging that W. H. Wilson and F. G. Wilson, doing business as Wilson Bros., and one G. H. Holmes, were cutting and removing said trees. The plaintiffs asked for an injunction restraining the activities of Wilson Bros. and Holmes, also an account of damages. About the time that Branham and Phipps applied for this injunction against Wilson Bros. and Holmes, as recited supra, the W. M. Ritter Lumber Company, a corporation, made application for like relief on the same grounds against the same parties. The lumber company claimed that it was seized and possessed of all of the trees and timber of every kind on a 100-acre tract, the former property of Josephine Stanley, and traced its title as follows: (1) By deed to said company from O. M. Vicars and wife, George C. Peery and wife, and Columbus Phipps and wife, dated May 29, 1917. This deed, conveys to the Ritter Lumber Company, with general warranty, all of the timber of every description on the 100-acre tract supra, with complete rights, etc., of cutting and removing same within a specified period.

Looking to the deeds from Josephine Stanley and husband to Vicars and associates, predecessors in title to the lumber company, it will be noted that the grantors convey to the said Vicars and associates the 100-acre tract in fee, making no reference to the timber on same. These deeds are three in number, bearing date, respectively, April 3, 1914, March 15, 1915, and October 14, 1915. The first deed in point of time was made when Josephine Stanley was an infant. The second deed ratifies the deed of April 3, 1914. The deed of October 14, 1915, makes a correction in the description and acreage of the land referred to in the prior deeds. But, as stated supra, there is no reference to timber in any one of the three deeds, all of which are prior in time to the deed of Josephine Stanley and her husband to William J. Branham. It is not needful to trace in full detail the title of the Ritter Company through Josephine Stanley to Felix Senter. Evidently Vicars, Peery, and Phipps, as the owners in fee of the 100-acre tract, claimed to own all the standing timber thereon. The bill of the lumber company alleged that Wilson Bros. and Holmes were cutting the standing timber on said 100-acre tract—that is, the Caroline Harris timber—and, like Branham and Phipps, it asked for an injunction restraining these acts and an account of damages.

In vacation of the circuit court of Dickinson county, on June 2, 1919, a preliminary injunction was awarded in the case of Ritter Lumber Company v. Wilson Bros. and Holmes. On June 12th a like order of injunction was entered in the case of Branham and Phipps against the same defendants.

The defendants later filed an answer in each of the foregoing cases.

In their answer in the case of Branham and Phipps v. Wilson Bros. and Holmes, Wilson Bros. claimed the 341 branded white oak trees standing and growing on the lands of Josephine Stanley. They denied that any right, title, or interest in these trees passed to the plaintiffs under the deeds from Stanley and wife. Further, the respondents set up their chain of title to said timber and trees, the same being the deed supra from the Senters to Caroline Harris, and successive conveyances thereafter; the last in the series being the deed of John Golding and Herbert A. Beard and their wives. By these deeds all the right, title, and interest of Caroline Harris in the timber aforesaid passed to and was finally lodged in respondents, the said W. H. and F. G. Wilson. The answer denied that respondents had done anything to lose or forfeit the estate and rights derived through conveyances in course from Caroline Harris, or that they, or their predecessors in title, "had ever abandoned said trees, or any of them." On the contrary, they asserted that they "had at all times claimed the same, and paid the taxes from year to year on the same, and have at all times asserted, and are now asserting, their ownership of said trees and timber, and the right to cut and remove the same." A like answer was filed in the suit of Ritter Lumber Company v. Wilson Bros. and Holmes. There are other allegations of the bills and answers, and facts developed by the testimony, that will be referred to in the discussion of the legal questions presented in this case.

After the pleadings were completed in the foregoing causes, voluminous depositions in behalf of the respective parties were taken and filed; the testimony in the one case being used in the other. Upon the final hearing of the foregoing causes, decrees were respectively entered sustaining the contention of the complainants, and perpetuating the injunctions originally awarded. From these decrees appeals were secured by the defendants, Wilson Bros. and G. H. Holmes, bringing the entire controversy before this court for review.

In the chain of title from Caroline Harris, grantee of the Senters, to the Wilsons is the deed of Beard and Golden, the immediate predecessors in title of Wilson Bros., to wit, W. H. and F. G. Wilson. This deed bears date September 10, 1912. Under its authority Wilson Bros. began to cut the Caroline Harris timber in that year, continuing their operations into the year 1913. Holmes was their active agent in the woods. Owing to scarcity of labor and difficulties in transporting the lumber, the work was finally discontinued after a portion of the timber had been cut and at considerable expense floated down Pound river. The trees in question were on Cane creek, an affluent of

Pound river. There was no railroad within reach during the foregoing period of operations. Hence, in order to reach their market, the defendants were compelled to float their timber down Cane creek to Pound river, and thence through the Breaks of Cumberland to the Big Sandy river. This venture proved to be difficult, costly, and unsatisfactory. Some years after the discontinuance of the initial operations, Wilson Bros. resumed the cutting of the oak trees on the Stanley tract. This was in 1919. Timber having increased in value in the meantime, and labor become easier, defendants hoped to make their venture profitable. The interruption of these and other operations by the injunctions of the several plaintiffs has been recited.

Complainants allege in their bills respectively: (1) That, whatever the original rights of the defendants under the Harris deed, the timber under that deed had reverted to the owners of the land; (2) that, if there was no reverter, the defendants had lost title to this timber by abandonment. It is fundamental, therefore, to ascertain the rights of defendants—i. e., the Wilson Bros.—under the deed from the Senters to Caroline Harris. The inquiry into the charge of abandonment will follow in due course.

The contention of the appellants is: (a) That the Senter deed conveying the timber to Caroline Harris conveyed an absolute estate in the timber, unlimited as to time of removal, with the right to the grantors, or to the then owners of the land, at the expiration of a period of 10 years from March 10, 1902, to deaden such of said trees as might then be standing on land which the owners desired to clear for cultivation; (b) that, if this contention is not sound, then the grantee in said Senter deed had a reasonable time after the expiration of the 10-year period within which to cut and remove said trees, and that such reasonable time had not elapsed when the defendants were restrained by the orders of court supra.

The appellees specifically insist that under the Senter deed Caroline Harris had a period of 10 years from March 10, 1902, within which to cut and remove the trees from the land in question, and that any trees uncut and unremoved at the expiration of said period became the property of the grantors, their grantees and assigns; further, that if this contention is not well taken, and it is considered that after the expiration of the 10-year period the said Harris was entitled to a reasonable time thereafter within which to cut and remove said trees, such reasonable time had elapsed before Wilson Bros. began their operations in 1919.

There are two noteworthy clauses in the Senter deed:

(a) "The parties of the first part grant unto the second party, his heirs and assigns, the right to enter upon said land at any time

* * * for the purpose of cutting, manufacturing, and removing said trees, or their products, from the land, and for that purpose grant unto the party of the second part, or his assigns, the right to build and open all wagon roads," etc.

(b) "The party of the second part, or his assigns, are to have ten years from March 10, 1902, in which to remove said trees from said lands, and if the party of the second part, or his assigns, shall fail to cut and remove said trees from said land within ten years from March 10, 1902, then the parties of the first part, or the owners of the land, shall have the right to deaden such of said trees as may be standing upon said land which the owner may clear for cultivation."

The primary inquires in this case are: (1) Whether it is possible for parties to make a contract whereby one would be entitled to a perpetual right to enter upon the lands of another, and remove timber therefrom; (2) if such a contract is possible, did Caroline Harris secure a right of that character under her deed from the Senters?

[1] There seems to be no sufficient reason why the owner in fee of lands producing standing timber should not be able to make an absolute conveyance of such timber, with unlimited time for entry and removal of same. "The right of an owner to carve out of his property as many estates, or interests (perpendicular or horizontal, perpetual or limited), as it may be able to sustain, cannot be open to doubt."

[2] It is incident to the rights of the owner of the fee, and in line with well-established policy which allows the free and untrammelled disposition of estates, that such owner may do what he will with his own, unless his intended disposition is contrary to public policy, or to some positive rule of law. We know of no public policy or rule of law, which forbids the owner of standing timber to convey an absolute estate in such timber, with an unlimited time for removal. The whole matter rests in the intention of the parties, and if it is clear that the owner intends to give such an estate, and the language used is adequate to that end, it is not for the courts to concern themselves with the wisdom or unwisdom of the owner's action. There are many cases supporting this power of disposition of the owner of lands over his standing timber, and, so far as we are aware there are none that deny it. A few authorities directly in point will be cited in this connection.

In *Hicks v. Phillips*, a Kentucky case, the grantor conveyed certain real property by deed containing the following clause:

"Said Phillips [the grantor] reserves the timber [on described land], * * * also all the rails made, and cut timber for rails, * * * lying on said land."

The heirs of the grantee brought a bill to quiet title, setting forth that more than 37

years had elapsed since the above reservation, during which time appellees had failed to take any steps to remove the timber, and that a forfeiture by reason of failure to remove had taken place. The court said:

"On the whole, * * * the correct rule is laid down in *Patterson v. Graham*, supra, where it was held that one may buy growing timber with no intention of manufacturing it, and may hold it just as he might buy and hold the land, if he so frame his contract; but that, where the parties intend that the timber shall be severed from the land, and no time is fixed therefor, the law implies that the grantee will remove it within a reasonable time. So, too, the vendor of land may wish to reserve the timber thereon, not with a view of cutting and removing it, but with a view of its ultimate enhancement in value when proper transportation facilities afford him a market. If so, he should be permitted to contract accordingly. But it is insisted that this will impose a heavy burden on the vendee of the land by defeating for an indefinite period of time the culture and improvement of the soil. If so, it will be a burden that he knowingly and voluntarily assumes. However, we apprehend that in the great majority of cases the burden will be more imaginary than real, for ordinarily the fact that the timber may be stolen, or may be destroyed by decay, by storm, or by fire, or may be lost in some other way, will be a sufficient incentive to the owner not to postpone indefinitely its severance from the soil." *Hicks v. Phillips*, 146 Ky. 305, 142 S. W. 394, 47 L. R. A. (N. S.) 878.

In *Clap v. Draper*, a Massachusetts case, the following state of facts is revealed: A tract of land was conveyed to grantee. Thereupon the grantee reconveyed to the grantor, "his heirs and assigns," all timber and trees growing and standing on said land forever, with full right "to cut and carry away said trees * * * at all times at their pleasure forever." The owner of the land cut and carried away some of these trees, and the owner of the trees thereupon brought trespass. The court held:

"The result of this joint construction is that the grantor conveyed the close to the grantee in fee, reserving to himself an inheritance in the trees and timber, not only then growing, but which might thereafter be growing in the close. This is the natural effect of the grantee's agreement that the grantor and his heirs should have all the trees and timber standing and growing on the close forever, and not merely those then standing, or which should be standing within a limited time, and of a perpetual license to cut and carry them away. The plaintiff having all the estate in the trees, timber, and close which the grantor had after the execution of these two deeds, he has an inheritance in the trees and timber, with an exclusive interest in the soil so far only as it may be necessary for the support and nourishment of the trees." *Clap v. Draper*, 4 Mass. 266, 267, 8 Am. Dec. 215, 216.

In *France v. Deep River Logging Co.*, the court was asked to construe certain language

giving to one Mooers and his assigns the right to enter upon a tract of land and remove certain timber and trees therefrom "at the pleasure of the grantee, his heirs, personal representatives and assigns, * * * forever." Held that—

This language pointed "conclusively to an intention on the part of the grantor to convey a continuing, perpetual right for all time, to enter upon the land and remove the timber. The grantee's assigns or descendants may do so a hundred years hence. Grants in substance the same as this were held by us to have such effect." *France v. Deep River Logging Co.*, 79 Wash. 336, 140 Pac. 361, Ann. Cas. 1916A, 238.

In the case of *Lodwick Co. v. Taylor*, the grantor "bargained, sold, and released unto the" grantee, "heirs and assigns, forever, in fee simple, * * * all the timber" on certain lands, with general warranty. Held:

"The deed unmistakably expresses the intention to convey the timber as an interest in the land on which it stood, and to convey it in fee simple and forever. It is a well-settled proposition that trees may be so conveyed or reserved in a deed as to leave in one person a title in fee in the soil generally and in another a like title in the timber. * * * The very terms of the deed, when it says the title is conveyed in fee simple forever, answer any question that might otherwise arise as to the nature and duration of the right granted." *Lodwick Co. v. Taylor*, 100 Tex. 270, 272, 98 S. W. 238, 239, 123 Am. St. Rep. 805.

The following citation is taken from the opinion of the court in the case of *R. M. Cobban Realty Co. v. Donlan*:

"In its essentials, deed A, conveying the timber with the right of entry to cut and remove the same, differs not from a *grant or reservation of coal or minerals*, with a similar right of entry to mine and remove. [Italics supplied.] That such a grant or reservation, couched in the terms employed in deed A, would be absolute, no one would deny; and in fact *McGrath* did * * * for the consideration paid * * * grant such an estate in the timber with right of entry for cutting, skidding, and removing the same so long as any of it remained, we hazard the opinion that apter words to express that intention could not have been chosen than those which were actually employed." "Owners of property have the right to be foolish as well as wise, prodigal as well as provident; and, whichever they are, it is the business of the courts to enforce their contracts freely made and plainly expressed." *R. M. Cobban Realty Co. v. Donlan*, 51 Mont. 58, 67, 149 Pac. 484, 487.

In *Magnetic Ore Co. v. Marbury Lumber Co.*, which was a controversy concerning the estate taken in standing timber, the court said:

"The title passed to the purchaser, and we see no reason for giving to words used in a deed of conveyance of trees a different meaning than that given when used in a deed of convey-

ance of minerals or any other portion of the realty; there being nothing in the instrument to control or vary their usual signification." *Magnetic Ore Co. v. Marbury Lumber Co.*, 104 Ala. 465, 470, 16 South. 632, 633, 27 L. R. A. 434, 435, 53 Am. St. Rep. 73.

In *Baker v. Kenney*, the following language was construed:

"* * * Do grant and convey unto the said party of the second part, his executors, administrators, and assigns, all timber and growth of timber" on said land. "To have and to hold unto the said party of the second part, his executors, administrators, and assigns forever," with the privilege at all times to enter said lands for the purpose of cutting and hauling the timber therefrom.

Said the court:

"The language of the instrument before us indicates that the parties contemplated the right on the part of defendant and his administrator or assigns to take timber and growth of timber from the described land. There is not only a failure to fix a time limit, but the habendum clause expressly describes the right as one which was to exist forever. It is true in neither the granting clause nor the habendum are the heirs of the grantee mentioned, and at common law the grant would be construed to be for life only. But in this state 'the term "heirs," or other technical terms or words of inheritance, are not necessary to create and convey an estate in fee simple.' (This is also true in Virginia.) "If a grantor, desiring to prepare an instrument which would convey to the grantee a fee-simple title to the incorporeal hereditament described in the instrument as the right to take timber and growth of timber from designated land, should attempt to frame a deed for that purpose, he could not, having regard to the laws of this state, do so in apter words than those used in the instrument before us, and we reach the conclusion that such was his purpose." *Baker v. Kenney*, 145 Iowa, 638, 645, 124 N. W. 901, 904 (139 Am. St. Rep. 456).

In *Butterfield Lumber Co. v. Guy*, the following language was construed, the plaintiff claiming that the timber had reverted by reason of the failure to remove same within a reasonable time:

"We convey and warrant to" the grantee "all the green pine timber on" the lands designated. "We further convey the right to enter upon said land with log carts and log wagons to remove said timber off said land."

This deed was made in 1892, and the suit claiming a reverter of the standing timber was brought in 1906. The court held as follows:

"The deed is a simple conveyance by warranty in fee simple of the timber, without time limit or conditions. In every essential necessary to convey a fee interest in the trees, the deed conforms to the requirements of the statutes. * * * No question of public policy is involved in this deed, so as to avoid it. The owner of the land was the owner in fee, and he might

carve it up into as many different sorts of estates as the land was susceptible of, and make a good and valid deed in fee simple to each. If he has done so, and finds it inconvenient or improvident, the courts will not destroy the property rights of his vendees in order to relieve him from his own improvidence. * * *

"The practical effect of the bill is to ask the court to write into the deed what is claimed was the intention of the parties as the legal sequence of the contract made, though the instrument itself is silent as to any such intention. If the conditions sought to be ingrafted on this contract by the complainant are to be put there, it must be done by the court writing into the deed for the benefit of one of the parties a clause which is at variance with his own contract and destructive of the property right of the other party, which property right was bought from, and consideration paid to, the party asking to have same canceled. The interest of the purchaser of this timber under his deed has no less claim to the protection of the law than the interest which the seller retains in the soil. The seller of this timber seeks to have the court do that which is in plain conflict with the rights which he has conveyed. By warranty deed he has sold this timber, received money for it, and now seeks to breach his own warranty by a proceeding in an equity court to cancel his deed, and declares that his vendee did not get what he warranted him he would convey. There is no justice nor equity in the contention. If he desired to limit the title which he conveyed, he should have placed it in the contract. If it had been his purpose to grant him a license merely to enter the land and cut the trees, his contract should have been drawn so as to express this intention. Not having done so, it is not for us, at his instance, to give to this contract an intention which deprives the vendee of his property and is contradictory of the terms of the deed made by the vendor." *Butterfield Lumber Co. v. Guy*, 92 Miss. 361, 46 South. 78, 15 L. R. A. (N. S.) 1123, 131 Am. St. Rep. 540.

In the case of *North Georgia Co. v. Bebee*, the grant of certain standing, branded trees was in the following language:

"* * * Doth grant, bargain, sell, and convey [i. e., said trees] unto the party of the second part, his heirs and assigns forever, * * * with the full and unreserved right of way * * * for the manufacture, or removal at any time of any and all timber," etc.

The conveyance was with general warranty. A claim of reverter was asserted in this case on the ground of failure to cut and remove within a reasonable time. The court held:

"The paramount consideration in the construction of every instrument conveying growing trees, with the right to cut and remove them, is the intention of the parties as contained in the writing. If that intention be a sale and purchase of the trees, to be held as land, with a perpetual right of entry to remove them, the vendor is estopped by his own grant from compelling the vendee to cut and remove the trees at his own will, or even within a reasonable time."

"It will be observed from the reading of the deed appearing in the statement of facts that the grant of the estate in the trees is absolute and unconditional; it is to the 'party of the second part, his heirs and assigns forever.' * * * These various privileges granted to the vendee would seem rather to be a recognition of the grant of an unconditional estate in the trees than a limitation upon the estate. The grantee's right of entry for the purpose of manufacturing or removing the timber was not limited, but the privilege was indefinite, or, to use the words of the grantor, he could exercise this right '*at any time*.'" (Italics supplied.)

"If it be possible to frame a conveyance creating an estate in trees with a perpetual right of entry to cut and remove them from the land, this deed has that effect. It may bear harshly upon the owner of the soil, but, as it was competent for him to make such a contract as this, he must abide the consequences of his own deed."

North Georgia Co. v. Bebee, 128 Ga. 563, 57 S. E. 873.

A case singularly in point is the case of *Shepherd v. Bank of Montreal*. The deed in question contained the following clause:

"* * * And the party of the second part is given the period of six years from and after this date in which to remove said trees from off said lands. But, if the party of the second part should desire to have said trees stand on said land for a longer period than six years, he shall have the right to let said trees stand on said land until he shall desire to remove them, except that the party of the first part shall, after the expiration of said period of six years, have the right to deaden such trees as stand on land where the said party of the first part desires to clear and cultivate, first giving the second party, or his assigns, twelve months' personal written notice to remove the said trees off said land where the party of the first part desires to clear or cultivate."

In this case, too, the question of reverter arose, but the contention to that effect was overruled. The following citation is from the opinion of the court:

"Defendant's position is that the title has reverted to him by reason of the failure on the part of the plaintiff, and those through whom it claims, to cut and remove the timber * * * within six years from the date of sale, or within a reasonable time thereafter. In our opinion neither one of these propositions can be maintained. By the very deed which defendant executed, the grantee is not only given six years within which to remove the trees, but the further right after that time to let the trees stand on the land until he desires to remove them, subject, however, to the right of the grantor to deaden the trees after first giving the grantee twelve months' personal notice to remove the trees off the land where the grantor desires to cultivate. True, we have held that where the contract for the sale of standing timber is silent on the question of removal, but the situation of the parties and the circumstances surrounding them at the time the contract is executed are such as to show that the severance of the timber from the soil

was contemplated, the title thereto may be defeated by a failure to cut and remove the timber within a reasonable time. * * * But that rule has no application to a case where the time for removal is fixed by the parties. In other words, it does not prevent the parties from agreeing on the time for removal. There can be no doubt that a party can buy growing timber with no intention of manufacturing it, and may hold it just as he might buy or hold land, if he so frame his contract. * * * Here the trees were conveyed by deed to the grantee, *his heirs and assigns* [italics supplied], with covenant of general warranty. * * * The parties not only agreed that the trees should remain on the land for six years, but for so long thereafter as the vendee desired. Under these circumstances, the trees passed as realty, and the covenant of title would follow into the hands of any vendee." *Shepherd v. Bank of Montreal*, 156 Ky. 495, 497, 161 S. W. 214, 215.

It abundantly appears from the cases cited, and from many others that might be cited, and it is in full accord with fundamental principles, that it is competent for an owner of lands to create an absolute estate in standing timber, with a perpetual right of entry to cut and remove same. Confronted with a given deed alleged to create rights of this character, the question is merely one of construction and the ascertainment of the intention of the parties.

We have been cited to a number of cases in this state as authority for the contention: (a) That under the deed in question in the instant case the grantee "was to have only 10 years from the 10th of March, 1902, within which to cut and remove the trees sold"; (b) that, even if the "grantee should be considered to be entitled to a reasonable time after the expiration of the 10-year period to remove said trees, such reasonable time had elapsed at or prior to the institution of this suit."

Much reliance is placed by appellees upon the principle announced in the following citation from the case of *Wright v. Camp Mfg. Co.*, 110 Va. 678, 687, 66 S. E. 843, 846:

"In *McRae v. Stillwell*, supra, the court says, among other things, that 'while it is possible * * * for parties to make a contract whereby one would be entitled to a perpetual right to enter upon the land of another and remove timber therefrom, as such an agreement is so unreasonable in its nature, no contract will be presumed to have this effect unless it is plainly manifest from the terms of the same that such was the intention of the parties.'

"In *Hill v. Hill*, 113 Mass. 103, 18 Am. Rep. 455, the court says: 'It is not reasonable to presume that it was the intention of the parties to subject the land to a permanent easement. The right claimed by the plaintiff would deprive the defendant of the full use and enjoyment of his land for an indefinite time, which might extend through his life, and would give the plaintiff for that time the principal, if not the sole, beneficial use of it. * * * The claim of the plaintiff that he had the right to

have the trees remain, drawing nourishment from the soil, as long as he chose, is, we think, contrary to the intention of the parties.'

It may be freely conceded that, taking a "whole contract together," effect should not be given to any provision which is ascertained to be contrary to the intention of the parties; but, whenever the intent of the parties is ascertained from internal evidence, and by proper construction of the instrument under consideration, that intent should be made effective. The timber cases, so called, in Virginia, rest upon the language construed in those cases, and they announce no principle contrary to the authority of the cases cited supra. Indeed, in the citation from *McRae v. Stillwell*, 111 Ga. 65, 36 S. E. 604, 55 L. R. A. 513, it is said:

"It is possible * * * for parties to make a contract whereby one would be entitled to a perpetual right to enter upon the land of another and remove timber therefrom, yet," etc.

But the conclusion announced is that—

Such an agreement is so unreasonable in its nature that "no contract will be presumed to have this effect unless it is plainly manifest from the terms of the same that such was the intention of the parties."

In deciding the cases cited by appellees, this court assumed the foregoing attitude with respect to contracts alleged to afford an indefinite right of entry and removal. But that attitude and those decisions are not decisive of the instant case, for the manifest reason that the language to be construed in the instant case and in the cases cited is essentially different. For instance, in the case of *Blackstone Mfg. Co. v. Allen*, 117 Va. 452, 85 S. E. 568, this court held that—

"Under a contract allowing a person to cut and remove standing timber within a time specified, the absolute title to the timber never passes out of the grantor until the grantee cuts and removes the timber within the time specified in the contract."

This is obviously true. Further, the court held that there was no forfeiture of the timber remaining uncut or removed after the time limit, for the manifest reason that there was nothing to forfeit. But in this case the court was dealing with an express and limited right to enter and remove the timber, not an unlimited right. The contractee's rights of every character fell with the termination of the time specified for cutting and removing the standing timber in question.

In the case of *Wright v. Camp Mfg. Co.*, supra, the deed conveyed all the pine timber standing on the land of a specific diameter, with the right to cut and remove same in five years, and, if not cut and removed within that time, then, upon specified terms, such further time of removal as the grantee

might desire was provided for. The grantee claimed an indefinite time under the terms of the latter provision. But the court held, taking the whole contract together, that the grantors never intended to confer any such indefinite right upon the grantee, and that "it would be unreasonable to hold" that such an indefinite right was intended to be conferred. This case is more in point as authority for the construction placed by appellees upon the Senter deed to Caroline Harris than any other that is cited, but there are several features of the Senter deed hereinafter to be discussed, and certain attendant distinguishing circumstances which distinguish this case from the Camp Case. These features and distinguishing circumstances will presently be considered.

The case of *Brown v. Surry Lumber Co.*, 113 Va. 509, 75 S. E. 84, rests upon the case of *Wright v. Camp*. The language to be construed was that the purchasers should have "five years in which to cut and remove" the timber conveyed, from the time at which they commenced "to manufacture said timber into wood or lumber, but they shall not be limited as to the time in which they shall commence to cut or remove the same." Construing this somewhat ambiguous language, the court held that the deed on the whole did not show an intention to convey a perpetual right to enter and remove the timber, but that such right must be exercised in a reasonable time.

In *Quigley Furniture Co. v. Rhea*, 114 Va. 271, 76 S. E. 333, the grantees were given six years in which to cut, fell, remove, etc., the timber conveyed. The court held, very properly, that no timber could be removed after the expiration of this period.

Smith v. Ramsey, 116 Va. 530, 82 S. E. 189, follows *Quigley v. Rhea*, supra. The same question was involved.

Hartley v. Neaves, 117 Va. 219, 84 S. E. 97, and *Blackstone v. Allen*, supra, are timber cases, but are no wise in point. *Johnson v. Powhatan Mining Co.*, 127 Va. 352, 103 S. E. 703, a recent case, reaffirms the proposition that, where one owns the fee in land and another the standing timber thereon, with a right of removal, the owner of the timber should remove the same within a reasonable time, unless the contract clearly affords an indefinite and perpetual right to allow the timber to remain unsevered. But the same case affirms the companion proposition that it is possible to so draw a contract as to give such a perpetual right to the owner of the timber, though a contract should not be construed to "have such meaning unless the parties clearly so intended and definitely expressed such intention." With these pronouncements we fully concur.

[3] Reverting now to the Senter deed under consideration, it will be noted that the

grantor "sells, grants, and conveys to the grantee, or his assigns, for a valuable consideration, and with general warranty, 1,286 standing and branded white oak trees, growing on certain lands, with the right to enter on said land at any time, to cut and remove said trees, or their products." Standing alone, these words are certainly technically sufficient to pass an estate in fee in the trees to the grantee, with an indefinite time to enter and remove same. Standing trees are realty under our law. The following citation from a well-known authority on real property is in point in this connection:

"But if the owner of lands grants the trees growing thereon to another and his heirs, with liberty to cut and carry them away at his pleasure forever, the grantee acquires an estate in fee in the trees, with an interest in the soil sufficient for their growth, while the fee in the soil itself remains in the grantor." 1 Washburn, *Real Property*, 17.

In *Butterfield Lumber Co. v. Gray*, supra, the grantor conveyed his pine timber on certain land with general warranty. The grantee was given the right to enter and remove said timber. Twenty-four years thereafter the owner of the land brought his suit, alleging that the failure to cut and remove the timber had operated a forfeiture of same. The court held that the language plainly afforded a fee-simple title in the timber, without a time limit for removal, and that, if the grantor desired to limit the rights of the vendee in any wise, he should have provided the limitation in the contract. This reasoning is essentially sound, and the conclusion derived from the language used is manifestly correct. But the words used in the deed in the instant case, to wit, "bargain, sell, grant, and convey, * * * with covenants of general warranty, the said trees," and the right given "to enter at any time on said land to remove the trees," etc., and to "build wagon and other roads to that end," even more plainly than the language construed in the *Butterfield Case*, supra, and in other cases cited, indicate the intent to give a fee-simple interest in the trees and the right to remove same without a time limit, or other conditions. Appellees, however, stress the language of a succeeding paragraph in support of their contention that a definite time limit for removal is fixed by the Senter deed. This language is the following:

"The party of the second part [i. e., Caroline Harris] or his assigns are to have ten years from March 10, 1902, in which to cut and remove said trees from said lands, and if the party of the second part or his assigns shall fail to cut and remove said trees from said land within ten years from March 10, 1902, then the parties of the first part, or the then owners of the land, shall have the right to deaden such of said trees as may be standing upon

the said land, which the owner may clear for cultivation."

[4] Apparently there is a conflict between the preceding language giving the party of the second part, his heirs and assigns, the right "to enter at any time on said land, to cut and remove the trees," etc., and the language just cited, to wit, that "the party of the second part or his assigns are to have ten years from March 10, 1902, in which to cut and remove said trees," etc. But according to familiar principles we must take the whole contract together, and reconcile, if possible, apparent conflicts between different portions of same so as to make the instrument, and every part thereof, conform to, and be in harmony with, the manifest general intent.

[5] If this provision as to a 10-year period within which the timber is to be cut and removed was intended to reduce the unlimited right to enter and cut previously given, and to fix absolutely the time within which the standing timber was to be removed, then at the expiration of 10 years all trees then standing would be the property of the owner of the land. As this court said in *Blackstone Mfg. Co. v. Allen*, cited *supra*:

"Under a contract allowing a person to cut and remove standing timber within a time specified, the absolute title to the timber never passes out of the grantor until the grantee cuts and removes the timber within the time specified in the contract. There is no forfeiture of the timber remaining uncut or unremoved after the time limit, for there is nothing to forfeit."

That is to say, such uncut or unremoved timber has never become in any final sense the property of the grantee. Hence, if the 10-year provision cited is designed to fix a precise and definite period within which the timber must be removed, then at the expiration of that period, according to the authority *ubi supra*, though there is no forfeiture, all the uncut, standing timber becomes the property of the owner of the land. Thereafter the trees will be in all respects subject to his use, disposition, and control. He can sell them, and as a matter of course can deaden them, as the greater power inevitably includes the less. In short, he can do what he will with his own. This being so, if the 10-year provision is intended definitely to terminate the grantee's interest in, and his relation to, the trees standing at its termination, why was it necessary to give in such precise language to the parties of the first part, i. e., the grantors, or the then owners of the lands, "the right to deaden such of said trees as may be standing upon said land, which the owner may clear for cultivation"?

If, as contended, the rights of the grantees of every character, with respect to the

standing trees, were to be terminated at the expiration of 10 years from March 10, 1902, then thereafter without any specific grant of authority the owner of the land would be entitled to deaden the standing white oak trees, not only on lands he might desire to clear for cultivation, but on any other lands. Hence, in this view of the words used with relation to the 10-year period, the provision with respect to deadening trees thereafter was a nullity, since it undertook to afford a right that the owner of the land would enjoy at that time by virtue of the termination of the grantee's rights. Evidently, however, this provision relating to deadening was not inserted in the deed as a piece of meaningless supererogation, for M. L. Senter, who undertakes to say in his deposition that the grantees were intended to be limited to a removal time of 10 years, states that after discussing the time for removal the "talk was that the owner of the land should have the right to deaden after 10 years for cultivation." But the query recurs, why should the rights of the owner of the land in respect to deadening be under discussion with the grantee, and be provided for by a specific provision in the deed intended to operate at the expiration of the 10-year period when, according to this witness and the contention of appellees, it was agreed that the rights of the grantee of all sorts were definitely limited to the 10-year period?

Thereafter the grantors were not concerned to make any agreement with the grantee concerning deadening trees or the exercise of any authority over the land in question incident to the ownership of the fee in same. Nor was it necessary for the owner of the land to undertake to derive the authority to deaden trees, or to exercise any other authority over his own property, from a contractee whose rights of every character definitely expired, as contended, at the expiration of 10 years from March 10, 1902. Effect and meaning should be given to the deadening provision. As this court said in *Halsey v. Fulton*, the President of the court, delivering the opinion:

"Words deliberately put into a deed, and put there for a purpose, are not to be lightly considered nor arbitrarily put aside. The words in the deed before us were deliberately written in the instrument, are there for a purpose, and are not without meaning." *Halsey v. Fulton*, 119 Va. 575, 89 S. E. 913.

The foregoing considerations very plainly indicate that the deadening right was afforded to the grantors, because it was considered that they would not otherwise enjoy it, thereby repelling the contention that the provision as to the 10-year period was intended to terminate the grantee's rights and privileges at the expiration of that period. As pointed out, if such a result was

intended by the 10-year provision, then the explicit grant of the right thereafter to deaden the standing trees on the grantors' lands was foolish surplusage.

There is another view of the 10-year provision which will bring the entire deed in harmony, and give meaning and effect to the deadening clause. The objection usually offered to that construction of a standing timber contract which affords a perpetual right of removal is that such construction, with the incidental right to have the trees draw nourishment from the soil, creates a bar to agricultural development, since the lands occupied by standing growing trees will not be available for such development. A very common practice, however, in many mountain counties, is to girdle the larger trees, remove the underbrush and small growth, and then cultivate the land between the dead trees, which no longer either shade or draw nourishment from the soil. Evidently the provision as to the 10-year period meant to say that the grantee was given an indefinite and unlimited right to use the grantors' lands for the sustenance of his trees, unless the grantors should desire to clear and devote to agricultural uses any portion of their lands occupied by said timber. With the better possibility in contemplation, the provision was made that at the expiration of 10 years a new right, not hitherto enjoyed, would arise and be enjoyed by the grantors, namely, the right to "deaden such of said trees as may be standing upon said land which the owner may clear for cultivation."

Summarizing the distinguishing features of the deed construed in the instant case, as contrasted with the deed in the case of *Wright v. Camp Mfg. Co.*, they are:

(1) The Senter deed conveys, for value, distinct branded trees, while under the deed in the Camp Case all the trees growing on the land in question during the deferred period would be the property of the grantee, provided that at the time of cutting they had attained the specified size.

(2) There is practically but little agricultural land embraced in the lands conveyed in the instant case.

(3) Provision was made for the prospective cultivation of this land, if desired, by the deadening clause of the Senter deed.

(4) Having in mind the provisions of the deed in question and the circumstances under which same was made, the purpose of this deed to afford a perpetual right to enter and remove the trees conveyed is distinctly manifested. The deed in question, considered as a whole, plainly means:

(a) That the standing timber was conveyed in fee to the grantee.

(b) That an indefinite right to remove this timber was afforded.

(c) That during the period of 10 years from March 10, 1902, the grantors were debarred from interfering in any wise with the standing trees, even though they might desire to devote the lands on which they stood to agricultural uses.

(d) That at the expiration of the 10-year period the rights of the grantors with respect to the standing trees and the use of the soil would be enlarged, and the rights of the grantee correspondingly diminished.

(e) That this enlargement of the grantor's rights was the specific authority afforded after said period to clear the land occupied by the standing trees for agricultural purposes, and to that end to girdle and thereby destroy the vitality of said trees.

(f) That the grantees were not affected in their right to remove their standing timber by the expiration of the 10-year period, but were subject thereafter to a new and superior right afforded the grantors to deaden all timber standing on land desired to be used for agricultural purposes, even though such action might be the cause of damage to the timber.

(g) That as to all lands occupied by standing timber, and not suitable for agricultural purposes, the rights of the grantee would not be affected by the 10-year provision. As to such lands the grantee would enjoy the right to have the trees remain untouched, and draw nourishment from the soil until such time as the grantee, in the exercise of her rights, might cut and remove the same.

This interpretation of the deed in question is supported by the situation of the parties and the circumstances surrounding them. It appears from the evidence that most of the land on Pound river, particularly that on the north side of the stream, is very rough and steep, and much of it rocky. On the whole very little of it is suitable for farming. The chief value of this land consisted in the standing timber for which there was no immediate market, owing to lack of transportation facilities. Various projected railroads were under discussion, but it was altogether problematical when and to what points they would be built, if at all. The watershed of Pound river and its affluents was a very rugged, remote, and inaccessible region. When the Senter deed was executed in 1904 the nearest railroad stations were Coeburn and Hellier, the former 25 miles away, and the other across the Cumberland Mountains. Heavy oak lumber could not be profitably hauled to either of these stations, nor was it commercially feasible to float such lumber down Pound creek, through the Breaks of Cumberland to the deeper and smoother waters of the Big Sandy. Wilson Bros. later essayed this experiment, with disastrous financial results. Hence, under the conditions depicted, standing timber would be purchased as an investment, and not for immedi-

ate severance and removal. It is permissible to buy and hold timber as an investment. In the words of one of the cases cited:

"There can be no doubt that a party can buy standing timber with no intention of manufacturing it, and may hold it just as he might buy, or hold, land, if he so frame his contract."

Harris looked over a field rich in timber, coal, and other minerals, all potential wealth, but of little present value, until markets were made available. Under such circumstances, operations in these potential values would necessarily be chiefly speculative. Owners who were either unable or indisposed to wait on the arrival of railroads or the development of water carriage were ready to sell for a moderate consideration, presently paid, and to pass a complete title. Speculators, with an eye to the future, were ready to buy provided the chances of profit were not too remote or the terms of sale too exacting. Harris was one of these speculative purchasers who believed that the large reserves of white oak timber in Dickenson county would be ultimately profitable, provided he could buy and hold until one or more projected railroads, then on paper, could be built into the timber area. As the time of construction and arrival of these railroads was purely conjectural, a speculative purchaser, exercising sound judgment, would be disposed to balk at limitations upon his right of removal. Naturally he would insist upon a fee simple in the timber, and an indefinite time for removal, unless the terms demanded by the seller were excessive and unreasonable. A seller owning trees on rough and rocky hillsides, unsuitable for agriculture, would not object to giving an indefinite time for removal, provided he could secure his price. With respect to trees standing on small areas suitable for cultivation, the right to deaden branded white oak trees, comparatively few in number to the acre, would sufficiently meet the situation. Hence the insertion of the deadening clause in the deeds taken by Harris from the Senters and others.

M. L. Senter, apparently the only grantor in the Senter deed who is disposed to challenge the right of Wilson Bros. to cut and remove the trees in controversy, undertakes to say that it was understood between him and his brothers and Harris that "only 10 years would be allowed to remove the timber." But he does not explain why, having made this definite agreement, "that talk was," citing his own language, "that the owner of the land should have the right to deaden after the 10 years for cultivation." But, if the testimony of this witness is competent, it is completely refuted by that of the witness Harris, who testifies in detail to the preparation of his deeds, the agreements embodied therein, and the underlying reasons therefor. The following citation is from Harris' deposition:

"There was a large amount of very fine white oak timber in Dickenson county. At that time there was no way to remove it to market, as the streams were small, and it was difficult to even float poplar or cucumber, especially from the head of Pound river and McClure; but, believing that the county would ultimately be developed by railroad on account of immense deposits of valuable coal, I decided to buy oak timber and hold it until the railroad was built, and, believing it would be a profitable investment, I prepared my contracts of purchase and deeds so as to give practically unlimited time in which to remove the timber. The only reservation set forth in the contracts of sale, and in the deed as well, was a reservation giving the seller of the timber the right to use his land for agricultural purposes, after a number of years set out in the deed, by deadening such trees as might be standing upon the land he cleared, or desired to clear, for agricultural purposes. This feature was decided on after a discussion with those familiar with the country and the conditions obtaining in reference to the land where the timber was sought to be purchased, it being generally agreed that, if the owner of the surface had the right to deaden the trees, and use his surface, he would suffer no loss by allowing the trees to remain on other portions of his land indefinitely, as these trees, each and every one of them, were definitely marked or branded, and the term of years during which they remained on the land would not increase or decrease the number of trees sold by the owner of the surface. * * *

"All the land along Pound river, and especially on the north side of the Pound river, is extremely rough, very steep, much of it rocky, in so much that the owners for years previous to the time I purchased the timber tried to sell the timber, and on several occasions the timber and sometimes the land was under option, but on account of the extreme roughness of the country no one had purchased much timber along the Pound river up to 1902. But very little of the land was suitable for farming, and on this account I did not think that any or but little of the land would ever be cleared."

Cross-examination:

"* * * Q. At the time you bought this timber, you bought it for the purpose of speculating on it, did you not?"

"A. I certainly did, and expected to make a profit on it, and contemplated having to hold it for many years."

It may be said in this connection that the suggested burden, even upon farming land, supposed to follow upon an indefinite right to remove mature standing timber, when submitted as a reason why a deed should not be construed to afford such a right, is greater in seeming than in reality. The conversion of mature oak timber into lumber cannot be indefinitely postponed in any literal sense. Oak timber does not indefinitely improve. After it becomes ripe, it deteriorates. Hence, as to oak timber, such as was purchased in the instant case, there is no likelihood that any great period of time would elapse before economic considerations would cause it to be

cut and removed by the owner, thereby freeing the land for agriculture, and relieving the soil of burden. This fact eliminates one consideration relied upon to justify the construction that the deed in the case in judgment should be construed to limit the grantee's right to remove his timber to a definite period of 10 years.

Another contention of the complainants is that after their initial operations were discontinued Wilson Bros. abandoned their claim to the uncut trees, and as a result of this abandonment title to said trees has been transferred to said complainants.

On the subject of parol disclaimer of title, this court said in *Southern R. Co. v. Gregg*:

"Where the legal title is vested in one, no mere parol disclaimer can divest title. It has been long settled here that disclaimer of a freehold can only be by deed, or in a court of record." *Southern R. Co. v. Gregg*, 101 Va. 317, 43 S. E. 573.

See, also, cases cited therein.

[7] The evidence of abandonment is far from satisfactory, apart from the testimony of the defendant, F. G. Wilson, and corroborating witnesses. The credibility of the witness, M. L. Senter, who testifies that Wilson Bros. told him in 1912 and 1913 that they "did not intend to have anything more to do with the timber," is badly shaken by an exhibit in the record. This contention of abandonment is considered to be supported by the testimony of the treasurer of Dickenson county, Dr. Sutherland, who testifies in relation to the contents of a letter received from Wilson Bros. in 1917 or 1918. This letter is not produced. The gravamen of its contents, as stated by Dr. Sutherland, is that the defendants wrote that "they had cut all of their timber in Dickenson county." F. G. Wilson, testifying for the defendants, denies most positively that they ever had any intention of abandoning the timber owned by Wilson Bros. in Dickenson county. With respect to the letters of the firm of Wilson Bros., the witness stated that it was the rule of the firm to keep copies of the same. He denied that they had written any letter stating that the firm "had cut all of their timber in Dickenson county," and asserted that his letter files showed no copy of a letter to that effect. The witness filed a copy of a letter to Treasurer Sutherland, which might have been construed by the latter to bear the meaning which he imputed to it. This letter was part of a correspondence between the Wilson Bros. and Treasurer Sutherland on the subject of taxes. The direct testimony of the defendant F. G. Wilson on the subject of abandonment is corroborated by a number of witnesses. One witness for complainants testifies that, after Wilson Bros. suspended their operations they corresponded with him with reference to cutting the balance of the timber for them.

"Q. You knew that Wilson Bros. intended to cut the balance of the timber that they had on Pound river, and had some correspondence with them, didn't you?

"A. Yes, sir; I did a while after they quit.

"Q. You corresponded with them with reference to cutting it for them?

"A. Yes, sir.

"Q. Then you knew that they still intended cutting this timber, didn't you?

"A. Yes, sir; I 'lowed that was their intention, or they wouldn't have been writing about it."

George Holmes, the agent of the defendant in their logging operations, makes the following answer to a question relating to this alleged abandonment:

"A. No, sir; they didn't talk that way; they talked the opposite way, the last time I talked with them, and Ferdie Wilson, here at Fremont in 1916, he told me then that they were going to abandon any efforts of taking anything down the river, but when conditions would permit they would make some use of this timber, and get it to the railway at Fremont, or any other point they might be able to reach; that is the way Mr. Wilson talked to me about it, and I know he meant it, and subsequent correspondence I have had with them indicates the same thing."

In a letter to the Ritter Lumber Company, of date September 11, 1918, the defendants, referring to their trees in Dickenson county, say:

"We have not abandoned the trees, and have paid taxes up to last year. * * * We, of course, consider these trees more valuable than at the time of purchase."

Apart from the direct testimony to the contrary, it is in the highest degree unlikely that the defendants ever entertained any intention of abandoning the uncut trees. From the evidence in the record it appears that, when the defendants suspended work on account of the difficulties of transportation, a considerable number of trees were still standing. The railroad was completed to Fremont in the fall of 1915, thereby affording the much-desired railroad transportation, as soon as the defendants were in a position to resume operations, after recovery from the losses sustained in the disastrous effort to float their timber down Pound river. According to the witness Holmes, the timber from the Senter tract can be successfully hauled to Fremont, and shipped from that point. Having these things in mind, there is no reason to believe that the defendants would abandon valuable property at a time when there was a reasonable hope that in the comparatively near future they could successfully market same, and recoup the losses which they had sustained. The evidence for the defendants positively disproves the charge of abandonment, and is entitled to far the greater weight.

Upon the whole we conclude that the de-

defendants had a title in fee to the timber in controversy plainly afforded, with no time limit on their right of removal, and that there was no abandonment of the uncut trees. For the reasons heretofore given, the decree of the circuit court of Dickenson county, perpetuating the injunction complained of, must be reversed, and the proper final order will be entered in this court.

Reversed.

PRENTIS and BURKS, JJ., absent.

(131 Va. 400)

**WILSON BROS. et al. v. W. M. RITTER
LUMBER CO.**

(Supreme Court of Appeals of Virginia. Sept. 28, 1921.)

Appeal from Circuit Court, Dickenson County.

Suit by the W. M. Ritter Lumber Company against Wilson Bros. and others. Decree for complainants, and defendants appeal. Reversed.

Sale & Harris, of Richmond, and Chase & McCoy, of Clintwood, for appellants.

A. A. Skeen and Phipps & Phipps, all of Clintwood, O. M. Vicars, of Wise, J. W. Flannagan, Jr., of Grundy, and Geo. O. Peery, of Tazewell, for appellees.

SAUNDERS, J. The substantial and controlling questions of law and fact presented in this case have been considered and disposed of in the case of *Wilson Bros. v. Branham and Phipps*, 109 S. E. 189, decided at this term. These cases were argued together upon the same evidence and, in large measure, the same record. The decision in the *Branham Case* is decisive of the merits of the instant case. For the reasons and principles set out in full in the opinion in said case of *Wilson Bros. v. Branham and Phipps*, which are herewith adopted and considered as repeated herein, the decree complained of in this case must be reversed. A like order to that entered in the said case of *Wilson Bros. v. Branham and Phipps* will be entered in the instant case.

Reversed.

PRENTIS and BURKS, JJ., absent.

(121 Va. 676)

PENDLETON v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia.
Sept. 22, 1921.)

1. Homicide \S 233, 245—Evidence held insufficient to establish motive claimed or to show shooting necessary to accomplish same.

In prosecution for murder, evidence held insufficient to show that defendant's motive was to put an end to decedent's lewd purpose

toward and persistent attentions to defendant's sister-in-law or that the shooting was necessary to accomplish that end.

2. Homicide \S 244(1)—Evidence held insufficient to show self-defense.

In prosecution for murder, evidence held insufficient to establish self-defense.

3. Homicide \S 214(3), 221 — Dying declarations as to facts leading up to declarant's death admissible as *res gestæ* and entitled to same weight as if under oath.

Dying declarations to identify the prisoner or to show the facts leading up to, causing, or attending the act resulting in the declarant's death are admissible and have the same weight as if made under oath; such facts being the *res gestæ* within the doctrine of dying declarations.

4. Homicide \S 214(3)—Dying declaration admissible, if admissible under oath.

Any dying declaration which would be admissible had declarant been sworn as a witness is admissible if confined to the facts leading up to, causing, or attending the homicide.

5. Homicide \S 215(1, 4)—Dying declaration, if hearsay, opinion, or irrelevant, is inadmissible.

A dying declaration, if hearsay, matter of opinion, or irrelevant, is inadmissible, but, if it relates to relevant facts within declarant's knowledge, it is admissible.

6. Homicide \S 214(3)—Dying declaration that accused borrowed money from deceased shortly before shooting held admissible to show animus.

In a prosecution for murder, deceased's dying declaration that defendant borrowed money from him a few hours before was admissible as showing their conduct toward each other shortly before and leading up to the shooting and defendant's animus toward declarant at the time thereof.

7. Criminal law \S 338(3)—Admission of dying declaration held not error where accused testified as to subject thereof and commonwealth introduced rebuttal testimony.

In a prosecution for murder, admission of a dying declaration that defendant borrowed money from decedent shortly before the shooting was not reversible error where defendant himself testified on such subject, and the commonwealth without objection introduced rebuttal testimony.

8. Homicide \S 214(3) — Dying declaration merely as to state of feeling between declarant and accused inadmissible.

Statements in a dying declaration consisting merely of the state of feeling between declarant and accused are inadmissible, though material and relevant, since the accused must be tried for his deeds in the light of the situation as it reasonably appeared to him from the outward demeanor and conduct of the deceased, and not in the light of his secret state of feeling toward accused.

9. Homicide \S 214(3) — Dying declarations that decedent had done nothing to accused or any one held admissible.

In a prosecution for murder, dying declarations of deceased that he was doing nothing at the time and had done nothing to accused or anybody to give him any cause to shoot were admissible, being declarations, not of a mere state of feeling between the parties, but of outward conduct of declarant toward accused and others.

10. Homicide \S 214(8)—Dying declaration as to facts leading up to, as well as those occurring at time, held admissible.

Though a general statement in a dying declaration that there was no cause for accused's act is not admissible, dying declarations as to facts leading up to a homicide, as well as to those occurring at the very time, which have a natural bearing on the motives and probable conduct of accused at such time, are admissible.

11. Homicide \S 215(4)—Dying declarations of conclusions of fact admissible.

Though the opportunity for cross-examination furnishes a safeguard against untrue general statements of conclusions of fact which is absent in the case of dying declarations, the same consideration of necessity which excepts dying declarations from the rule against hearsay evidence operates in favor of admitting such declarations of conclusions of fact, as well as of specific facts.

12. Homicide \S 221 — Dying declarations admissible for what they are worth in light of other evidence.

Dying declarations are not admitted as evidence which is true, but only for what the jury may consider them worth in the light of all the other evidence and circumstances.

13. Homicide \S 214(3), 215(4)—Dying declaration as to conclusion of fact must refer to relevant facts so nearly antecedent to time of homicide as to show motive and probable conduct of accused at such time.

A dying declaration is not inadmissible merely because it states a conclusion of fact, but must refer to relevant facts which, if they do not attend the very time of the homicide or concern the cause of death, are so nearly antecedent in time as that it may be reasonably considered they tend to show motive and probable conduct of accused at such time.

14. Homicide \S 214(2) — "Circumstances of the transaction itself" not confined to occurrences at very time of homicide.

"Circumstances of the transaction itself," as used in the doctrine of dying declarations, are the circumstances or facts leading up to, causing, or attending the homicide, and are not confined to occurrences at the very time thereof.

15. Homicide \S 221—Absence of self-serving purpose not essential to trustworthiness of dying declarations.

The absence of any self-serving purpose is not an essential element of the circumstantial guarantee of the trustworthiness of dying declarations.

16. Homicide \S 214(3)—Dying declarations as to decedent's relations with accused's sister-in-law held admissible where such relations existed for only few weeks prior to homicide.

In a prosecution for murder, decedent's dying declarations as to his relations with defendant's sister-in-law, on account of which defendant claimed to have shot, were admissible where such relations had existed for only a few weeks prior to the homicide, and the commonwealth, without objection, introduced testimony concerning such relations during all of such time.

17. Witnesses \S 246(2), 282—No error in examining as court witness and permitting cross-examination by commonwealth of hostile witness summoned by it, though adverse interest not shown.

Under Code 1919, \S 6214, permitting cross-examination of a party's own witness who has an adverse interest, the court did not err in a criminal case in introducing and examining as a court witness one summoned by the commonwealth who had not been sent before the grand jury because she stated she did not know anything and "had refused to talk to any one before the trial," nor, "the witness showing great reluctance to testify," in permitting the commonwealth to cross-examine her as a hostile witness and ask leading questions; the statute being applicable, though it is not shown the witness had an adverse interest, if she is in fact adverse.

18. Witnesses \S 246(2)—Court in criminal case may call as court witness adverse witness summoned by commonwealth.

In a criminal case the court may, in the exercise of a sound discretion, call and examine as a court witness an adverse witness summoned by the commonwealth.

19. Witnesses \S 244—No error in permitting cross-examination of witness who proved hostile on direct examination.

In a criminal case the court did not err, in view of Code 1919, \S 6214, permitting cross-examination of a party's witness who has an adverse interest, in permitting such examination by the commonwealth of a witness who on direct examination by it proved hostile.

Appeal from Circuit Court, Buckingham County.

Wyatt Pendleton was convicted of murder in the second degree, and he appeals. Affirmed.

The accused was indicted for the murder of the deceased, Frank Raymond Barker. The indictment is in the form of an indictment for murder at common law. There was a trial by jury. The verdict of the jury found the accused guilty of murder in the second degree, as charged in the indictment, and fixed his punishment at 10 years' confinement in the penitentiary. The trial court entered judgment and sentenced the accused accordingly.

The deceased was mortally wounded on the night of Sunday, August 29, 1920, a bright

moonlight night, by being shot in the back with buckshot from the discharge of a shotgun in the hands of the accused. The accused admits that he shot the deceased and that he did so intentionally, but claims that he did it in self-defense thinking that he was in danger at the time of being killed by the deceased, who, as the accused testifies, "turned towards me and threw his hand to his hip pocket" just before the fatal shot was fired.

The circumstances and the material conflicts in the testimony as to the circumstances or facts leading up to the shooting were as follows: Daisy Moss, a girl of between 15 and 16 years of age, a sister of the wife of the accused, had been in the home of the accused for about five weeks prior to the shooting, the family consisting during that time of the accused, his wife, who was in delicate health, Daisy Moss, and the father of the accused. About four weeks before the shooting the deceased began to take his meals at the home of the accused as a boarder, and did so for about three weeks and up to about one week before the shooting. The accused testified that, while the deceased was taking his meals at the home of the accused, the attentions of the deceased to Daisy Moss became very marked and persistent; that several times while the deceased and the girl were sitting on the porch after supper the accused heard the girl say to the deceased that if he did not stop and behave himself she would go in the house; that on the Saturday night, which was a week and a day before the shooting, the accused looked through the window and saw the deceased and Daisy "sitting on the porch floor, with their feet on the ground; she was sitting close to one of the porch posts, and Raymond was sitting wedged up against her with his leg over both of her legs and his arm across her back;" that he (the accused) started to go out there, but his wife dissuaded him and went herself and told Daisy to come in. The accused further testified that—

"The next morning I talked it over with my father, and we decided for my father . . . to tell Barker that he must stop taking his meals there and must get some other place to take his meals as quick as he could, and that he must let Daisy alone and not visit her or go with her any more. And my father told Barker that on that day, which was Sunday morning. On the next morning, Monday, I told Barker the same thing, that he must get another place to take his meals at once, and that he must let Daisy alone and have nothing more to do with her."

The father testified that he did, on the Monday just mentioned, tell the deceased that he could not take his meals there any longer, but stated, in substance, that he did not tell the accused to let Daisy alone and not visit her or go with her any more, and did not

know of his own knowledge that any one told the deceased not to go with the girl.

Daisy Moss testified, in substance, that there was nothing improper in the conduct of the deceased towards her; that she "thought he was a nice boy"; that he stopped taking his meals at the home of the accused "because I was cooking and it was too much for me."

The testimony of the accused and of other witnesses in his behalf before the jury was to the effect that the deceased was lewd in his conduct with women, having a bad general reputation in that respect, and that the accused was informed of this after the deceased began to board in his home. Whereas there was testimony for the commonwealth to the effect that the general reputation of the deceased in the particular just mentioned was good.

The accused further testified that he left home on the Monday last above mentioned and was absent for three or four days; that on his return his wife told him that in his absence the deceased had been to the home of the accused to see Daisy; that the deceased also met Daisy at the home of Ben Pendleton, a brother of the accused, on Saturday evening, the day before the shooting, as the accused heard; that on Sunday morning, the day of the shooting, the accused was told that on the day before the deceased, while somewhat under the influence of liquor, had made statements to a companion named Charlie Jones which were to the effect that he intended to seduce and have carnal intercourse with Daisy Moss the first chance he might have. This companion of the deceased repeated these statements to the accused on the Sunday morning just mentioned before the accused and the deceased went on the trip together now to be mentioned.

Without objection on the part of the accused, the commonwealth introduced testimony to the effect that on the Sunday of the shooting the accused and the deceased, along with a number of others (the party consisting of about 10 or 12 in all), hired seats in a truck and went on a trip from Dillwyn to see the bridge across James river at Brems, which had been damaged by high water, and this testimony tended to show that the accused and the deceased were apparently on friendly terms while on this trip. There is a reference in the dying declaration, more specifically mentioned below, which was introduced in evidence in chief for the commonwealth, to the effect that the deceased said on his deathbed that the accused had borrowed of the deceased all the money the deceased had on the day of the shooting, which the testimony of and for the accused, later introduced, developed had reference to the conduct of the accused towards the deceased on the trip just mentioned; but it was the testimony of the accused himself

which made a specific issue of fact before the jury concerning whether the accused borrowed any money of the deceased on such trip, the accused testifying that he borrowed money from one Wirt Hill instead of from the deceased, and that the deceased borrowed money from one Tom Maxey. Whereupon the commonwealth in rebuttal, without objection from the accused, introduced a witness who testified that the deceased "loaned" the accused "a dollar on that trip when they were returning." Thereafter Wirt Hill, and Tom Maxey were called as witnesses for the defense, the former testifying that he "loaned" the accused \$1 on that trip, and both testifying that they did not see the accused borrow any money from the deceased on the trip, and "would have seen it if he had borrowed any money from him."

There was testimony for the accused tending to show that the deceased habitually carried a pistol and was a rowdy, quarrelsome, and dangerous person, and that he bore that general reputation during that last years of his life, but that he was never heard to make any threat against the accused.

Coming now to the occurrences which followed the return of the accused and the deceased from the trip to Bremono, the following is the testimony of the accused as to what transpired up to and including the shooting and his motive therefor:

"We got back about 7 or 8 o'clock, and, as I wanted something to smoke, I went to Ellis' store, and Barker also went to the store to get something to smoke. I had nothing to say to him; he went without any invitation from me to get something for himself to smoke. On the way back from the store to El. D. Gregory's office I collared Raymond Barker and told him what Charlie Jones had told me, and he did not deny it, but hung his head. I told him, 'You have those rubbers in your pocket for her now, and you have your pistol in your pocket and you are carrying for me.' And I told him he must let Daisy alone and have nothing more to do with her while she was at my house, and he promised me that he would not go with her again. Then I stood on the corner of the street for a while with Charlie Jones, Ben Pendleton, Barker and others, and Daisy Moss, Frances Ranson, and Eliza Huddleston came by on their way to church. Barker spoke to them when they passed. We stayed there awhile, and Barker slipped off from us without saying anything to anybody, and, when I missed him, I believed he had gone to the church after Daisy Moss.

"I was unarmed and that he always carried a pistol and I had seen him have it in his pocket that day, and I had determined not to let him go with Daisy Moss while she was in my care. I then went home and got a single-barrel gun that I had borrowed some months before to keep the crows off the corn. I had bought four shells when I got the gun, and two of them were buckshot and two small shot; I got them that way because I just got the odd shells that Mr. Pearson had at his store so as

not to break a box. I had shot three of the shells and had only one left, and that was a buckshot shell. I got this shell and the gun and started out, and my wife asked me what I was going to do with the gun, and I told her that I was not going to hurt anybody and that I would be back soon. I said I was going to keep Barker from going with Daisy to-night. I went back to my brother Ben Pendleton's house. I passed the front of the house, and Barker was sitting on the front porch. I went around to the side and looked into the window, and then went in the kitchen, where my brother was eating his supper. Barker saw me as I passed the front porch with the gun. It was only about 15 feet from the porch where he was sitting and the moon was shining. When I went into the kitchen Ben asked me what I was going to do with the gun, and I told him I was going to keep Barker from going home with Daisy that night, that I thought he was trying to seduce her, and Ben told me that Barker had walked by with Daisy from the church, holding her by the arm. I told Ben to go with Daisy home, and Ben said to leave it to him and he would fix it. I had seen Daisy in the room with Frances when I looked in the window (the house is a cottage). Ben had told me to go on home and go to bed, that he would fix it all right. I went out back of the house to see what they were going to do. The weeds were tall, but I could see over them. From where I was I could see the main road over which I had come from my house to Ben's and I could see if they came out the back way. I could see them no matter which way they went to my house. I wanted to see if Barker was going to go home with Daisy that night and I was going to try to stop him if he did.

"I laid the gun down in the weeds. After I had been there about 10 minutes Daisy Moss, Mrs. Ben Pendleton, and Frances Ranson came out of the back door, and Barker followed them out and took hold of Daisy's arm and started to walking with her, and she wanted to go home by the main road, the way I came there, but Barker said, 'No; we will go this way,' and pulled her up through the weeds toward me, and I heard Barker say, 'God damn,' and something else, but did not understand what else he said. They all passed by me, and after they had passed me a few steps Frances Ranson looked back and saw me. She said, 'Lord, yonder's Wyatt.' Then Mrs. Pendleton ran back past me, Frances ran the other way, and Barker pushed Daisy over in the weeds and told her to 'Run for your life; I will take care of Wyatt,' and he then turned toward me and threw his hand to his hip pocket. I grabbed the gun off of the ground and fired from my hip at Raymond Barker as I raised the gun. I did not get it to my shoulder. Just as I fired Daisy stumbled in the weeds, and Barker turned back toward her as I fired, with his right hand still on his hip pocket."

Cross-examination:

"By Attorneys for the Commonwealth:

"I shot Barker because I thought that, if I did not shoot him, he would shoot me; if I had not shot him, he would have shot me. I shot him in self-defense. I was going to him

without anything in my hands. I did not need anything but my hands to handle Barker with if he did not use his gun, but, when I saw him put his hand to his hip pocket and about to draw his pistol, I knew that he would shoot me if I did not shoot him first, and that was why I shot him. * * *

"I wanted the gun to protect myself with, and that was why I went after it that night. * * * I did not intend to use the gun unless Barker tried to use his pistol. I did not try to get behind any building there. The nearest building was about 50 feet, and I could not get behind it, so that there was nothing I could get behind to keep Barker from shooting me. When I raised my gun and just as I shot, Barker turned to look at the girl (Daisy Moss)."

There was testimony before the jury in conflict with that of the accused on the following material points:

(a) Daisy Moss testified that the exclamation of Frances Ranson when she looked back and saw the accused was not merely, "Lord, yonder's Wyatt," as stated by the accused, but, "Lord, there is Wyatt back of us with a gun;" whereas the accused testified that his gun was then lying on the ground in the weeds.

(b) The testimony of Frances Ranson bears upon its face, as it appears in the record, evidence that it was reluctantly given where inculpatory of the accused and readily given where favorable to him. On the question of whether she saw the gun in the hands of the accused when she first discovered him and made the exclamation aforesaid she first says that she did then see the gun in his hands. She then states that she did not see the gun when she first saw the accused, but only after she ran and was looking back. Later in her testimony she testified to the effect that when she first saw the accused she saw him standing with the gun in his hands. Her testimony is also both ways on the question of whether the accused fired the shot "right away" following her first seeing him with the gun in his hands, or whether there was an interval after her first seeing him in which she was running, and, looking back as she ran, saw the deceased push Daisy Moss from him, turn towards the accused, and make the hip pocket movement before the shot was fired.

(c) There is no conflict in the evidence that the shot from the gun struck both sides of the back of the deceased, and, so far as the course of the shot is disclosed by the evidence, the evidence tended to show that the shot penetrated, not obliquely, but practically in a direct line from the back towards the front of the body, tending to establish as a physical fact that the accused shot the deceased when his back was practically directly towards the accused. Other buskshot struck the right hand of the deceased, one of them entering the palm of that hand, demonstrating that the palm of that hand was

turned in the direction of the accused at the time of the shot, and the ends of the forefinger and thumb of that hand were struck by either one or two separate shot.

(d) The testimony of the accused that "just as I fired Daisy stumbled in the weeds and Barker turned back towards her as I fired" is unsupported by any other testimony. No other eyewitness of the occurrence testified to any stumbling of the girl, or any turning away of the deceased from the accused. On the contrary the direct testimony of the eyewitnesses of the shooting, other than the accused, in so far as it was favorable to the accused, was to the effect that, when Frances Ranson discovered the accused and made the exclamation aforesaid, the deceased turned and faced the accused, making the hip pocket movement as he turned, and that the shot followed while the deceased was in that attitude. But this was manifestly physically an impossibility, in view of the fact that the wounds were in the back of the deceased.

(e) There was testimony for the commonwealth in rebuttal which very conclusively established that the deceased had no pistol about his person when he was shot; and the rebuttal testimony for the commonwealth also tended to show that the deceased had no pistol that day; that he was not in the habit of carrying a pistol; and that his general reputation was that of a quiet, peaceable person, as boy and man.

The dying declarations of the deceased, admitted in evidence over the objection of the accused, were made to his mother, who testified as a witness for the commonwealth, and contained the following statements:

"He said that he was shot for nothing; that he had never done anything to him or to anybody on earth. * * * He said Wyatt Pendleton shot him, and he says, 'He shot me for nothing.' * * * He said he was right out there coming out from Mr. Ranson's, and he wasn't doing nothing, and he shot him. * * * He said he hadn't given him any cause to do it. He said he borrowed all the money he had that day. He said he loaned him all—two pennies in his pocket and he loaned him that."

Other specific testimony and pertinent matters are referred to in the opinion of the court.

F. C. Moon and J. B. Boatwright, both of Buckingham, for appellant.

John R. Saunders, Atty. Gen., and J. D. Hank, Jr., and Leon M. Bazile, Asst. Attys. Gen., for the Commonwealth.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

The following questions raised by the assignments of error will be disposed of in their order as stated below:

1. Does it appear from the evidence that

the judgment under review is plainly wrong or without evidence to support it?

This question must be answered in the negative.

[1] It has been earnestly and ably argued before us in behalf of the accused that he was justified in shooting the deceased in order to put an end to his alleged lewd purpose toward, and persistent attentions to, Daisy Moss. But it affirmatively appears from the evidence that this was not the motive for the shooting, and that the shooting was not necessary to accomplish that end, even from the viewpoint of the accused. For, as appears from his testimony, quoted above, the accused stated before the jury:

"I was going to him without anything in my hands. I did not need anything but my hands to handle Barker with, if he did not use his gun."

[2] The plea of self-defense was the sole defense relied on by the accused on the trial to justify the shooting, and hence our consideration of the sufficiency of the evidence to support the verdict and judgment must be confined to a consideration of the evidence as bearing upon that defense.

In so far as the question of the sufficiency of the evidence is concerned, the case turns upon the issues of fact of whether the gun of the accused was lying on the ground in the weeds as he arose, when Frances Ranson first saw him and made the exclamation shown in evidence, of whether the deceased turned towards the accused and threw his right hand to his right hip pocket, of whether the accused then for the first time "grabbed the gun off of the ground" and fired at the accused, and of whether, just as the accused fired, the girl stumbled in the weeds and the deceased turned back towards her, and thus received the wounds found upon his person, or whether the accused arose with the gun in his hands, and the deceased did not throw his hand to his hip pocket, but had his back practically directly towards the accused when the gun was fired. There was sufficient evidence to support the finding of the jury either way; hence their verdict was binding upon the court below and is binding upon us.

The direct testimony for the commonwealth, it is true, tended in part to sustain the version given by the accused of what occurred, but the credibility of such part of the testimony was solely for the determination of the jury; and the circumstantial evidence furnished by the absence of any pistol in the pocket of the deceased, by the mute wounds upon the back of the deceased, and the spontaneous exclamation of Frances Ranson, if it consisted of the words, "Lord, there is Wyatt back of us with a gun," as the testimony for the commonwealth tended to show was true, were sufficient to warrant the jury

in disbelieving the testimony of and for the accused on the subject of the alleged hip pocket movement, and hence in discarding the self-defense theory.

While possible, it was in the highest degree improbable, if the deceased turned so far facing the accused as to make a demonstration against the latter of drawing a pistol from the hip pocket, that, even if the attention of the deceased was attracted elsewhere by the girl stumbling in the weeds, he would have then turned so far away from the accused as to have received the discharge from the gun practically directly in the back. If this movement had occurred, the strong probability is that the deceased would have been shot in the right or left side, dependent upon whether he had turned to the right or the left in the attempt to draw a pistol. Indeed, it is stated in the petition of the accused for the writ of error that just at the moment the shot was fired "Daisy Moss, who had started to run, stumbled in the weeds, and Barker, hearing her stumble, partly turned towards her with his hand still on his hip pocket, so that his right side and back were thus turned towards petitioner just as petitioner fired. The shot from petitioner's gun, therefore, penetrated Barker's right side and back. * * *" But, unfortunately for the accused, the uncontroverted testimony of the physician who examined the wounds was as follows:

"There were four shot in his left thigh; one came through here; there was one in his right, that is, below the hip joint in the pelvic bone; two here; and one in the palm of his hand. Then his right forefinger and his right thumb at the end were shot. I counted eight shot in his body; four in his left thigh and one in his right; that is five; two here (indicating); and one in the palm of his hand. * * *"

Cross-examination:

"Q. By Mr. Moon. I don't exactly catch how those shot were. How many shot struck him?

"A. Nine shot I know of.

"Q. Will you show me where they were?

"A. (indicating). There were four that went into his left thigh; two came through here, and one in his right thigh, and that came through just under the surface of the skin, and one struck him just below the hip bone, and there were two hit him in his buttock, just to the right of the middle line, just about there, and one struck him in the palm of his right hand, and his finger and thumb were shot. * * *

"Q. They went in sort of from the side and back, those shots did, didn't they?

"A. I think they were pretty much from the back.

"Q. How did they come out?

"A. They came out straight in front.

"Q. You pointed out where the shot entered. Now point just where they came out.

"A. They came out just to the center of the thigh.

"Q. About the center of the right side? And the left?"

"A. Right and left. I don't know which side of the leg bone they went. The one that went in the right thigh seemed to go right straight through the thigh."

This testimony was sufficient to warrant the jury in concluding that the deceased was shot when his back was practically directly towards the accused.

Again: It is contended for the accused that the fact that one shot penetrated the palm of the right hand of the deceased confirms the testimony of the accused that the right hand of the deceased was in his hip pocket at the time the gun was fired. This may have been so. But, in view of the character of the other wounds aforesaid, the jury may have reasonably regarded the fact to have been that the hand was in the natural position of one feeling from another, namely, at the side, when the gun was fired, in which position the shot would have penetrated the palm as it did.

[3] 2. Were the dying declarations of the deceased, admitted in evidence over the objection of the accused, of such character as to have been properly admissible in evidence as dying declarations?

It appears from the petition for the writ of error that the objections of the accused to the declarations in question which are insisted upon before us are those shown by the record to have been made and overruled in the trial court, and they are, in substance, as follows:

That the declarations do not come within the meaning of dying declarations. "His (the deceased's) treatment of other people and how he treated the accused and their previous relations cannot be the subject of a dying declaration. * * * A dying declaration ought to be one as to circumstances; as to what actually happened. I move to exclude the whole thing, but particularly that part which refers to their previous relations."

As stated in 2 Wigmore on Ev. § 1434:

"* * * The declaration may not concern any and all topics. It must concern the facts leading up to or causing or attending the injurious act which resulted in the declarant's death. * * *"

Such topics, on principle and according to the weight of authority, are the *res gestæ*, within the meaning of that phrase as used in the books in connection with the doctrine of dying declarations.

As said in O'Boyle's Case, 100 Va. 785, at page 795, 40 S. E. 121, at page 124:

"* * * Dying declarations to identify the prisoner, or to establish the circumstances of the *res gestæ*, or to show transactions from which death results, are always admissible, to have the same weight as if made under the sanction of an oath."

See to same effect Swisher's Case, 26 Grat. (67 Va.) 963, 21 Am. Dec. 330, and Richards' Case, 107 Va. 881, 59 S. E. 1104.

[4, 5] Within the limitation that the declaration must be confined to "the facts leading up to, or causing or attending the homicide," any dying declaration which would be admissible as testimony had the dying person been sworn as a witness is admissible in evidence as a dying declaration. Within such limitation, the test of the admissibility or nonadmissibility of the dying declaration is whether it is hearsay, or matter of opinion, or altogether irrelevant; in such cases it is inadmissible; or whether, within the said limitation, it relates to facts within the knowledge of the declarant which are relevant. In such case it is admissible. Clark's Crim. Proc. § 210; 10 Am. & Eng. Ency. L. (2d Ed.) pp. 376, 377.

In the authority last cited, at page 376, this is said:

"Dying declarations, being a substitute for sworn testimony, must be such narrative statements as would be admissible had the dying person been sworn as a witness. If they relate to facts to which the declarant could have thus testified, they are admissible."

[6, 7] What we have said above, and the quotations we have made from the authorities, is sufficient to dispose of that portion of the dying declarations in question which had reference to the borrowing by the accused of money from the deceased. This was a fact, consisting of conduct of the accused and the deceased towards each other a few hours before and leading up to the shooting, and was material in its bearing upon the animus of the accused at the time of the shooting. Since the accused was being tried upon the charge of murder, that animus was a material issue in any aspect of the case. Had the deceased lived and been sworn as a witness in the case, there can be no doubt that his testimony on this subject would have been admissible. And especially would there have been no error in its admission in view of the fact that the accused himself testified on this subject, and the commonwealth, without objection on the part of the accused, introduced rebuttal testimony, and subsequently the accused introduced further testimony on the same subject.

This being the situation, we have no hesitancy in holding that the portion of the dying declarations just mentioned was properly admitted in evidence.

[8] Concerning the remainder of the declarations, there is more difficulty. The declarations appear in detail in the statement preceding this opinion. While general and in the form of conclusions, they all concern conduct of the accused. They are, in substance, that the accused shot the deceased; that he (the deceased) was doing nothing at the time and had not previously done any-

thing to the accused or to anybody to give the accused any cause to do the shooting. Considered in the light of the other evidence in the case, we have no doubt that these general statements had the specific meaning to the jury that the declarant stated that he did nothing at the time of the shooting, to the accused or to Daisy Moss, and had done nothing previously to either of them, to give the accused any cause for the shooting.

There are two objections which we find from the authorities have been sometimes urged to such declarations—one that they are conclusions of fact and hence embody matter of opinion, which goes to all of the declarations; the other, which goes only to the declaration as to conduct previous to the very time of the homicide, that such declarations concern circumstances too remote from the homicide to be admissible as dying declarations.

As we understand the objections of the accused to the declarations, they are not that they are inadmissible because they are conclusions of fact or opinions, but take the position that the declarations are inadmissible in evidence for the sole reason that they concern conduct of the deceased towards other people, and especially towards the accused, previous to the very time of the homicide. However, without considering whether the form of the objections aforesaid has at all narrowed the scope of the legal questions raised, we shall proceed to consider the whole subject.

[9] We will say at the outset that it is well settled that the statements in a dying declaration, consisting merely of the state of feeling between the declarant and the person who committed the homicide, is inadmissible in evidence. See 10 Am. & Eng. Enc. L. (2d Ed.) p. 384. But this is not because the state of feeling between such parties leading up to and at the time of the homicide is immaterial or irrelevant, for it is decidedly material and relevant. The reason for this rule is that the accused must be tried for his deeds in the light of the situation as it reasonably appeared to him from the outward conduct and demeanor of the deceased, and not in the light of the secret state of feeling existing on the part of the deceased. However, plainly, as we think, the declarations involved in the instant case are not of a mere state of feeling between the declarant and the accused, but of outward conduct of the former towards the latter and towards another person.

[10] Coming now to the further consideration of the subject in hand, the following should be said:

As we know, the ancient rule against the admission in evidence of statements of conclusions of fact has been much relaxed in modern times.

As said in 10 Am. & Eng. Ency. L. (2d Ed.) p. 383:

"A statement which tends to show whether there was any provocation for the defendant's act may be so worded as to be admissible. It has, however, been held that the general statement that there was no cause for the defendant's act is not admissible. [Citing Kentucky and Missouri cases.] But some courts have taken the contrary view. [Citing Ohio, Mississippi, Texas, Indiana, Georgia, California, Iowa, Alabama, and North Carolina cases.]"

[11, 12] An examination of the cases discloses that in Kentucky and Missouri it is held that the dying declarations which are admissible in evidence are those confined to the topic of the facts which occurred at the very time of the killing; and it is also held in these two states that statements of the declarant of conclusions of fact are inadmissible in evidence because violative of the rule against opinion evidence of nonexpert witnesses. *Starr v. Com.*, 97 Ky. 193, 30 S. W. 397; *Collins v. Com.*, 12 Bush (Ky.) 271; *State v. Elkins*, 101 Mo. 344, 14 S. W. 116; *State v. Parker*, 172 Mo. 191, 72 S. W. 850. (It may be noted that in the note to section 1434 of 2 Wigmore on Ev., supra, the holding of the last-cited case is severely criticized.) The Kentucky and Missouri holding is, as we think, contrary to principle and the greater weight of authority, certainly in so far as it confines the topic to the facts which occurred at the very time of the homicide. The "facts leading up to," and hence which precede, the homicide, which have a material bearing upon the motives and the probable conduct of the accused at the time of the homicide, are relevant, and dying declarations concerning such facts are plainly admissible upon principle and according to the greater weight of authority. There is force in the position taken in the Missouri case of *State v. Elkins* to the effect that the opportunity for cross-examination of a witness on the stand furnishes a safeguard against untrue general statements of conclusions of fact which is absent in the case of the admission in evidence of a dying declaration; but the same consideration of necessity (which is the foundation of the rule excepting dying declarations from the rule against hearsay evidence) operates in favor of admitting in evidence dying declarations of conclusions of fact as operates in favor of admitting such declarations of specific facts. The declarant most often, indeed, is in extremis, and so not in a physical condition to state occurrences in detail, but only conclusions of fact. And, so far as truth is concerned, the sanction afforded by the sense of impending death, without any expectation or hope of recovery, would seem to constitute an equal guaranty of the truth of both character of statements. With respect to unintentional errors in statements of fact, they may, it is believed, occur at least equally as often, if not more frequently, in statements of detailed occurrences than of conclusions of fact. The trial jury

is charged with, and seldom fails to perform, the duty of making the proper allowance for such errors of statement. The dying declaration is not admitted as evidence which is true, but only for the consideration of the jury for what it may consider it worth in the light of all the other evidence and circumstances in the case.

[13] The true principle would seem to be that the dying declaration is not inadmissible in evidence merely because it states a conclusion of fact, but to be admissible it must refer to a fact or facts which are relevant and which, if they do not attend the very time of the homicide, or concern the cause of the death, are so nearly antecedent in time as that it may be reasonably considered that they tend to show the motive and probable conduct of the accused at the time of the homicide, which are in issue in the case.

[14] Patterson's Case, 114 Va. 807, 75 S. E. 737, is strongly relied on for the accused. And it must be admitted that there are expressions in the opinion in that case which might bear the construction that dying declarations to be admissible must be confined in their scope to the occurrences at the very time of the homicide, and that declarations concerning transactions prior in date to the homicide itself are inadmissible in evidence, although in a dying declaration, however relevant as leading up to and disclosing the animus or evidencing the probable conduct of the accused at the time of the homicide. We cannot think, however, that such a meaning was intended. The meaning contended for on the part of the accused is derived by giving to the phrase in the opinion "circumstances of the transaction itself" the meaning of *res geste* in its strictest sense, which indeed has been adopted in connection with the subject by the Kentucky and Missouri courts as aforesaid. Such a restricted meaning does not seem to us, as aforesaid, to be in accord with principle or the greater weight of authority. And, if the expressions in the opinion of this court in the Patterson Case can be construed to have the meaning contended for for the accused, they are hereby disapproved. What we are satisfied, however, is meant in that opinion by the phrase "circumstances of the transaction itself" are the circumstances or facts leading up to or causing or attending the homicide; any of such things being "circumstances of the transaction itself" in the correct meaning of that phrase as used in connection with the doctrine of dying declarations.

In the Patterson Case the declaration was held to be inadmissible as a dying declaration, for the reason that it was not made under a sense of impending death without any expectation or hope of recovery; hence what was said in the opinion with respect to the essential character of dying declarations to be admissible in evidence was not necessary

for the decision of the case, and doubtless the court did not give the subject as mature consideration as it would have done had the case turned upon that issue. Moreover, the opinion does not designate what portions of the declaration there involved were considered as parts and what as not parts of "the circumstances of the transaction itself"—that is to say, of the circumstances relevant to the issues involved in the case. Patterson claimed that the deceased, Campbell, threw rocks at him, and was in the act of taking up a large rock to throw again when he, Campbell, the accused, shot the deceased in self-defense. The whole declaration of the deceased, as made shortly prior to his death, was testified to by a witness as follows:

"When I got back to Campbell's, * * * I told him what Patterson said about him throwing rocks, and Campbell said that there had been no trouble between him and Patterson, and he asked me whether Patterson said that he had thrown any rocks. Says he, 'Did he say that?' and Campbell then said * * * that he never had any trouble with Patterson, *only at the spring on the mountain, and that Patterson said that he had eight feet of his land and must put the fence back, and that Patterson ripped out an oath and refused to speak to him.* Campbell said there had been no trouble between them, and that Patterson shot and killed him for nothing; that Patterson said, 'God damn you, don't come through my gate or I will blow your brains out.' And Campbell said that he hoped he would die that minute if he threw a rock, that whether Patterson's nerve failed him or not he did not know, but that he dropped the gun from his head and shot him in the leg. When I went back after the arrest he * * * said * * * *that he never had mistreated Patterson's daughters—respected them as his own.*" (Italics supplied.)

Those portions of the declaration which we have italicized seem to have had reference to distinct transactions, not leading up to or in any way connected with the conduct of the accused at the time of the homicide, so as to have any evidential value as to his motive or probable conduct on the occasion of the homicide. If these were the only portions of the declaration referred to in the holding in the opinion on the subject, we consider the holding sound, in view of the issues of fact in that case. And we do not understand that the court meant to hold that any of the other declarations, though some of them were in the form of general conclusions of fact, were inadmissible in evidence.

[15] Before we pass from the Patterson Case, this further, however, should be said: The following expression is relied on in argument for the accused in the case before us, which occurs in the opinion in the Patterson Case, at page 816 of 114 Va., at page 740 of 75 S. E. namely:

"The absence of any self-serving purpose to be furthered on the part of the declarant is an essential element of the circumstantial guaranty of the trustworthiness of dying declarations. 2 Wigmore on Ev. § 1443."

This is evidently an inadvertent expression in the opinion. It is not supported by 2 Wigmore on Ev. § 1443, cited, nor have we been able elsewhere to find any authority sustaining such position. Nor can it be correct on principle, since for the most part dying declarations of deceased persons put in evidence by the commonwealth, and universally held to be admissible, in accordance with the established doctrine on that subject, are exculpatory of the deceased and inculpatory of the accused, and so must be said to have a self-serving purpose. This expression in the opinion in the Patterson Case, and what is said on the same subject in the next following paragraph therein, is hereby disapproved.

The following decisions in other jurisdictions show the trend of the great weight of authority on the subject under consideration:

In *Wroe v. State*, 20 Ohio St. 460, the declaration of the deceased held admissible was that the shooting "was done without any provocation on his part." The court said:

"Whether there was provocation or not is a fact, not stated, it is true, in the most elementary form of which it is susceptible, but sufficiently so to be admissible as evidence."

In *Payne v. State*, 61 Miss. 161, the declaration of the deceased was that the defendant "shot him without any cause." In the opinion, referring to dying declarations, this is said:

"Such declarations are * * * restricted to a statement of facts and opinions, and opinions and inferences are to be excluded, but the dying declaration admitted in this case was of a fact, and not an opinion or inference of the declarant."

In *Pierson v. State*, 21 Tex. App. 14, 17 S. W. 468, the declaration was:

"They had no occasion to shoot me. I had not spoken to them a word, nor had I done anything to either of them."

The court, at page 59 of 21 Tex. App., at page 470 of 17 S. W., said:

"The statement that 'they had no occasion to shoot me' was not a mere inference or opinion of the wounded man, and inadmissible on that account."

The opinion then cites with approval the cases from Ohio and Mississippi next above cited.

In *Roberts v. State*, 5 Tex. App. 141, the declaration admitted was that "Steve Roberts had killed him for nothing." Held: This "states a fact, beyond opinion, and is admissible."

In *Boyle v. State*, 97 Ind. 322, the declara-

tion was in the form of the following question and answer:

"Q. What reason, if any, had the man you have so identified for shooting you? A. Not any that I know of."

Held:

"Admissible in evidence, being the statement of a fact, and not an opinion"—citing *Wroe v. State* and *Roberts v. State*, supra, and other authorities to the same effect, with approval.

In *Darby v. State*, 79 Ga. 63, 3 S. E. 663, the declaration of the deceased was that the defendant "had cut him and that he had done nothing to cause it." The court said:

"It was objected that this was a conclusion. It seems to us that it was a question of fact whether he did anything or not. It is an everyday occurrence to ask witnesses in court what the parties did, and for the reply to be made that one of the parties did a certain thing and the other did nothing. We do not think there is anything in that ground."

The declaration was held to have been properly admitted in evidence.

In *State v. Mace*, 118 N. O. 1244, 24 S. E. 798, the declaration held admissible in evidence was "Oh, Lord! They have murdered me for nothing in the world."

In *Sullivan v. State*, 102 Ala. 135, 15 South. 264, 48 Am. St. Rep. 22, the court laid down the general rule confining dying declarations, which are admissible in evidence, to the topic of the facts which occurred at the very time of the killing, with all the strictness of the Kentucky and Missouri rule, and yet held that the dying declaration involved in that case, which was, "Jim Sullivan cut me; he cut me for nothing; I never did anything to him," was admissible in evidence. The court said:

"The objections made to this testimony were that it was the conclusion of the declarant—the opinion of the deceased—and that it did not relate to the circumstances or transaction of the killing. There is nothing in this objection. The statement certainly did relate to the act or transaction of the killing. * * * He * * * said Sullivan cut him for nothing, and that he, the declarant, did nothing to Sullivan. True, this statement was very general, but it was admissible as a collective fact."

In *Bull's Case*, 14 Grat. (55 Va.) 613, the declaration was that the prisoner—

"struck and kicked the deceased without provocation, and for no cause except that the prisoner and those who joined him in the affray said the deceased had talked about a young lady in Haley's house, which the deceased said he had never done."

It is true that no objection was made in that case to the character of this statement, so far as appears from the report of the case; the question raised and decided by the court therein concerning only whether the

declaration was made when the declarant was under a sense of impending death and without any expectation or hope of recovery. The declaration was held to be admissible in evidence, however, without any question being even raised by counsel against its admissibility because of its statements of general conclusions of fact or because those facts were not expressly confined to the occurrences at the very time of the homicide.

Coming now to a more specific consideration of the dying declarations remaining to be disposed of in the case before us, our conclusions are as follows:

[16] Since the relations of the deceased with the accused and Daisy Moss, which were in question, consisting of their conduct toward each other, had existed only for a few weeks prior to the homicide, we think that the conduct of the deceased towards the accused and Daisy Moss during the whole of that time may be fairly said to have been relevant and hence admissible in evidence as a part of the circumstances leading up to the homicide, certainly at the time the dying declaration was introduced, when the accused was being tried on the charge of murder, and his testimony had not come in limiting his defense to the narrow one of self-defense only. In fact, both the commonwealth, without objection on the part of the accused, and the accused, introduced the testimony of a number of witnesses concerning such relations during the whole of this time. We perceive no good reason why the dying declarations of the deceased on the same subject were not as properly admissible in evidence as the other testimony just referred to. If the deceased had lived and been testifying as a witness in the case, his testimony to the same effect as the declarations now under consideration would have been unquestionably properly admissible in evidence. Therefore, while, abstractly speaking, portions of these declarations were too unlimited as to time antecedent to the homicide to be admissible in evidence as dying declarations under the correct rule on the subject, practically, as applied to the facts of the instant case, they could have had no reference to any longer time than the few weeks of the association of the deceased with the aforesaid parties. Hence, upon principle, and under the holding of the weight of authority above referred to, we are of opinion that such declarations were properly admitted in evidence.

[17] 3. It appears from the record that Daisy Moss was not sent before the grand jury who indicted the accused, because "she stated that she did not know anything"; that she was summoned as a witness for the commonwealth to attend the trial of the case, and upon the entering upon the trial of the case the commonwealth moved the court to

introduce Daisy Moss as a court witness on behalf of the commonwealth, she being the first witness, no other witness having been introduced, and the attorney for the commonwealth further moved the court to be permitted to cross-examine the said Daisy Moss, stating to the court as the ground for such action that the attorney assisting the attorney for the commonwealth in the prosecution had not had an opportunity to talk with this witness, although he had been at her home for that purpose, and "she had refused to talk to any one before the trial." Thereupon the court, over the objections of the accused, granted the motions of the attorneys for the commonwealth, and accordingly introduced Daisy Moss as a court witness, and the court proceeded to examine and did examine her as a witness. After she had been so examined by the court, "the witness showing great reluctance to testify," as is certified in the record, the attorneys for the commonwealth were permitted by the court, over the objection of the accused, to cross-examine the witness as a hostile witness and to ask her many leading questions. And the question is presented for our decision as to whether said action of the trial court was error.

This question must be answered in the negative.

Section 6214 of the Code of 1919 provides as follows:

"A party called to testify for another, having an adverse interest, may be examined by such other party according to the rules applicable to cross-examination."

As held in *Gordon v. Funkhouser*, 100 Va. 675, 42 S. E. 677, although it be not shown that a witness has an adverse interest, if it appears that the witness is in fact adverse, the statute is applicable.

Under the circumstances above narrated, we think that there was no error in the action of the trial court stated. That action amounted in substance to no more than to allow the witness, who was in fact adverse, to be examined as an adverse witness under the statute.

[18] It is urged for the accused that for a witness to be introduced as a court witness is not in accordance with the practice in Virginia; and *Blackwood Coal Co. v. James*, 107 Va. 656, 60 S. E. 90, is cited in support of that position. That was a civil case, in which the court, 107 Va. at page 659, 60 S. E. at page 93, said this:

"So far as we are advised, it has not been the practice in this state for the court, of its own motion, to call a witness in a civil case; but it is not necessary, in this case, to consider or decide upon the right of the court to call the witness in question."

We are of opinion that in a criminal case, under the circumstances above stated, the

court has the right, in the exercise of a sound discretion, to call the witness, as was done in the instant case, and that there was no error in the action of the trial court under consideration.

[19] But one other question remains for our decision and that is this:

4. Did the court err in permitting the attorneys for the commonwealth to cross-examine the witness Frances Ranson, after introducing such witness as a commonwealth's witness and examining her in chief as such a witness?

The trial court certifies as a fact that this "witness had shown on her examination in chief by her demeanor and her answers that she was a hostile witness," and on that ground permitted the attorneys for the commonwealth to cross-examine her.

We are of opinion that the statute next above cited is applicable and fully authorized such action of the court. Hence, we find no error in such action.

The judgment under review will be affirmed.

BURKS, J., absent.

(111 Va. 19)

DEITZ v. WHYTE.

(Supreme Court of Appeals of Virginia. Sept. 22, 1921.)

1. Attachment \S 103—Affidavit held not to show decree on which execution could issue.

Statements in an affidavit for attachment under Code 1904, \S 2961, referring to a decree as showing the amount due, held not to warrant a presumption that plaintiff had a personal decree against defendant on which execution could issue, and that therefore attachment would not lie.

2. Appeal and error \S 1002—Verdict for claimant in attachment on conflicting evidence conclusive.

Verdict for a claimant in attachment rendered on conflicting evidence will not be disturbed.

3. Fraudulent conveyances \S 149(2)—Recording statute inapplicable where possession passes to third party before plaintiff's rights attach.

Where defendant sold the property to a third party, who obtained possession before plaintiff's rights attached it was immaterial that the bill of sale was never recorded.

4. Appeal and error \S 1058(1)—Erroneous exclusion of evidence harmless where subsequently admitted.

Where evidence is erroneously excluded, but subsequently admitted, the error is harmless, no prejudice having resulted.

5. Evidence \S 243(1, 7)—Agent's declarations not during agency inadmissible against principal.

The declarations of an agent made before the agency began or after its termination cannot be given in evidence against his principal.

6. Evidence \S 121(3)—Claimant's letter of instruction to agent admissible as part of res gestæ on issue of ownership.

Where certain mules and a horse were attached, on an issue of ownership set up by a claimant, the claimant's letter of instructions to his agent sent when the property was delivered to him for pasturage, stating that it belonged to claimant, held admissible as part of the res gestæ.

7. Trial \S 191(4)—Instruction not erroneous as assuming facts.

In attachment, where a third party made claim to the property through a sale, an instruction on that subject held not erroneous, as assuming the fact of a sale, or that the person to whom claimant delivered the property was his agent.

8. Appeal and error \S 362(2) — Petition for writ of error must specifically point out errors.

A petition for a writ of error is a pleading, and must specifically point out the errors complained of, a reference generally to "various other errors" being insufficient.

Error to Circuit Court, Tazewell County.

Action in attachment by William F. Deitz, against Samuel G. Walker, wherein W. W. Whyte filed a petition claiming ownership of the property levied on. Judgment for the intervening claimant and plaintiff brings error. Affirmed.

Sexton & Roberts, of Bluefield, W. Va., for plaintiff in error.

R. O. Crockett, of Tazewell, for defendant in error.

BURKS, J. In June, 1918, Deitz sued out an attachment against Samuel G. Walker, and had the same levied on certain mules and a horse which the plaintiff claimed was the property of the defendant Walker. The defendant in error, W. W. Whyte, filed a petition in the cause claiming the ownership of the property levied on, and an issue was made up upon this petition and tried by a jury. After a full hearing of the evidence the jury rendered a verdict in favor of Whyte. The trial court refused to set aside this verdict, and to the judgment entered thereon the writ of error in this case was awarded.

The mules and horse had been purchased by Samuel G. Walker & Co. in St. Louis in April, 1917, for work on the county roads in West Virginia, where the firm of Samuel G. Walker & Co. had a large contract. In May, 1917, Samuel G. Walker came to Mr. Whyte

and requested a loan of \$3,000, which Mr. Whyte refused to make, but on the contrary told Walker that, while he would not make him the loan, he would purchase the mules and horse from the firm at \$3,000. The sale was consummated on May 9, 1917, when a bill of sale for ten mules and one horse was executed and delivered to Whyte. Whyte did not at that time take possession of the mules and horse, but left them in the possession of Samuel G. Walker & Co. until they could complete the contract on which this stock was then being used. This contract was not completed until about April 1, 1918, when the mules and horse were delivered to H. F. Harman, agent for Mr. Whyte. Whyte had previously sent H. F. Harman to Virginia to engage pasture for this stock in Russell county, and when the contract of Samuel G. Walker & Co. aforesaid was completed about April, 1918, Harman, as the agent for Whyte, carried the mules and the horse to Tazewell county and put them to pasture in accordance with the contract previously made therefor. The bill of sale aforesaid was never recorded in either West Virginia or Virginia.

It was earnestly contended by counsel for Deitz that there never was any sale of this property by Walker & Co. to Whyte, and that Whyte had simply loaned to Samuel G. Walker & Co. the sum of \$3,000, and that the bill of sale was nothing more than a mortgage to secure this loan. It is further contended for Deitz that if there was any sale the possession was allowed to remain with the sellers, and that the bill of sale was void as to Deitz because never recorded. It was also contended on behalf of Deitz that the transaction between Samuel G. Walker & Co. and Whyte was fraudulent as to Deitz, and the property was liable to the attachment. All of these contentions of Deitz were earnestly denied by Whyte, and there was a full hearing on the merits in the trial court.

[1] The defendant in error, Whyte, moves this court to dismiss the writ of error on the ground that the trial court had no jurisdiction of the attachment. The attachment was sued out under section 2961 of the Code of 1904, and it is insisted by the defendant in error that at the time the attachment was sued out the plaintiff in error had a decree for the amount of his debt against Samuel G. Walker & Co. upon which he could issue an execution at any time, and that therefore an attachment under section 2961 did not lie. Upon the record as it stands the trial court appears to have had jurisdiction of the attachment under section 2961, and if there was a lack of jurisdiction it was because of the existence of facts not made to appear in the present record. The defendant in error relies upon the statement in the affidavit for the attachment as showing that there had

been a decree upon which an execution could issue, but the affidavit to the attachment does not show this. It states the amount of affiant's debt, the time from which it bears interest, and also claims the costs of a certain chancery suit pending in the circuit court of Tazewell county, Va., in the name of Deitz v. Samuel G. Walker, and refers to the whole "as shown by a decree of said court entered at the May, 1918, term thereof." It is not stated that any decree had been entered therefor, or that any execution could have been issued thereon. The decree is simply referred to as showing the amount due. No copy of the decree is filed, and no evidence was offered to show that Deitz could subject the property in any way save by the attachment. We cannot presume from this mere reference that Deitz had a personal decree against Walker for the amount aforesaid. There may or may not have been such a decree, or a decree may have been rendered and execution thereon suspended, or there may have been other reasons showing that Deitz had no right to sue out an execution. At all events, the affidavit and attachment conform to the statute, and the record does not show anything to defeat the jurisdiction. For these reasons the motion to dismiss the writ of error is overruled.

[2] The first assignment of error is to the action of the court in refusing to set aside the verdict of the jury as contrary to the evidence, or without evidence to support it. The main argument presented in the petition is under this assignment of error. It is earnestly insisted that the transaction was fraudulent, and that the bill of sale was void because not recorded. There are undoubtedly many badges of fraud set forth in the petition and earnestly insisted on. The evidence for the plaintiff and defendant, respectively, is directly in conflict on a number of the most material questions involved. There can be no doubt that if the case had been submitted to the jury on the testimony in behalf of Whyte alone, a verdict in his favor must have been found. Whether the transaction was a sale or a mortgage, or whether or not it was fraudulent, were questions properly submitted to the jury with whose verdict we cannot interfere.

[3] The bill of sale was executed in West Virginia, and the property remained with the seller only in West Virginia, so that the Virginia statute has no application thereto. Before the property was removed to Virginia, according to the testimony for Whyte, it was turned over to him as purchaser. This occurred before Deitz had acquired any right whatever to subject the property to the payment of his debt. When the property was brought into Virginia it was brought as the property of Whyte. The jury was fully instructed on this subject at the instance of Deitz, and the finding of the jury settled the

question that the property was in the possession of Whyte when brought into Virginia. In *Sydnor v. Gee*, 4 Leigh (31 Va.) 535, it was held:

"If an absolute sale of chattels, fair in itself, be not accompanied and followed by immediate possession, but possession is taken by the vendee before the rights of any creditor of the vendor attach, the sale is good against the vendor's creditors."

In the course of his opinion in that case, Judge Tucker said, at page 549:

"It is strongly my impression that the failure to deliver possession, where there is no real fraud intended, does not attach fraud to the transaction forever; and that a subsequent delivery will make it valid and effectual against all creditors whose debts are contracted, and all purchasers whose bargains are made, after such subsequent delivery."

See, also, *Clark v. Ward*, 12 Grat. (53 Va.) 440.

In *Poling v. Flanagan*, 41 W. Va. 192, 23 S. E. 635, it was held that—

"Under a bona fide sale of chattels, though there is no delivery of possession at the time of sale, yet, if the purchaser gets possession of them before an attachment is levied, his title is good against the attachment."

The next assignment of error is the action of the trial court in excluding from the jury the testimony of H. S. Lefler regarding statements made to him by H. F. Harman, agent for Whyte, at the time he made the contract for rent of pasture and at the time the mules and horse were delivered at the pasture. H. S. Lefler was the manager of the farm on which the mules and horse were to be pastured. It is true that the trial court did at one time exclude the testimony as to this statement. This exclusion was made at an early stage of the examination of the witness Lefler. The record shows, however, that Lefler was afterwards recalled by defendant's counsel and in the first question propounded to him defendant's counsel said:

"Mr. Lefler, the court has ruled that you can give your testimony as to what occurred at the time the contract was made for the pasture of the mules and at the time the mules were delivered there between you and Mr. Harman."

Counsel then proceeded to examine him on this subject, and was allowed to examine him fully and to bring out everything that had been excluded at the earlier stage of the examination. While he was being examined the court broke into the examination and propounded to him the following question:

"What all did Howard Harman say the day he brought the mules there; that is what we want to know—and the day he arranged for the pasture?"

[4] The witness testified fully on the subject, so that the defendant could not have been

prejudiced by the exclusion of the testimony at the earlier stage of his examination.

[5] Exception was also taken to the ruling of the trial court excluding certain declarations which had been made by Harman, the agent of Whyte, a week before the horses were brought to Virginia, and several months after they had been there; the first conversation having taken place in West Virginia. Harman had not been appointed the agent of Whyte at the time of the first conversation, and his agency had terminated long before the second conversation. It is well settled that the declaration of an agent, made before the agency began or after its termination, cannot be given in evidence against his principal. The agent is a competent witness, and may be put on the stand and allowed to testify as any other witness, but his declarations are not admissible. *Huffcut on Agency*, § 137; *Lake v. Tyree*, 90 Va. 719, 721, 19 S. E. 787; *Fisher v. White*, 94 Va. 236, 26 S. E. 573; *Hoge v. Turner*, 96 Va. 624, 32 S. E. 291. It may be observed in this connection that Harman was put on the stand by the defendant during the progress of the trial, but the defendant never asked him a question on the subject of these various conversations. There was no error, therefore, in excluding the declarations alleged to have been made by this witness.

The next error assigned is the refusal of the trial court to strike out the testimony of Whyte relating to the contents of certain letters he claimed to have written to Lefler, the superintendent of the farm, regarding the ownership of the mules and horse. Whyte testifies that he wrote one letter by mail the day before the mules were sent, and wrote another which he sent by Harman, who carried the mules. The letter sent by mail contained nothing of great importance. In the letter sent by Harman, Whyte testifies that he wrote "these were my mules and to take good care of them, and that I would pay whatever the cost was." Lefler denied that Harman delivered any letter to him at the time the mules were delivered, but did admit that he had received two or three letters from Harman on the subject, but he states that in one of these letters he referred to the mules not as "my mules," but as "our mules," and says that this letter was received some time after the attachment was levied.

[6] Whyte testifies that the letter sent by Harman was a letter of instructions. If it was delivered at the time he delivered the mules it constituted part of the res gestæ. The contract for the pasturage for the mules had been made, but the name of the owner had not been given. Now, the mules are delivered for pasturage, and the owner writes: "These are my mules, take good care of them, and I will pay you the cost. This was explanatory of the act of delivery of the mules,

(109 S.E.)

Whether the letter was delivered at the same time that the mules were delivered, or sent at a later period was a question for the jury. No objection was made to the testimony, on the ground that no such letter had been delivered, nor that it was parol evidence of the contents of a writing, the original of which was not produced or accounted for, or that no notice had been given to produce the original, nor was any other objection made to the introduction of the testimony. On the contrary, Whyte was examined at length, as to these letters, and the addressee was examined to show that no such letter was delivered by Harman at the time the mules were delivered. The bill of exceptions states that—

"After all the evidence offered by both the plaintiff and defendant had been heard by the jury, the defendant moved the court to strike from the record and from the consideration of the jury the evidence with reference to any letters claimed to have been written by W. W. Whyte to H. S. Lefler with reference to said mules and horse, for the reason that such letters, if produced, would have been improper testimony in this case if offered by said Whyte, because merely self-serving declarations."

The trial court refused to strike out the testimony as requested, and in this there was no error. Whyte had been cross-examined at length as to these letters, Lefler had been examined to contradict him, and no objection had been offered to the testimony until all the evidence on both sides had been heard by the jury, and the objection, when it did come, was merely because the letters, if produced, would be improper because self-serving. If, as seems probable, the letter was delivered at the same time that the mules were delivered, the contents of the letter were not merely self-serving, but were explanatory of the act of delivery of the mules, and as such were properly receivable. *Cluverius v. Commonwealth*, 81 Va. 805, 806; *Scott & Boyd v. Shelor*, 28 Grat. (69 Va.) 897; *Crite v. Commonwealth*, 1 Va. Dec. 431.

The next assignment of error is to the ruling of the trial court in granting an instruction in behalf of the petitioner. This instruction was as follows:

"The court instructs the jury that if they believe from the evidence that W. W. Whyte, by a written contract of sale, purchased the mules in controversy, for a valuable consideration, from Sam G. Walker & Co., such purchase being made in McDowell county, W. Va., and while the said mules were in said McDowell county, that the laws of the state of Virginia relative to the recordation of contracts for sale of personal property (as comprised in section 2405 of the Code of Virginia) did not apply to such contract of sale so long as the property remained in the state of West Virginia; that if they further believe from the evidence that the said W. W. Whyte took possession of the said mules in McDowell county, W. Va.,

and sent them by his agent, H. F. Harman, to the Sanders farm in Tazewell county, Va., and said mules so remained on said farm in Tazewell county, Va., until levied on under the attachment in this case, then the jury shall find for the plaintiff, W. W. Whyte, even though they shall further believe that the said contract of sale was never recorded in Tazewell county, Va."

[7] The objection to this instruction is that it assumes that Howard Harman was the agent of W. W. Whyte, and also that the contract in question was "a sale out and out of the mules and horse." We do not think the instruction is amenable to either of the objections mentioned, and read in connection with other instructions given in the case it fairly presented the case to the jury. It may be observed further in this connection that the defendant himself had excepted to the ruling of the court refusing to allow witnesses to testify to certain conversation had with Harman which could only have affected Whyte in the event that Harman was his agent.

The fifth and last assignment of error is:

"Fifth: Various other errors, in the rulings and judgment of the court, occurring during the trial of the case and which are covered by the various exceptions of the petitioner, taken at the time, all of which clearly appear in the record of this case."

[8] This amounts to no assignment at all, and will not be considered. A petition for a writ of error is a pleading, and must specifically point out the errors complained of. It is always incumbent on the plaintiff in error to point out in what respect the trial court has committed error to his prejudice. *Lorillard Co. v. Clay*, 127 Va. 734, 104 S. E. 384, and cases cited.

We find no error in the judgment of the trial court, and it is accordingly affirmed.

Affirmed.

DEITZ v. HIGH.

(131 Va. 7)

(Supreme Court of Appeals of Virginia.
Sept. 22, 1921.)

1. Appeal and error \Leftrightarrow 1067—Error, if any, in striking part of instruction, leaving substance intact, harmless.

Where plaintiff in error admitted that the act of the court in striking part of an instruction left the substance practically intact, the error, if any, was harmless.

2. Appeal and error \Leftrightarrow 730(1) — Assignment failing to specify error in instructions held insufficient.

An assignment of error based on the giving of certain instructions admittedly correct as abstract propositions, but claimed to be improper in the particular case, held insufficient as not pointing out the reasons why the instructions were not proper.

3. **Fraudulent conveyances** ⇨295(1)—Finding that sale of property levied on was not fraudulent sustained.

In interpleader proceedings by a claimant of property levied on, evidence held to support a finding that the sale to claimant by the defendant in execution was not fraudulent in fact.

4. **Fraudulent conveyances** ⇨299(9)—Finding that possession of property sold by debtor was transferred sustained.

Where property levied on was by an interpleading claimant alleged to have been purchased by him under an unrecorded contract, evidence held to support a finding that possession was not allowed to remain in the debtor after the sale.

Error to Circuit Court, Tazewell County.

Interpleader proceedings by O. G. High against William F. Deitz, asserting a claim to property levied on by the latter as belonging to Samuel G. Walker. Judgment for plaintiff in the interpleader, and defendant brings error. Affirmed.

Sexton & Roberts, of Bluefield, W. Va., for plaintiff in error.

R. O. Crockett, of Tazewell, for defendant in error.

BURKS, J. This is a contest over certain personal property alleged to have been the property of Samuel G. Walker. An execution in favor of Deitz against Walker was levied on the property, and it was claimed by the defendant in error, C. G. High. In an interpleader proceeding instituted by High, the title to the property was tried before a jury, who found in favor of High. Judgment was entered in his favor, and to that judgment a writ of error was awarded.

The property was levied on in the Pocahontas Inn, at Pocahontas, Va., in October and November, 1918. Prior to coming to Pocahontas, Walker and High had been engaged together in the retail liquor business at various points in West Virginia for about 12 years. When prohibition went into effect in that state, they came to Pocahontas together, and Walker purchased the Pocahontas Inn building. The defendant in error, High, testified as to what took place thereafter as follows:

"That a corporation was organized under the name of Pocahontas Inn Company, Incorporated, and it conducted both a hotel and retail liquor business, the retail liquor business being first conducted in the hotel or Pocahontas Inn building, and later in a new brick building erected by Sam G. Walker, adjoining the said Inn building, and on the same lot; that he was interested as a stockholder in the Pocahontas Inn Company, Incorporated; that Sam G. Walker was also interested as a stockholder in said Pocahontas Inn Company, Incorporated; that he and Sam G. Walker had charge of the retail liquor business conducted by Pocahontas

Inn Company, Incorporated, and that he, a part of the time, prior to the fire of February, 1915, partly destroying the Pocahontas Inn, had charge of the hotel conducted by Pocahontas Inn Company, Incorporated; that some time thereafter a new corporation was organized and chartered under the name of Sam G. Walker & Co., Incorporated, of which he was a stockholder and Sam G. Walker was a stockholder, and of which he and the said Sam G. Walker were in charge; that thereafter the retail liquor business which had been formerly conducted by Pocahontas Inn Company, Incorporated, was conducted by Sam G. Walker & Co., Incorporated; that during the early part of the year 1915 the Pocahontas Inn building was partly destroyed by fire, and that Sam G. Walker & Co., Incorporated, suffered considerable loss therefrom by reason of the fact that it had large quantities of liquor stored therein; that the said Sam G. Walker, by reason of the said loss and the failure to have his insurance adjusted promptly, became hard up for money; that the said firm of Sam G. Walker & Co., Incorporated, became involved by reason of its loss by said fire and the failure to have its insurance promptly adjusted, and it became necessary for some one to advance to said Sam G. Walker & Co., Incorporated, funds to carry on its business; that witness at that time loaned to said corporation the sum of \$1,000, which was never repaid to him; that after said loan Sam G. Walker & Co., Incorporated, carried on its retail liquor business until May 1, 1916, and made a profit of about \$6,000; that Sam G. Walker, who was president of said company, drew out the said entire profits from the business, and made use of them for his own personal uses, thereby using the dividends which belonged to the witness, and the said Sam G. Walker, recognizing his personal indebtedness to the witness, executed to the witness the written contract of date May 1, 1916, introduced in evidence in this case; that for some months prior to May 1, 1916, being the date of such written contract, the property in controversy in this case had been in the brick building or saloon, and possession of Sam G. Walker & Co., Incorporated, and had been used by such corporation in the conduct of its business; that on May 1, 1916, the said property was still in the said brick building or saloon and possession, and remained there until removed as hereinafter stated; that the said property and the furniture and fixtures of Sam G. Walker & Co., Incorporated, which had been used by said corporation in the conduct of its said business, remained in said building and possession of Sam G. Walker & Co., Incorporated, for some time after May 1, 1916; that shortly after May 1, 1916, witness was called to the bedside of his father, who was very ill, and while away from Pocahontas some one, whom he understands was Sam G. Walker, removed the property in controversy in this case from the said brick building or saloon building into the building of Pocahontas Inn or hotel building, in which Pocahontas Inn Company, Incorporated, was conducting a hotel business, which hotel building had been repaired after said fire, such removal being made without the

knowledge or consent of the witness; that he understands that said properties were removed from said brick building or saloon building in order to change or remodel the interior of same preparatory to its use as a motion picture theater; that the large mirror, mentioned in said written contract, after its removal from said saloon building, was attached to the partition between the dining room of said Pocahontas Inn Building and sample room that had been constructed from a large porch along the side of same; that the iron safe was placed in a room adjoining the washroom, and that the office counter or cigar case and cash register were placed in the lobby of the Inn, and used in connection with the business of said Inn; that the said Sam G. Walker explained to witness that the reason he placed said mirror there was in order to prevent its being broken; that prohibition went into effect in the town of Pocahontas at midnight on April 30, 1916, after which time said Sam G. Walker & Co., Incorporated, ceased its business of retailing ardent spirits; that at the time said contract was executed he showed same to his attorney, and asked his attorney if said contract would protect him, and he replied that it would; that witness soon thereafter went to the city of Roanoke, Va., where he entered into a liquor business with Virginia Wine & Liquor Company, of which he was a stockholder, and continued in said business there until prohibition went into effect in Virginia November 1, 1916; that witness knew that Sam G. Walker was indebted at the time he executed the said writing; that he did not know what the contract was between the defendant, Deitz, and Sam G. Walker; that he knew that defendant had not been paid for work of installing the heat and plumbing in the Pocahontas Inn building after the fire, which work had been completed, or was about complete, at the time said written contract was executed; that he had never told any one except John Roberts, an attorney, of his said purchase; that on November 22, 1918, said property was advertised for sale under decree of the circuit court of Taxewell county, Va., in the case of William F. Deitz v. Sam G. Walker et al., and when he heard of such advertisement he appeared at Pocahontas and made claim to the said property; that such advertisement of sale was pursuant of a decree entered in the case of William F. Deitz v. Sam G. Walker et al.; that said property was not sold as the property of Sam G. Walker, but the sale continued at his request; that prior to the execution of said written contract, and while the safe was in the possession and use of Sam G. Walker & Co., Incorporated, witness had possession of the keys to said safe mentioned in said contract, and that after said sale he retained possession of said keys and used said safe in which to store some of his property while the same was in the Pocahontas Inn building, and that no one else ever used said safe because the inside doors of same were locked and the keys held by him; that he had never paid any taxes on said property nor had he ever been charged with any taxes on said property."

The witness also testified that he purchased the property of Samuel G. Walker on May

1, 1916, at which time Walker executed and delivered to him a bill of sale in the following words and figures:

"Know all men by these presents: That I, Sam G. Walker, of Welch, W. Va., in consideration of one thousand dollars (\$1,000.00) the receipt of which is hereby acknowledged, do hereby grant, sell, transfer and deliver unto Chas. G. High the following property, to wit: All office and bar fixtures as used in Stag Bar in brick annex of Pocahontas Inn, Pocahontas, Va., including front and back bar fixtures with mirror, racks and cases, one double drawer National cash register, one standing desk, one flat top office table, one Mosler iron safe, one high stool, two office chairs, one check protector.

"To have and to hold the said goods and chattels unto the said Chas. G. High, his executors, administrators and assigns, to his proper use and benefit forever. And I, the said Sam G. Walker, do avow myself to be the true and lawful owner of said goods and chattels; that I have full power and good right and lawful authority to dispose of said goods and chattels in manner aforesaid; and that I will warrant and defend the same against the lawful claims and demands of all persons whomsoever.

"In witness whereof, I the said Sam G. Walker, have hereunto set my hand this first day of May, 1916. Sam G. Walker.

"M. C. Smith, Witness."

We have given the testimony of this witness practically in full, because it is mainly upon his testimony that the plaintiff in error relies for reversal. The execution of the contract was also proved by M. C. Smith, the subscribing witness thereto.

On behalf of the defendant, Deitz, it was shown that the property levied on was pointed out as the property of Walker by Mrs. Dupuy, who was in charge of the Pocahontas Inn at the time of the levy; that the claim of High as owner of the property was not made or heard of, so far as the witness knew, until the day first appointed for the sale thereof; that the property was never listed for taxes by High, but that the "personal property in the Pocahontas Inn building for those years (1917 and 1918) was assessed * * * in the name of Samuel G. Walker, the owner of the building."

It is assigned as error that the trial court struck out the words italicized in the following instruction offered by the defendant Deitz:

"The court instructs the jury that if you believe from the evidence that Sam G. Walker was, prior to the 1st day of May, 1916, the owner of the property mentioned in the plaintiff's petition, and was in possession thereof as owner, and that he on the said 1st day of May, 1916, entered into a written contract by which he sold said property to the plaintiff, which contract was signed by him, and if you further believe from the evidence that the possession of said property was left with the said Sam G. Walker by the said purchaser, the plaintiff, then you are further instructed that

said contract of sale was void, as to creditors, until and except from the time that it is duly admitted to record in the county or corporation wherein the property embraced in said contract may be, and if you believe from the evidence that the contract offered in evidence is not now, or was not of record in Tazewell county at the time the defendant had execution issue and placed in the hands of the sheriff, that then you must find against the plaintiff on the issue joined."

[1] Plaintiff in error admits in his petition that the "action of the trial court perhaps left the substance of the instruction practically intact," but insists that he was "clearly entitled to have his entire instruction given to the jury." The admission is a demonstration that the error, if any, was harmless, and not a ground for reversal.

It may be observed in passing that the words used in the instruction, "that the possession of said property was left with" the grantor, are not the words of the statute. The language of the statute is "When the possession is allowed to remain with the grantor." It is always safer to use the language of the statute where it can be done. "Left," as used in the instruction, may mean temporary leaving which could not be cured by a subsequent transfer of possession, even though possession was thereafter taken before the rights of others attached. In *Deltz v. Whyte*, 109 S. E. 212, decided to-day, we had occasion to quote the language of Judge Tucker in *Sydnor v. Gee*, 4 Leigh (31 Va.) 535, 549, as follows:

"It is strongly my impression that the failure to deliver possession, where there is no real fraud intended, does not attach fraud to the transaction forever; and that a subsequent delivery will make it valid and effectual against all creditors whose debts are contracted, and all purchasers whose bargains are made, after such subsequent delivery."

The next assignment of error is:

"The trial court erred in giving the two instructions to the jury on behalf of the plaintiff, O. G. High, over petitioner's objection. * * *"

"While said instructions may be correct as abstract propositions of law, petitioner submits that they were improperly allowed and given to the jury in this case."

[2] This is not such an assignment of error as this court will consider. If there were any reasons why the instructions were not proper, it was the duty of the party complaining to point them out. It would be unreasonable to expect this court to search the record to ascertain why instructions which are admitted to be "correct as abstract propositions of law * * * were improperly allowed." *P. Lorillard & Co. v. Clay*, 127 Va. 784, 104 S. E. 384, and cases cited.

[3] It is earnestly insisted that the trans-

action was actually fraudulent, and that the dealings of Walker and High were mere devices to screen the property of Walker from the payment of his honest debts. Undoubtedly the evidence presents strong suspicions of fraud, and counsel for the plaintiff in error in their able review of the evidence point out various indicia of fraud, but the question of fraud or no fraud was fairly and fully presented to the jury, and was one which it was peculiarly their province to decide. It is immaterial what we think of the weight of the testimony as it appears in the printed record. The jury have found that the transaction was not fraudulent in fact, and we are unable to say that their verdict on this question is without evidence to support it, or is so plainly contrary to the evidence that it is our duty to set it aside. The law relating to fraud and the presumptions and burden of proof in cases of fraud has been so often stated by this court that it is not necessary to enter upon any detailed discussion thereof. See *Hutcheson v. Savings Bank*, 129 Va. —, 105 S. E. 677; *Hickman v. Trout*, 83 Va. 478, 3 S. E. 181; *Engleby v. Harvey*, 93 Va. 445, 25 S. E. 225; *American Net & Twine Co. v. Mayo*, 97 Va. 182, 33 S. E. 523; *Flook v. Armentrout*, 100 Va. 638, 42 S. E. 686; *Johnson v. Lucas*, 103 Va. 86, 48 S. E. 497; *Redwood v. Rogers*, 105 Va. 155, 53 S. E. 6; *Shoemaker v. Chapman Drug Co.*, 112 Va. 612, 72 S. E. 121.

[4] Finally, it is said that the trial court erred in not setting aside the verdict because, even if not fraudulent in fact, the failure to record the bill of sale rendered it fraudulent as to the plaintiff in error, under the provisions of section 2465 of the Code of 1904, now section 5194 Code 1919. It is conceded that the property in controversy was, prior to the sale, the individual property of Samuel G. Walker, and that if possession was allowed to remain with him after the sale, and until the rights of Deltz had attached thereto, the verdict of the jury is wrong, and must be set aside. Whether or not the property was allowed to remain with Walker after the sale was a question of fact which was fairly submitted to the jury under a proper instruction granted at the request of Deltz, and the finding of the jury on that question was that it was not. The testimony of High is that the Pocahontas Inn and Samuel G. Walker & Co. were each corporations in which both Walker and High were stockholders, and that Walker was president of the latter company, but the extent of their holdings of stock, or how far they had control of these corporations does not appear; that the Samuel G. Walker & Co. "ceased its business of retailing ardent spirits" on April 30, 1916, but not that it ceased to exist or to do any other business; and that the property in controversy was from time to

time, at and after the sale, in the possession of one or the other of the two corporations aforesaid. There is no direct evidence that Walker, individually, at any time, either at or after the sale, had possession of said property. There are circumstances from which the jury might have inferred possession or control by Walker, but the jury did not take that view, and in the face of the testimony hereinbefore recited, we are unable to say that the verdict of the jury on this question is either without evidence to support it, or is plainly contrary to the evidence.

We find no reversible error in the judgment of the circuit court, and the same is therefore affirmed.

Affirmed.

(131 Va. 88)

HINES, Director General of Railroads, v. BUCHANAN.

(Supreme Court of Appeals of Virginia. Sept. 28, 1921.)

1. Carriers ⇨121 — Not liable for injuries traceable solely to improper loading and packing undertaken by shipper himself.

Generally a common carrier has the duty of loading and unloading the goods and is responsible for loss or injury incident thereto, but where a shipper for purposes of his own convenience undertakes to load and unload the goods, the carrier is not responsible for injuries received in transportation traceable solely to improper loading and packing.

2. Carriers ⇨134 — Evidence held to prove carrier did not make practice of inspecting carloads loaded by shippers.

In action for damage to household goods loaded and packed by third party employed to so do by shipper, in car furnished by carrier, evidence held to prove that carrier did not make a practice of inspecting carloads loaded by shippers.

3. Carriers ⇨111—Carrier not required to inspect cars loaded by shippers to see if goods are properly packed.

A carrier is not required to inspect carloads loaded by shippers to ascertain whether goods have been properly packed before proceeding to transport them.

4. Carriers ⇨134—Evidence held to prove goods were improperly loaded and packed in car by shipper's agents.

In shipper's action for damage to a carload of household goods, evidence held to prove the goods were not properly loaded and packed in the car by third parties employed by shipper.

5. Carriers ⇨132—Negligence presumed from arrival of goods in damaged condition.

Negligence in transportation will be presumed from arrival of goods at destination in damaged condition.

6. Carriers ⇨134—Evidence held to overcome presumption of negligent transportation arising from arrival of goods in damaged condition.

In shipper's action for damage to carload of household goods, evidence held to overcome presumption of negligent transportation arising from arrival of goods in damaged condition and to prove that damage would not have occurred if the car had been properly loaded and the goods properly packed.

Error to Law and Equity Court of City of Richmond.

Action by Elizabeth Buchanan against W. D. Hines, Director General of Railroads. Judgment for plaintiff, and defendant brings error. Reversed.

Munford, Hunton, Williams & Anderson, of Richmond, for plaintiff in error.

T. Justin Moore, of Richmond, for defendant in error.

SAUNDERS, J. This is a writ of error awarded on the application of the Director General of Railroads, United States Railroad Administration, operating the system of the Richmond, Fredericksburg & Potomac Railroad Company, to a judgment of the law and equity court of the city of Richmond in the sum of \$740, entered in January, 1920, on a motion for judgment on the part of Elizabeth Buchanan against the said Director General. There is a companion suit to this proceeding, in which the said Elizabeth Buchanan is plaintiff and Smith & Hicks, Inc., is defendant. In the first case the plaintiff in error is the Director General; in the second Elizabeth Buchanan. Originally Mrs. Buchanan sued the Director General and Smith & Hicks, jointly, but the court held that the liability alleged was several, and should be determined in a separate action against each defendant. Thereupon the plaintiff instituted several actions, and both cases were heard and decided by the law and equity court on the same evidence, a jury being waived, and all matters of law and evidence submitted to the court. The judgment of the court was favorable to the plaintiff in the action against the Director General, and adverse in the action against Smith & Hicks. In the first case a writ of error was awarded the Director General, and in the second case one was secured by the plaintiff, the said Elizabeth Buchanan.

These actions arose out of a shipment by the plaintiff of certain articles of valuable furniture and household effects from her home in Richmond to a new home in Atlantic City, N. J. The Smith & Hicks corporation was employed to remove, crate, and ship this furniture to Atlantic City. Certain features of this contract of employment will be adverted to later. About September 10, 1918, Mrs. Buchanan notified Smith & Hicks that she wished the shipment of her effects to be

made. Thereupon representatives of the said corporation went to the plaintiff's house in Richmond, and took charge of the crating, hauling, packing, loading, and shipping of said effects. These goods were to be loaded in a car which Mrs. Buchanan had ordered, and had had placed for convenience of loading at the old baseball park in Richmond. This car was a suitable box car, in good condition, the property of the Atlantic Coast Line, but in charge of and operated at the time by the Richmond, Fredericksburg & Potomac Railroad Company. After Smith & Hicks loaded the car, they turned the same over to the railroad company on the evening of September 10, 1918, taking therefor an order notify bill of lading, with the following notation on its face:

"S. L. and O., R., F. & P. R. R. Co. and connections not responsible for number or condition of packages"

—that is to say, shipper's load and count, R., F. & P. Railroad Company and connections not responsible for number or condition of packages. Another notation on the bill of lading was to the following effect:

"Unusual conditions prevail on the lines of the carriers which will handle this shipment, and it is subject to delay."

About a week after the bill of lading was issued—to be exact, eight days—that car reached Atlantic City. The concern of William Heald Company of that city was employed to unload the car, and transport its contents to Mrs. Buchanan's house. William Graham, an employee of said company, broke the seal and entered the car. He immediately noted that its contents were in the utmost confusion. He took a couple of pieces of furniture to plaintiff's home, and reported the condition of the shipment. Thereupon Mrs. Buchanan, and, at her request, Ellis H. Evans, the manager of the Heald Company, proceeded to the car to make an examination of the contents. This examination confirmed the report of Graham. The contents of the car were in a state of wild disorder. The floor was littered with broken bits of furniture, books, and shattered graphophone records. In the language of one witness:

"Pieces were broken off of almost everything. It was chipped, and it was strewn over the floor of the car." "There was no indication of bracing," and "nothing at all in place to indicate that there was any packing done in the car."

Citing this witness further:

"There was no semblance of a packing job in the car to my idea of the way furniture of that description should have been packed. It appeared to be thrown in there in any sort of fashion." "There was not enough lumber to crate any one piece that I recognized, unless possibly a light chair."

The furniture in the car was badly scarred, and practically it was all damaged. Several of the mirrors were left on the pieces to which they belonged. A witness acquainted with the values of secondhand furniture said that the "damage inflicted had depreciated the value of the furniture as of the time of shipment at least one-half." The car was about two-thirds full, the actual weight of the contents being about 7,400 pounds, but said contents were shipped as 12,000 pounds, the minimum for a carload lot. This shortage of contents emphasized the necessity for proper bracing to prevent oscillation of said contents under the shocks and jars incident to the ordinary handling and movement of freight trains.

Having ascertained the extent and character of the mischief done, Mrs. Buchanan made demand upon Smith & Hicks and the railway company for the damages sustained. Each defendant denied responsibility, and insisted that the other was responsible. Ultimately, as noted supra, both defendants were sued in several actions. We are now concerned with the case against the railway company.

In her declaration in this action the plaintiff alleged that she employed Smith & Hicks, Inc., to "pack, crate, transfer, haul, load, and ship" the furniture and other articles in question; that these parties were to "exercise ordinary care generally in the manner of handling, hauling, packing, and shipping said furniture," etc., and particularly to wrap and pack securely in the car said household goods and effects; that in violation of their undertakings in this regard said Smith & Hicks negligently hauled, carried, transferred, loaded and shipped said goods and effects, with an utter disregard of consequences; that they wholly failed to crate, wrap, load, brace, and pack securely, or to crate, wrap, or pack in any manner, said furniture and effects; that as the proximate result of the negligence of said Smith & Hicks, its agents, etc., together with the concurring negligence of the carriers concerned in the transportation, the goods of the plaintiff were greatly damaged.

It will be noted that with respect to Smith & Hicks the plaintiff charges specific failure in the first instance to crate and wrap her goods in proper fashion, and in the second instance to load and brace these goods in like fashion in the car. With respect to the railroad company, she alleges that this negligence of Smith & Hicks in the matter of packing, crating, and shipping her effects was, or should have been, perfectly obvious to said company; that it was the duty of said company to inspect the car to determine whether its contents were loaded with reasonable care and in such manner that they could be carried safely, and to carry same safely, without accident or mishap, and without unnecessary jarring, jostling, and shak-

ing of the same; that in violation of its duties in these regards the defendant company, its agents and employees, wholly failed to exercise ordinary and reasonable care, or any degree of care to inspect said car at Richmond, or elsewhere, to determine whether its contents were loaded in such manner that they could be safely carried in the ordinary course of transit, though such inspection would have disclosed that the car was not properly packed, and that transportation of same in the condition existing would be likely to cause damage; that the defendant did jar, jostle, and shake the car in question negligently, unnecessarily, and improperly, and carry the same in such a negligent manner, other than in the usual course, that the contents were damaged, said negligence concurring with the negligence of Smith & Hicks in the matter of loading and packing.

It will be noted from the foregoing abridgment of the allegations of the statement of the plaintiff's case that she rests her claim against the defendant, the Director General, upon the ground that he was aware, or would have been aware if he had discharged his alleged duty of inspection, that the contents of the car in question were imperfectly prepared in the first instance, and insufficiently packed in the second; (2) that with this knowledge, actual or imputed, he handled the car in so negligent and improper a fashion, and with such a multiplicity of unnecessary bumps, shocks, jars, and jolts, that the contents of the car were churned up to the extent established by the witnesses who inspected said contents in Atlantic City upon the termination of the trip.

In this connection it will be necessary to consider certain questions of law:

First: Did the plaintiff assume responsibility for loading the car, and for damages resulting from improper loading?

It has been noted that under the original bill of lading the plaintiff (i. e., the shipper) was to load the car and count the contents; the R., F. & P. R. R. Company disclaiming any responsibility for the number or condition of the packages constituting the shipment. The goods were neither delivered at the depot of the defendant nor handled by his employees. The plaintiff secured a car, and had it placed at a point, presumably of convenience, for the agents who had the contract for crating, packing, and loading her furniture and other effects.

[1] The general rule with respect to loading and unloading goods transported by a common carrier is that these duties attach to the carrier, and it is responsible for loss or injury incident thereto. But the shipper, for purposes of his own convenience, may assume these duties. In such case, by the plainest principles of justice, the carrier is absolved from responsibility for injuries received in

transportation that are traceable solely to improper loading and packing.

"A shipper who to save charges, or for his own convenience, or for any other reason, loads the property himself, is not the agent of the carrier in so doing, and the latter is not responsible for his negligence in loading the car." Moore on Carriers (2d Ed.) p. 193.

"The owner of goods cannot hold a carrier liable where the loss or injury is the result of his own fault, or that of the consignor, in loading or packing the goods. There can be no doubt that the doctrine stated is solidly founded on principle, but there is sometimes difficulty in determining whether the fault of the owner or consignor was the cause of the loss of the goods, or of the injury to them." 5 Am. & Eng. Ency. L. p. 368.

"So, where the owner of goods has unskillfully packed or loaded, * * * the carrier will be exonerated from all liability for losses which result from such carelessness of the owner." Hutchinson on Carriers, § 218.

"If the shipper assumes the responsibility of loading and unloading, the carrier is thereby relieved from liability for loss in that connection." 6 Cyc. p. 381.

"The carrier is not responsible for loss of, or injury to, goods occasioned by their being improperly loaded on the cars of the shipper." Moore on Carriers, *supra*, p. 560.

In *Ross v. Troy & Boston R. Co.*, 49 Vt. 364, 24 Am. Rep. 144, certain machinery was damaged due to insufficient fastenings employed by the plaintiff in loading. This loading had been done by the plaintiff. The court said on page 368 of 49 Vt., on page 145 of 24 Am. Rep., *supra*:

"Is the defendant chargeable with the consequences of that insufficiency? We think not, in the sense in which the county court seems to have regarded it. The undertaking and duty of the defendant was to transport and deliver safely against all contingencies except the act of God, public enemies, and acts of the parties shipping the property. It was the insurer against everything but those. But, as against them, it was bound only to the exercise of reasonable care and diligence."

The circumstances of the accident are described by the court:

"In the case before us the testimony is that the blocking under the large wheel that finally gave way and caused the injury was in its place, and did not appear to have been started or stirred at all, and the only defect in it was that it was insufficient in the first place.

"It seems incongruous for the plaintiff to claim that the defendant should overjudge him in a matter in which he assumed to judge and to do all that he required or supposed necessary to be done in the premises, and that the defendant should be responsible for the inadequacy of what the plaintiff adjudged and did." (Italics supplied.)

49 Vt. 370, 24 Am. Rep. 148.

In *Milwaukee v. Chicago & Northwestern Ry. Co.*, 37 Wis. 190, 195, 196, cited in Hutch-

inson on Carriers, *supra*, we find the following in the opinion of the court:

"The company received the property for transportation, loaded and secured as the plaintiffs saw fit to load and secure it; and why should negligence be imputed to it for not taking precautions to guard against the plaintiffs' want of care? It is said the company was exceedingly careless and negligent in attempting to carry this covered wagon at the time and in the manner it did, without making any effort to attach the same more firmly to the car. But the obvious answer to this argument is that the plaintiffs themselves assumed the risk and responsibility of loading and securing the wagon, and the company was not called upon to see that they had properly performed their duty in that regard."

The cases cited *ubi supra* clearly rest upon the broad proposition that shippers may assume the risk of responsibility of loading and securing their property in the car of the common carrier, and that, when such is the case, the defendant carrier is not called upon to "see that they had properly performed their duty in that respect," or "held responsible for the inadequacy of that which the plaintiff adjudged, or did." Some authorities go so far as to hold that the carrier is not liable for loss or injury due to improper loading, even when such defective loading is open and obvious, or when it knows, or in the exercise of ordinary care could have known, of the shipper's negligence in this respect. On the other hand, other authorities hold that—

"The carrier being entitled to reject defectively packed goods tendered for shipment, if it accepts for transportation goods which it knows are defectively packed, or which by the exercise of reasonable care it could have observed were defectively packed, it assumes to carry the goods as they are, and its common-law liability as a carrier attaches, and it is subject to all of the liabilities usually attaching to an ordinary shipment of the same character."

To this effect, see, also, 4 R. C. L. § 203.

It is the contention of the defendant in error (plaintiff below) that it was the legal duty of the defendant to inspect the car which was delivered to him by Smith & Hicks with the door unlocked; that "she had no knowledge whether the defendant was accustomed to make inspection in such cases, and it was immaterial whether she had such knowledge or not"; "that, even if she had been aware that it was not the custom of the defendant to inspect cars when loaded by the shipper, such knowledge would not relieve the carrier of the duty of inspection, if that duty was imposed by law."

We have been cited to two cases expressly relied upon to support the contention that, under the circumstances appearing in the instant case, the defendant was bound to inspect, and therefore was charged with the knowledge that such inspection, properly made, would have afforded. The first case is

that of *Hannibal Railroad v. Swift*, 12 Wall. 262, 20 L. Ed. 423, and the other that of *McCarthy v. L. & N. R. Co.*, 102 Ala. 193, 14 South. 370, 48 Am. St. Rep. 29. These cases are readily distinguished, in respect of the facts appearing in same, from the case in judgment.

In the *Hannibal Railroad Case*, the car containing the goods of the plaintiff took fire from an unknown cause in the course of transportation, and was totally consumed with its contents. This occurred during the Civil War. When the plaintiff applied to the railway company for transportation for himself, family, troops, and luggage, he was advised that hazardous conditions prevailed in the communities through which the railroad operated. He insisted, however, upon his demand, and the company furnished the transportation including a car for the luggage, equipment, munitions, etc. This car was loaded by the commanding officer, locked, and turned over to the railway company. Later, as stated *supra*, it caught fire and was destroyed. There was no question of negligent loading involved. In the argument for the defendants in error it is said:

"No question of negligence, in the matter of loading the car, can arise here, as the agreed case expressly finds that the car took fire 'from some cause unknown.'" 12 Wall. 268, 20 L. Ed. 423.

The company undertook the carriage of the men and property without compulsion, and the precise question presented was whether, under the circumstances, it was liable under common-law principles as an insurer. The court propounded that very query in its statement of the issues to be decided, as follows:

"Upon the facts stated in the agreed case, was the railroad company liable as a common carrier for the safe conveyance of the baggage and other property of the plaintiff?"

The court held that the liability of the company attached when it took possession as follows:

"In all such cases the liability of the common carrier attaches when the property passes, with his assent, into his possession, and is not affected by the car in which it is transported, or the manner in which the car is loaded."

The court maintained in the *Hannibal Case* the broad proposition that, having accepted the goods for transportation, the carrier was responsible as an insurer for supervening accidents occurring during transportation. The question of loading in that case was immaterial, since it was not contended that the fire was due to, or in any wise related to, the loading. Hence this case did not fall within the exception that a carrier is not liable for losses caused by the act of the owner of the goods, and does not present or turn upon the question in issue in the instant case. It is

true that the court in the case supra uses this language:

"The common carrier is regarded as an insurer of the property carried, and upon him the duty rests to see that the packing and conveyance are such as to secure its safety."

This statement is relied upon to support the contention that in the instant case it was the duty of the defendant to inspect the car which it received from Smith & Hicks, and to ascertain by such inspection whether it was properly loaded. But, as the question of loading in relation to the accident—that is, the destruction of the car by fire—was not before the court, and it was not contended that the manner of loading and the persons doing the loading had any casual relation to the fire the language with respect to the duty of a carrier "to see that the packing and conveyance are such as to secure the safety of the property carried," if relied upon to support the general proposition that, even when the owner loads a car, the carrier must inspect that loading and ascertain that it has been properly done, is obiter dictum.

In the McCarthy Case the plaintiffs loaded four cars with terra cotta tile, and delivered same to the railroad company. The tile reached Birmingham in a very damaged condition. A suit for damages was brought against the company. The defense relied upon was that the shipper had insufficiently and inadequately loaded the cars. In reply the plaintiff insisted that the carrier had failed to show affirmatively that it was free from fault, and that in any event the insufficient loading was discernible on an ordinary examination, and that, under the circumstances, the carrier was bound to inspect, and that, failing in this and having accepted the shipment it was charged with the usual liability of an insurer. In this case the goods were undoubtedly delivered to the carrier in good condition. The court, in part, said:

"It is manifest that the case made by the averment of these facts tendered no issue of negligence vel non on the part of the defendant. The contract averred is an unconditional common-law contract of carriage without reservations or exceptions. By its terms the defendant insured the safe delivery of the goods to the consignee, and assumed liability for any loss or injury resulting from any cause except such as afforded the carrier a defense at common law. The strictest proof of all possible care on the part of the carrier in the transportation and delivery of the goods would have been no defense, and, of course, proof of the carrier's negligence was in no wise essential to a recovery. The defenses which a carrier under such a contract may interpose to an action for failure to deliver in good condition are commonly mentioned as two only, namely, that the loss or injury was due either to the act of God, or to the act of a public enemy. But there is in reality a third resting on the fault of the owner of the goods or his agent. * * * A carrier is liable * * * for any loss or in-

jury which is due to the concurring and contributory negligence of himself and the shipper; so, when he relies upon the * * * exception to that rule of liability * * * which rests upon the fault of the shipper, he must bring himself entirely and perfectly within it by negating all contributing fault of his own." 102 Ala. 199, 200, 201, and 202, 14 South. 371, 372, 48 Am. St. Rep. 29, and authorities cited.

This extract embodies sound principles of law generally stated. But, looking to the opinion of the court for the disposition of the case under the situation presented by the pleadings, it will be seen that the court concluded that the defendant had failed in respect both of "averment and proof to bring itself within the exception under which it attempted to shield itself from liability." While some of the evidence tended to show that the goods had been improperly and negligently loaded by the shipper, the court construed the pleas setting up the defense to mean, in effect, that, though the defendant carrier was guilty of negligence in the matter of transportation, it was absolved from liability for such negligence by reason of the fact that "its negligence was aided to the damaging result, was contributed to, by the concurring negligence of the plaintiffs." Says the court:

"These averments, in short, were admissions of negligence on the part of the pleader, coupled with charges of negligence on the part of the plaintiffs. The further averments of these pleas that the cars were closed when they were received by the defendant from the first carrier, so that the condition of their contents was not visible, and that defendant and its agents did not then know that said cars were improperly loaded, if intended to negative all negligence on the part of the defendant, are repugnant to and inconsistent with the admissions of defendant's negligence implied in the allegation that plaintiff's negligence contributed to the injury. On the other hand, if these further averments are not to be taken as negating all negligence imputable to defendant, and that is probably the true construction of them, the pleas are yet bad, for, as a carrier is liable for loss or injury resulting from the act of God aided by his own negligence, or from the act of a public enemy to which his own fault contributed, so he is liable for any loss or injury which is due to the concurring and contributory negligence of himself and the shipper. * * * McCarthy v. Louisville, etc., R. R. Co., 102 Ala. 199, 14 South. 370, 48 Am. St. Rep. 29.

It is easy to extract from this citation the foundations of the court's finding. In one view, the pleas undertook to negative negligence on the part of the carrier, but, if so intended, they were inconsistent with the implications of negligence on its part carried by the allegation that the plaintiffs' negligence contributed to the injury. If an injury is due to negligence, and the negligence of one party contributes to the injury, of

necessity the remaining portion or residuum of negligence is the negligence of the other party, in the case cited the defendant carrier. In the other view, the pleas did not negative all negligence imputable to the defendant. This would carry an admission of negligence on the part of the defendant. In either view, under the interpretation placed by the court upon the pleas, the defendant would be liable.

But the defense in the instant case is that the unaided and uncontributed-to negligence of the shipper, in the matter of shipping and packing, was the efficient cause of the injury, the defendant claiming to have used due care in handling the shipment. The court admits in the case *supra* that, conceding such a state of facts, the defendant would not be liable. For instance, in 102 Ala. on page 202, 14 South. on page 372, 48 Am. St. Rep. on page 34, we find the following:

"The unaided, uncontributed-to negligence of the plaintiff producing the injury is a defense, but where there is negligence also on the part of the defendant, without which, notwithstanding plaintiff's fault, the injury would not have happened, this fault of the defendant neutralizes and eviscerates the negligence of the plaintiff as a ground of defense." (Italics supplied.)

Plainly in that case the defendant did not state a case in his pleas which brought it within the exception upon which it sought to rely, nor did the bill of lading provide that, the shipper having undertaken to load and count his packages, the carrier disclaimed responsibility for the number and condition of same.

The conclusion of the court in the case *ubi supra* was:

That the evidence "afforded an inference, or rather room for an inference," "that the goods were negligently packed," and "that but for this fault * * * the injury would not have occurred. But, though the jury had found in line with this tendency of the evidence, and deduced the conclusion * * * that plaintiffs * * * were at fault, and that such fault had a causal connection with the injury, it was yet their duty to indulge the presumption that the defendant was also negligent in and about the transportation * * * of the goods, and that this negligence aided plaintiff's negligence to the result complained of, there being no evidence * * * on the part of the defendant, upon whom the burden in this regard rested, nor indeed any averment, to the contrary." (Italics supplied.)

We do not consider that this case establishes the contention that the defendant, as a matter of law, was bound to inspect the contents of the car in question upon delivery of same.

This case does hold, however, and very properly, that even when there is evidence tending to show that the goods were not properly packed by the shipper, and they

arrive at their destination in a damaged condition, but the defendant neither avers nor furnishes evidence that it was free of negligence, there is a presumption that there was sufficient negligence in the course of transportation to justify a verdict for the plaintiff. The facts with respect to the delivery of the car in the instant case are that when Otto, acting for Smith & Hicks, had completed the operation of loading, he turned it over to the yardman and told him to receive it. The following questions and answers are taken from Otto's testimony:

"Q. Did he inspect it after you packed it?

"A. We left the door open so that he could look in.

"Q. Did he look in?

"A. I suppose he did. We turned it over to him.

"Q. And he accepted it with the door open?

"A. Yes, sir.

"Q. And then sealed it?

"A. Yes, sir; the door was partly open."

Cross-examination:

"Q. Did you see him seal it up?

"A. Saw him going towards that car. He was sealing other cars, going right along sealing cars up.

"Q. You realized, though, that you were shipping a car as a carload shipment, the shipper being responsible for the proper loading of the car, didn't you?

"A. Yes, sir."

The car was described as a "clean, closed car; no defect in the car."

In the matter of loading it appears that the ends of the car were loaded. As the shipment was not sufficient to fill the car, the middle space, where the doors are placed, was vacant.

"By Mr. Scott:

"Q. Leaving the middle vacant, so that you can get at it?

"A. Yes, sir."

This witness does not state that the defendant inspected this car, or that he ever saw a car inspected that he had packed, or that it was the practice of the company to make inspection of cars packed by shippers. The nearest approach to a positive statement in this respect is the following answer of the witness:

"I knew it would not be sealed if it was not properly packed."

The other parties engaged in the operation of packing do not testify in regard to inspection, but the plaintiff undertook to prove by one Louis Werner, Jr., a foreman of the C. & O. Ry. Co., the general usage, in the matter of inspection, common to railroads in the city of Richmond.

Testimony of Louis Werner:

"By Mr. Scott:

"Q. When you accept shipments, are you supposed to inspect the cars?

"A. Yes, sir; to see whether they are properly loaded.

"Q. If you find it not properly loaded, do you make objection?

"A. Yes, sir; you refuse to sign the bill, if it is not properly loaded."

On cross-examination this witness made the following statements:

"Q. All in the world that you know about this thing is just what you observed there in working for the C. & O.?

"A. That is all.

"Q. You know nothing about the practice of the R., F. & P.?

"A. I don't know about their practice, but that is the way we are all supposed to do. I *never worked with them.* [Italics supplied.]

"Q. You never worked for the Seaboard?

"A. No, sir.

"Q. You don't know what they do?

"A. No, sir.

"Q. You haven't worked with the Coast Line?

"A. No, sir.

"Q. You don't know what they do, of your own knowledge?

"A. No, sir.

"Q. Your experience is entirely limited to the C. & O. and what you are supposed to do?

"A. Yes, sir."

It is manifest from the testimony of this witness that he was not qualified to testify as to the practice of the R., F. & P. in the matter of inspection, and his evidence in that regard has no probative value.

Leslie Ellis, freight agent for the R., F. & P. in the city of Richmond, was a witness for the defendant. He states that on application he placed a car for Smith & Hicks to load; that, having loaded it, they brought the bill of lading to him to sign; that he thereupon had the car sealed and weighed. Further, in respect of inspection, he testified as follows:

"Q. What is the practice in regard to sealing a car, or any possible inspection, where the shipment is carload shipment?

"A. As soon as this car was reported loaded by Smith & Hicks, we had it sealed; but we don't inspect carloads. They are loaded on private sidings, in various yards miles away from us, and we have nothing to do with what he puts in there. * * *

"Q. Had Smith & Hicks been in the custom or in the habit of loading cars at your yards?

"A. Yes, sir; they loaded quite a number.

"Q. In any other cases have there been inspections?

"A. No, sir; never has been any inspections at all.

"Q. Did they know that?

"A. They knew it. I suppose so. We have never given them any reason to think that we inspected them. We put a car, and they load it, and we seal and forward it. * * * All that is done with carloads, we give a man a car, and he loads to suit himself. We receipt for it: 'Shipper's loading and accounting, and railroad company not responsible for the number or condition of packages.'"

[2] It is very clear from the testimony in this record that it was not the practice of the R., F. & P. R. R. Co. to make inspections of carloads loaded by shippers, nor was there any reason why they should do so, having in mind that the cars are placed for the convenience of the shipper, and he undertakes the task of loading. If he is negligent in that respect, he should be responsible for the consequences of his own acts. Quite a different question would be raised if the improper loading was manifest to ordinary observation when the car was received. But such is not the situation in the case in judgment.

[3] The car was an ordinary box car, with the furniture and other goods in the ends. It is stated that the door was open, but the extent of the opening is not given. It is not stated that the door was pushed back, so that the sealer, as he walked by the car, could see into the interior. It is true that if the door was not locked, the sealer could have pushed it back, climbed into the car, and inspected the contents. But it was not incumbent upon him to do this, and there is certainly no evidence to show, or even tending to show, that as the yardman discharged his task of sealing the car the insufficiency of the packing was manifest to him, in the exercise of ordinary observation.

Coming now to the question of packing, loading, and transportation, the plaintiff alleges, as stated supra, that Smith & Hicks agreed to pack, crate, transfer, haul, load, and ship all of her effects, but that, so far from doing so, said Smith & Hicks did not properly load, pack, crate and ship said effects and the defendant negligently transported same; the concurring negligence resulting in grievous damage to plaintiff's property. Such are the averments of her declaration. But the evidence submitted by the plaintiff is highly conflicting on the questions of crating, packing, and loading. She testifies in person, and submits letters tending to show, that Smith & Hicks were to crate the mirrors, pictures, and china press, pack four barrels of china and silverware, and wrap and pack the furniture securely in the car, but her other witnesses who testify as to the contract, said witnesses being the agents of Smith & Hicks, are in sharp conflict with the plaintiff. These witnesses—at least some of them—deny that it was agreed on the part of said Smith & Hicks to wrap the furniture. It is admitted that no wrapping was done. Further, they do not sustain the plaintiff's averments or agree with the plaintiff's statements that the furniture was insufficiently and inadequately loaded. On the contrary, they positively state that the loading was properly and efficiently done. It will be necessary to go

somewhat into detail in respect of this matter of loading and packing.

The evidence relied upon to sustain the plaintiff's averment of negligence in this respect is the state of the contents when the car arrived at its destination and the lack of packing material in the car. The witnesses who testify in this regard are the plaintiff, Ellis Evans, an expressman in Atlantic City, engaged to unload the car, and William Graham, an employee of Evans. The testimony of these witnesses is clear, specific, coherent, and consistent. Evans and Graham are entirely without interest in the premises, since, whatever the result of this litigation, no liability can attach to Graham or his employer, Evans. Both Evans and Graham have had years of experience in the moving and transfer business and were qualified to speak as to the proper method of loading furniture for shipment by railway car. As soon as the car was opened, and the condition of its contents revealed, Graham took two pieces to the plaintiff's house, and asked her to come down to look over the state of her effects. This she did at once, meeting Mr. Evans at the car. She states:

That she found "an old mahogany framed mirror lying face up on the floor, and handsome books scattered all over the car; a handsome mahogany chest of drawers with the cloth (?) broken off; victrola records scattered around and broken up; lamps and kitchen utensils in general confusion; a lamp shade with the leg of a chair sticking through it; two dressers had been overturned, and neither one had had even the mirror taken off; the small Persian rugs had evidently been used for packing."

The witness picked up a man's hat full of little pieces that had been broken off the furniture, "such as knobs, and the toes of claw feet, and little pieces like that." This witness testified as follows as to the material suitable for bracing that was found in the car when the seal was broken in Atlantic City:

"Q. Did you see any bracing whatever in that car?

"A. No; I saw two boards I should say as wide as my hand that were lying loose in the car. Now whether or not they were meant for bracing I do not know, but absolutely that was the only thing that could have been bracing in the car.

"Q. They were about the width of your hand?

"A. Yes.

"Q. About how thick?

"A. I should say half an inch.

"Q. There were just two of those?

"A. Yes.

"Q. How long were they?

"A. Maybe six feet."

Speaking of a velvet upholstered mahogany claw-foot davenport the witness states that evidently a heavy piece of furniture

had been on the davenport, and the upholstery was practically ruined, and the frame badly scratched, so that it had to be entirely done over. A chest of drawers had three legs off, and most of the knobs, with the top badly scratched. The only packing that she saw was a little loose excelsior in the car, a small market basket full, and her small Persian rugs. Great pieces were split off the top of a cedar chest, and the kitchen table was split in half. The kitchen utensils were mashed and battered.

The testimony of Evans and Graham fully confirms that of Mrs. Buchanan as to the condition of the contents of the car, and describes in full and convincing detail the utter inadequacy of the material found in said car for properly bracing and packing the furniture.

Examination of Ellis H. Evans:

"Q. When you got to the car, what was the condition you found?

"A. Well, the furniture was in very bad shape for a carload movement. Of course, to describe in detail, there were pieces broken off of almost everything. It was chipped, and it was strewn over the floor of the car.

"Q. Did you find any bracing at all in the car?

"A. No, there was no indication. The only indication of packing was a small quantity of excelsior and a few pieces of board which in my opinion wouldn't be sufficient to brace or pack a carload at all of that quantity of goods. * * *

"Q. How should that furniture have been packed or prepared for shipment properly?

"A. Well, the furniture should have been wrapped with heavy paper or newspaper in the first place. It should then have been placed in the ends of the car and the heavy furniture on the bottom and the lighter furniture piled on top with excelsior between them. After an end of the car was filled, it should have been braced with heavy enough lumber to guarantee it arriving with ordinary care in the freight movement.

"Q. Did you find a single piece of bracing intact and in proper place when you opened the car?

"A. Nothing at all in place to indicate that there was any packing done in the car.

"Q. How many pieces of lumber did you find in the car?

"A. Well, I can't tell you offhand now, Mr. Moore, but my recollection is that there were about four pieces of lumber that I kicked out into the yard.

"Q. Did you have to unfasten these pieces?

"A. No; they were on the floor of the car.

"Q. About what size were they?

"A. Well, I should judge it was about seven-eighths lumber, what we call roofers here.

"Q. You mean about seven-eighths of an inch thick?

"A. Yes.

"Q. About how wide?

"A. Six inches, I think, that lumber runs.

"Q. How long?

"A. Well, they were not over five feet in length, I think, any of them. * * *

"Q. Did there appear to be any orderly arrangement of the furniture?"

"A. None whatever. There was no semblance of a packing job in the car to my idea of the way furniture of that description should have been packed.

"Q. If all of the excelsior and all of the lumber that is those four pieces to which you refer had been used to properly pack or crate some of the furniture, how much could have been properly prepared or crated for shipment with the amount of excelsior and the pieces of lumber that were in the car?"

"A. Well, there couldn't be any more than one piece. In fact, there was not enough lumber to crate any one piece that I recognized, unless possibly a light chair.

"Q. Was a single piece of furniture crated at all?"

"A. No; I don't recall any one crated in the car. * * * I would say that the way it was put in there none of it could arrive safely.

"Q. How were the mirrors arranged?"

"A. I recollect two or three of them attached to the pieces of furniture on which they belonged. * * * The books were strewn over the floor of the car, with no pretense at packing at all."

Cross-examination:

"* * * Q. Haven't you seen cars of furniture, which have been properly packed, smashed and broken by rough handling?"

"A. Not to the extent that this car was; never.

"Q. Have you not seen carloads of furniture badly damaged by rough handling by the railroads?"

"A. Well, I have seen pieces badly damaged, but not carloads. Of course, I don't know what—I naturally know that you are interested in another side of it. It was a mighty bad-looking car when I got into it for anybody to pretend to say they had packed. I am saying that without feeling in the matter at all."

William Graham:

"Q. What did you find, William, when you broke the seal of the car?"

"A. The first thing I found was furniture piled; I guess it was the first thing I found; furniture scattered all over the car and propped against one another.

"Q. When you opened the door, did you see any mirrors?"

"A. Yes, sir; laying all over the floor. * * *

"Q. Did you ever see a car packed like that one?"

"A. No, sir; I never did. Never seen a car packed like that before.

"Q. How was that furniture packed?"

"A. It weren't packed at all, in my estimation, like I have seen cars packed that I have unloaded.

"Q. How is a car usually packed when it is packed right?"

"A. Packed right, the heavy stuff is generally put at the bottom and the light stuff on top, and then braced with the chairs on top; of course, it has got to be well packed with excelsior, or something, or burlap.

"Q. How ought it to be braced?"

"A. After you have stacked the furniture, you

have naturally got to brace it with lumber to keep it from shaking.

"Q. Ought that to be light or heavy lumber?"

"A. Heavy lumber always.

"Q. Was there any such heavy lumber in that car?"

"A. I didn't notice any at all.

"Q. Would you have seen it, if it was there?"

"A. Sure. We *would have had to break it loose.* [Italics supplied.]

"Q. Did you have to break loose any piece of lumber at all?"

"A. No, sir.

"Q. Was there any piece of lumber fastened to the car at all?"

"A. I didn't notice any at all. * * * I don't think the car had been in any accident. I think it was the packing that caused the damage to the furniture, the way it was packed."

The testimony of the witnesses for the plaintiff who did the actual loading and packing of her furniture is to the effect that it was properly done. These witnesses are Alfred Otto, Arthur Otto, London Chandler, and Garland Evans, all employees of Smith & Hicks.

The testimony of Alfred Otto is in part that "the furniture was braced in the car as securely as any car here ever packed"; that he used a sufficient amount of excelsior, "a bale and a half"; that he used a sufficient amount of lumber to properly brace the furniture as packed; that he crated and packed everything as per agreement; that Chandler Evans and his son Arthur helped him; that he had the stuff placed as he wanted it.

Cross-examination:

"Q. How many pieces of lumber did you use?"

"A. Well, I will not say positively how many pieces I used, but I used enough lumber to brace the car as far as I saw it was necessary.

"Q. You have some idea of how many pieces you used?"

"A. I may have used—

"Q. Two or three?"

"A. Two doesn't start. It may be for half of one side of the car.

"Q. You think two would be enough for one side of the car?"

"A. No, sir; two wouldn't have started it.

"Q. How many did you use?"

"A. About eight or nine 16-foot strips. * * *

"Q. You testified a moment ago that you did not recall as to the number of strips used. When you say that there were probably eight or nine, you simply mean that was about the number that should have been used?"

"A. I didn't say it should have been used. If it should have been used, I used it. I mean to say, if I thought it was right to use ten pieces, I would use ten, and wouldn't use eight or nine. If I thought twelve ought to be used, I would use twelve pieces.

"Q. But you have no distinct recollection as to what you did on this occasion?"

"A. No, sir; with the exception of that excelsior. I do know what I had of the excelsior.

"Q. But you have no distinct recollection as to the amount of lumber?"

"A. No, sir.

"Q. How much was the amount of the excelsior?

"A. About 165 or 170 pounds. * * * I used half a bale out of the car, and a bale and a half on the car. * * *

"Q. Did you say the mirrors on all bureaus were taken off?

"A. Yes, sir.

"Q. You remember each one?

"A. I remember distinctly. I have been in the business 10 years and never yet handled a bureau or washstand I didn't have the mirrors taken off."

Examination of Arthur Otto:

This witness states that in his opinion the car was packed "the same as they generally packed a car, and braced the same way, with particular care," and there was enough excelsior used and enough lumber used to properly pack and brace the car.

The following extracts are from the cross-examination of this witness:

"Q. You don't recall anything particularly what you did?

"A. I couldn't tell you anything particular that I did.

"Q. You just remember that was one job you worked on?

"A. Just one job I worked on.

"Q. I reckon you have worked on hundreds since then?

"A. I have worked on a plenty of jobs since that time."

London Chandler states that the car in question was packed and braced to go anywhere *except in a wreck*. (Italics supplied.) On cross-examination witness stated that he saw the lumber used; could not say how much, but enough to brace a car. He did not participate in the actual packing, but "stood on the truck and handed the stuff off." On direct examination witness stated that the car was braced like all other cars are braced that he had seen. He had seen a great number of cars packed and braced.

Garland Evans who had also loaded a great many cars, helped load this one. He stated that "it was packed properly so far as he could see, unless it was in a wreck; that it was well braced and well packed;" that in the time since he had helped load this car (about 12 months prior) he had loaded a great many others, too many to remember.

The testimony of the witnesses who speak as to the loading of the car and that of the witnesses who speak as to the condition of the contents of the car at the place of destination cannot possibly both be true, and the statements of the former are wholly irreconcilable with the averments of plaintiff's declaration. The physical facts refute the testimony of Otto and his associates, who are put on the stand as the witnesses of the plaintiff, but who are in fact the employees of another party, to wit, Smith & Hicks. It is to the interest of the latter

to discredit plaintiff's allegation that the goods were improperly packed and insufficiently braced. In the judgment of the foregoing employees of Smith & Hicks, the packing was of the highest order of excellence, one of them testifying that the car "was packed and braced to go anywhere, except in a wreck." But, as there was no wreck, the internal condition of the car on arrival refutes this confident statement.

Otto, Sr., repudiates, almost with indignation, the suggestion that he used only two or three strips of roofers to brace the furniture in the car. He states that "two wouldn't start," and that he used eight or nine 16-foot strips, also 165 or 170 pounds of excelsior. If this bracing and packing material had been found in the car when the seals were broken in Atlantic City, the witness' statements would have been corroborated, and the inference would have been strong that the battered condition of the furniture was due to extraordinary jolts and jars received in the course of the trip, which loosened the bracing, and allowed the furniture to move forward and backward—that is to say, longitudinally—in the car. Having in mind the number and variety of pieces of furniture in the car, and that same was only about two-thirds full, it requires no expert knowledge to reach the conclusion that four pieces of narrow roofers, as described by the witness, Evans, were totally insufficient for adequate bracing. If sufficient bracing and packing material—that is to say, if eight or nine 16-foot strips and 165 or 170 pounds of excelsior—had been really used, as claimed, how is it to be explained that they disappeared in the course of a comparatively short trip in a closed and sealed car? The circumstances were such as to impress indelibly upon the minds of the only disinterested witnesses, Evans and Graham, that there was an almost total lack of packing material in the car when the doors were opened. A witness who loads many cars in the course of a year may well be at fault when, looking backwards, he seeks to call to mind in self-justification precisely what he did in one of many jobs.

Confronted with such a scene of confusion and disorder as was revealed when the seals of the car in question were broken in Atlantic City, the experts who had been employed to unload a presumably well-packed car would naturally be on the lookout for the efficient cause of this pitiful wreckage of costly furniture. If that cause, upon inspection, was ascertained to be insufficient bracing and packing, as evidenced by an almost entire absence of appropriate material for such bracing and packing, that lack of material would be a fact forcibly implanted in the memories of the witnesses. The witness Evans noted about "four pieces of lumber seven-eighths of an inch thick six inches wide and about five feet long" on the

floor of the car and "a small quantity of excelsior." One hundred and sixty-five pounds of the latter material, relieved from pressure, would make a very large pile, and if used as alleged, would have been instantly noticeable upon the most casual inspection of the car. Otto, Sr., states as a positive fact that the mirrors on all the bureaus were taken off. On this point his associate workers do not testify. Evans, Mrs. Buchanan, and Graham all concur in stating that when the car arrived several of the mirrors were "attached to the places to which they belonged." This piece of negligence would make an ineffaceable impression on Evans, for the reason stated by him, namely, that "they should not have been moved out of the house in that fashion, let alone shipped." Otto's statement that the mirrors were all removed is most overwhelmingly refuted.

[4] The testimony of the witnesses in this case, fairly scrutinized with reference to the apparent probabilities and improbabilities of their respective stories, plainly shows that Smith & Hicks were guilty of gross negligence in loading the car. The physical facts establish plaintiff's contention that the furniture was not properly packed when it left Richmond. It is plain to us upon the evidence that the furniture was not properly loaded and braced, and that, if the railway company subsequently handled the shipment with the care appropriate to a properly loaded car, then the injury to its contents is traceable exclusively to the negligence of the plaintiff's agents in the discharge of the task of packing and loading.

Hence one question only remains for disposition, and that is whether the railway company exercised proper care in transportation. It is clear that the car was delivered to the plaintiff in good condition, and, while no special inspection of same was made in Atlantic City, it is reasonably apparent that, if the car had shown any external signs of injuries received in transit, they would have been manifest to Evans and Graham when they set about the task of unloading. So far from noticing anything of the sort, Graham testifies, as recited supra, that "he didn't think the car had been in an accident." "I think," he said, "that it was the packing that caused the damage to the furniture, the way it was packed." A certain amount of shocks and bumps are necessarily incident to and attendant upon the movement of freight trains, and the purpose in view in packing and bracing the contents of a freight car is to make said contents capable of withstanding these inevitable shocks. Furniture packed as the furniture in question was packed was not prepared for the ordeal of an ordinary freight movement, involving many starts, stops, and shiftings.

The query in the instant case at this point is whether the defendant, in view of the damaged condition of the contents of

the car on arrival, has negated the presumption that the car was handled in the course of transit under conditions of needless and excessive jolts and jars. On this point the defendant submits the testimony of six witnesses concerned with the movement of the car from the beginning to the termination of the trip. The time taken for the trip is immaterial, since the shipper was advised that, owing to unusual conditions prevailing over the lines of the carriers concerned, the shipment was subject to delay. Heavy movements of troops destined for transshipment were in progress. The car was moved in accordance with regularly arranged freight service, and, having in mind the intervals when it was at rest, about eight days elapsed before Atlantic City was reached. The actual running time required was much less.

The first witness in this connection was Yowell, yard conductor for the R., F. & P. in Richmond. He moved the car from the ball park to Acca as conductor in charge of the movement. He reached Acca about 6 a. m. September 11, 1918. Nothing unusual happened on the trip. He left the car on what is known as the "no-bill" track. He is specific that no "rough handling" took place while the car was under his control. From the time that the car was picked up at the park until it was left on the "no-bill" track at Acca there was no other conductor in charge. During most of this period the car was at rest. The next witness in order is W. R. Utley, a yard conductor for the R., F. & P. He weighed the car at Acca.

"Q. Was there any accident, or anything unusual, in connection with this car on that occasion?"

"A. Not while in my charge."

It would have been the witness' duty to report any rough handling, breaking, or accident while the car was in his charge.

M. T. Cummins, a yard conductor of the R., F. & P., follows Utley on the stand. He "lined the car up on September 14th to go north," finding it on the no-bill track.

"Q. Was there any accident or anything unusual in handling the car?"

"A. No, sir; if there had been, I couldn't have lined it up."

Cross-examination:

"* * * By Mr. Moore: If there had been any accident or anything out of the ordinary, would you have been required to make a report?"

"A. I would."

"Q. Did you have to make a report?"

"A. I did not."

The next witness called in order was the yardmaster of the freight yards of the R., F. & P. in Richmond, J. W. Hall. He had charge of all freight movements on the

yard. The witness states that his records do not show that there was anything wrong with the car in question, and the movement of troop trains held the car in Richmond. He "ordered the crew to take the car to Potomac Yards," and his records show that there was no accident or unusual occurrence on that trip.

L. W. Gills, the conductor who took the car to Potomac Yards, was next called. This witness was a conductor of long experience in the service of the railway company. He stated that the car containing the furniture was in a favorable place on his train "from the standpoint of jarring." This car was the third car from the engine. Conductor Gills took out the train containing the car in question on the morning of September 14th, reaching the Potomac Yards about 2:51 p. m. of the same day. He testifies that the time of movement was "about normal," and that the car did not get any rough handling while in his charge, that it was not in any accident, and that it was left in Washington "in the track that we turn our freight trains on over to the Potomac in good condition without exception."

W. H. Charles, the witness next in order, was the "assistant yardmaster of north-bound Potomac Yards." He gave the record of the car in question as follows:

"Arrived in Potomac Yards 2:51 p. m. September 14, 1918, in charge of Conductor Gills, delivered to Pennsylvania Railroad 4:20 p. m., and leaving on the Pennsylvania train 9:55 a. m. September 15th. * * *

"Q. Was there any accident or rough handling, as far as your records show, of that car during that time?

"A. Before I came here I examined our records, and could find no record of that car being in any accident. Our records do not show it, and the records of the mechanical department do not show anything the matter with it.

"Q. If there had been, would the records show it?

"A. Yes, sir; and it would even show if they made any slight repairs. There is no record of any slight repairs even."

The foregoing witness testified orally. In addition the defendant submitted the depositions of W. W. Thrift and others.

Thrift deposed that he was in 1918 in the service of the Philadelphia, Baltimore & Washington Railroad Company, and that it was his duty to take charge of trains from Potomac Yards between Alexandria and Washington, and have charge of such trains until delivered to the next connecting conductor at Edgemoore Yard, Del.; that he made a record from personal observation of the cars in the trains that he moved on September 15, 1918; that the fourth car in his train from the engine was the car in

question; that he left it at 6:06 p. m. of September 15th; that the movement was a good one; and that there was no rough handling of that train in the course of said movement.

Knotts, the next witness, deposes that he was a freight conductor of the P., B. & W. R. R. Co., and moved trains from Edgemoore to Pavonia Yards, N. J.; that he moved a train containing the car in question on September 15th (evidently 16th) from Edgemoore to Pavonia Yards; that the movement was an "ordinary, good movement"; and that there was no rough handling of the train while same was in his charge.

W. G. Long deposes that he was an extra freight conductor of the West Jersey & Seashore Railroad, and moved trains from Pavonia Yards to City Line Sidings, outside of Camden, N. J.; that on September 17th he moved the car in question and delivered it at City Lines; that there was no rough handling of the train while in his hands.

Benjamin H. Campbell deposed that he was an extra freight conductor on September 18, 1918, on West Jersey & Seashore Railroad; that it was his duty to take trains from City Lines to Atlantic City; that he moved the car in question on the 18th; that he had a passenger engine, and a very easy handling of the train; that he had a good movement, and delivered the car at Atlantic City at 9:31 p. m. on the above day.

W. R. Brown, supervisor of arranged freight service on the Pennsylvania System east of Pittsburg, testifies that the record of the movement of the car in question from Potomac Yards to Atlantic City was the "regular, arranged freight movement for a shipment of merchandise such as furniture."

[5, 6] The testimony of the foregoing witnesses, giving in detail the movement and location of the car containing Mrs. Buchanan's furniture from the time of reception of same in Richmond to date of delivery in Atlantic City, shows very clearly that nothing happened en route to cause injury to a properly packed car. It negatives satisfactorily the presumption of negligence of handling in the course of transportation. We are fully satisfied after a careful consideration of the evidence in this record that it was error in the trial court to hold that the damage to the goods in question was caused by the negligence of the defendant. It was evidently due to the negligence of Smith & Hicks in the matter of loading and packing.

For the reasons heretofore given, we are satisfied that the judgment complained of was plainly against the evidence, and the same should be reversed. The proper order will be entered in this court.

Reversed.

(131 Va. 1)

BUCHANAN v. SMITH & HICKS, Inc.

(Supreme Court of Appeals of Virginia.
Sept. 28, 1921.)

1. Appeal and error \Rightarrow 1008(1)—Judgment reversed if plainly wrong or not supported by evidence.

The judgment will be reversed on writ of error if the court is of the opinion that it is plainly wrong or without evidence to support it.

2. Contracts \Rightarrow 322(3) — Evidence held to prove negligence in packing goods and loading car causing damage to carload during transportation.

In action for damage to carload of household goods, injured during transportation, against defendant, who had been employed by plaintiff to pack goods and load car, evidence held to prove that defendant was negligent in packing goods and loading car, and that such negligence was the cause of the damage.

Error to Law and Equity Court of City of Richmond.

Action by Elizabeth Buchanan against Smith & Hicks, Inc. Judgment for defendant, and plaintiff brings error. Reversed, and judgment rendered for plaintiff.

T. Justin Moore, of Richmond, for plaintiff in error.

Scott & Buchanan and A. G. Robertson, all of Richmond, for defendant in error.

SAUNDERS, J. This case and the case of Walker D. Hines Director General, etc., v. Elizabeth Buchanan, 109 S. E. 218, decided at this term of this court, were heard together in Richmond. The plaintiff is the same in both cases, and the claim asserted against the respective defendants concerns the same goods. In the motion for judgment in this case of Buchanan v. Hines, Director General, etc., Smith and Hicks were charged with negligent failure to properly load, pack, crate, and brace the furniture and other goods of the plaintiff in the car in which the same were shipped, while the railroad company was charged with negligence in the matter of transporting these goods. In the instant case the defendants, who had undertaken the task of loading plaintiff's goods, are charged with having "negligently and improperly loaded the same on the car in an unsafe and insecure condition," so that said car, "having been carried to its place of destination in the ordinary course of transit and without accident, and without knowledge of the unsafe and insecure condition of said contents, reached said destination with its entire contents in a ruined, destroyed, and damaged condition," all resulting directly from the failure to properly load, brace, pack, and crate same.

After hearing the evidence in the instant case, the trial court entered judgment for

the defendant. A writ of error was awarded to this judgment by one of the judges of this court.

It appears from the record that a jury was waived on the trial of this case, and all matters of law and fact were submitted by consent of counsel to the court for determination.

The following stipulation was made:

"Stipulation.

"It is hereby stipulated by and between the parties in this case, by their respective counsel, that the transcript of the evidence taken during the trial of the case of Elizabeth Buchanan v. Walker D. Hines, Director General, etc., which has been certified from this court to the Supreme Court of Appeals of Virginia, is to be read as a part of the true transcript in this case. * * * The parties hereby stipulate that the transcript of the evidence in the case of Elizabeth Buchanan v. Director General of Railroads, etc., shall be treated as the transcript of the evidence in the present case of Elizabeth Buchanan v. Smith and Hicks, Inc., and that the clerk of this court shall not make the evidence a part of the record in this case, but shall insert in lieu thereof this stipulation in order to avoid unnecessary costs."

Here follow the signatures of counsel.

The fourth assignment of error in plaintiff's petition in the instant case is as follows:

"(4) That the defendant did not 'pack said furniture securely in car,' in violation of said agreement and in violation of the common-law duties owing to the plaintiff by the defendant, as a bailee for hire for this purpose, irrespective of the agreement, and defendant wholly failed to brace securely and substantially load said furniture and effects on the car."

This assignment presents an issue of fact; the plaintiff contending that defendant's negligent failure in the foregoing respect occasioned the consequent damage to the contents of the car. The plaintiff also charges that the defendant undertook to wrap and crate her furniture. These charges the defendant denies.

In view of the conclusion reached on the first issue of fact, it will not be necessary to determine the second contention.

It is insisted by the defendant in error:

(a) That the goods in question were properly loaded and packed, and delivered to the railway company in good order, and that thereafter they were injured while they were in the exclusive care and control of said carrier who had accepted them without objection; (b) that, while the evidence on these allegations of fact is conflicting, this conflict must be resolved in favor of the finding of the trial court, because it cannot be said that such finding was either plainly wrong or without evidence to support it.

We are cited to many familiar authorities supporting this rule of decision. Notably among the precedents cited are the recent

cases of Standard Accident Insurance Co. v. Walker, 127 Va. 140, 102 S. E. 585, and Graham v. Commonwealth, 127 Va. 808, 810, 103 S. E. 565, 566.

In the latter case the court said:

After careful consideration of "all of the evidence in the case, and upon giving the weight to the decision of the jury upon the matters of fact dependent upon the evidence which is conflicting and which involves the credibility of the witnesses, * * * and, along with this, also upon giving due weight to the action of the trial judge in refusing to set aside the verdict, * * * we are of opinion that it does not appear from the evidence that the judgment under review is plainly wrong, or without evidence to support it, and hence such judgment will be affirmed."

[1] This citation very plainly carries the implication, and such indeed is the law, that if in the situation *supra* the court has been of the opinion that the judgment under review was plainly wrong, or without evidence to support it, said judgment would have been reversed.

[2] In the instant case we have very carefully considered and reviewed, in the case of Elizabeth Buchanan v. Walker D. Hines, Director General, etc., the evidence relating to the packing and loading of the goods in question, and the subsequent handling of the car on which these goods were loaded, by the different railway companies concerned in the course of the movement of said car from Richmond to Atlantic City, the place of destination. We are satisfied that this evidence plainly shows that the defendant, Smith & Hicks, Inc., was negligent in the matter of loading and packing, and that the defendant in the case *ubi supra* successfully negated the presumption of negligence in transportation. Further, it is considered that the evidence plainly shows that the injuries to the contents of the car were due to the negligence of the defendant, Smith & Hicks, Inc., in the said matter of loading and packing.

In the opinion of this court the judgment of the trial court in the instant case, ascertaining, in substance, that the defendant, the said Smith & Hicks, Inc., was not negligent in the matter of loading and packing, and in consequence not liable to the plaintiff for the subsequent injuries to her furniture and other goods, was plainly wrong. Hence that judgment will be reversed, and the plaintiff having established by uncontroverted evidence the amount of her damages consequent upon defendant's negligence, the same appearing to be the sum of \$1,341.50, a judgment for that amount, with interest at 6 per cent. per annum from September 18, 1918, in favor of the plaintiff, Elizabeth Buchanan, against the defendant, Smith & Hicks, Inc., will be entered in this court.

Reversed.

(89 W. Va. 275)
DEL SIGNORE v. PAYNE, Director General of Railroads. (No. 4319.)

(Supreme Court of Appeals of West Virginia.
Oct. 18, 1921.)

(Syllabus by the Court.)

1. Commerce \Leftrightarrow 8(12)—Provisions of uniform bill of lading held binding as to interstate shipments.

The provisions of the "Uniform Bill of Lading—Adopted by Carriers in Official Classification Territory, Effective January 1st, 1916," when employed, constitutes the contract between the parties to an interstate shipment and is binding upon them in determining their respective rights growing out of such interstate shipment.

2. Carriers \Leftrightarrow 140—Uniform bill of lading gives 48 hours after notice to owner of arrival before liability as carrier ceases and that of warehouseman begins.

Section 5 of the conditions contained in such Uniform Bill of Lading, properly construed, gives the owner 48 hours after notice by the carrier of the arrival of the goods, within which to remove the goods before the liability of the carrier as such ceases and its liability as warehouseman begins.

3. Cases held inapplicable to interstate shipments.

Our cases of *Berry et al. v. W. Va. & P. R. R. Co.*, 44 W. Va. 538, 30 S. E. 143, 67 Am. St. Rep. 781, *Hurley & Son v. N. & W. Ry. Co.*, 68 W. Va. 471, 69 S. E. 904, and *Hutchinson v. U. S. Express Co.*, 63 W. Va. 128, 59 S. E. 949, 14 L. R. A. (N. S.) 393, are inapplicable to interstate shipments made pursuant to the contract contained in such Uniform Bill of Lading.

Error to Circuit Court, Tucker County.

Action by Sante Del Signore against John Barton Payne, Director General of Railroads, begun in the justice court. The circuit court directed verdict and judgment for defendant. Plaintiff's motions to set aside the verdict and for new trial were denied, and he brings error. Reversed, verdict set aside, and new trial granted.

J. W. Harman, of Parsons, for plaintiff in error.

E. A. Bowers, of Elkins, for defendant in error.

MILLER, J. The controversy is over the alleged liability of the defendant to plaintiff for the total loss of one hundred cases of beverage shipped by the Cumberland Brewing Company, December 19, 1918, from Cumberland, Maryland, over the Western Maryland Railway, and consigned to plaintiff at Thomas, West Virginia.

On the trial of the action below, upon appeal from the judgment of a justice, at the

conclusion of plaintiff's evidence, the court sustained defendant's motion to strike out the evidence and directed a verdict for him, and the judgment of nll capiat now complained of followed the verdict so directed. And the circuit court also denied plaintiff's motion to set aside the verdict as contrary to law and the evidence and to grant him a new trial.

[1] The contract of shipment was contained in the bill of lading issued to the shipper, and purporting on its face to be "Uniform Bill of Lading—Adopted by Carriers in Official Classification Territory, Effective January 1st, 1916." Section 5 of the "Conditions" contained in this bill of lading, a part of plaintiff's evidence, among other things provides:

"Sec. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in a car, depot, or place of delivery of the carrier or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage."

[2] The other evidence of the plaintiff, oral and documentary, shows that the goods sued for were valued at \$240.00; that having been shipped December 19, 1918, they did not arrive at their destination until January 2d, and were not unloaded until January 3, 1919; and the plaintiff was not given notice of the arrival until the morning of January 4, 1919, after they had been frozen and rendered absolutely worthless; and for this reason he refused to receive them. It does appear that some workmen at the railroad station had told plaintiff's driver on the afternoon of January 2d, that the goods were in the car on the sidetrack, with other cars, but not unloaded; but plaintiff was not advised of the unloading of the car until the morning of January 4th, after the goods had been destroyed. At that time the forty-eight hours given by the bill of lading for removal of the goods, considering the notice to the drayman on the afternoon of January 2d as notice to the plaintiff, had not yet elapsed, and of course this time had not elapsed after the agent's notice to plaintiff on January 4th, and the question presented by the evidence was whether the liability of defendant as carrier continued for the forty-eight hours, or was at the time the goods were destroyed only that of warehouseman. We find that the proper construction of said Section 5 of the Uniform Bill of Lading was before the Supreme Court of the United States in the recent case of *Michigan Cent. R. R. Co. v. Mark Owen & Co.*, 256 U. S. —, 41 Sup. Ct.

554, 65 L. Ed. —, where it was held that the liability of the carrier as such continued during the whole of the forty-eight hours. And in that case it was held that the fact that the owner had had notice of the arrival of the goods and that they were in the car on the sidetrack, and that he had broken the seals on the car and had commenced the unloading of the goods made no difference, and that the goods having been destroyed by fire in the meantime, the carrier continued liable as such for their loss. In the case at bar it is conceded that the forty-eight hours had not elapsed from January 4th, when the plaintiff had his first notice from defendant's agent of the arrival of the goods, and the jury would have been justified in finding from the evidence that the period had not elapsed from the time plaintiff's drayman learned of the arrival of the goods from the employees of defendant at the railway station on January 2d.

[3] To support the finding and judgment of the circuit court defendant's counsel rely on our cases of *Berry et al. v. W. Va. & P. R. R. Co.*, 44 W. Va. 538, 30 S. E. 143, 67 Am. St. Rep. 781, *Hurley & Son v. N. & W. Ry. Co.*, 68 W. Va. 471, 69 S. E. 904, and *Hutchinson v. U. S. Express Co.*, 63 W. Va. 128, 59 S. E. 949, 14 L. R. A. (N. S.) 393. These cases are not pertinent to the case presented here. Neither of them involved the proper construction of the Uniform Bill of Lading constituting the special contract between the shipper and the carrier here relied on. The shipment in question was an interstate shipment, and the federal not the state law applies. *United Metals Selling Co. v. Pryor*, 243 Fed. 91, 155 C. C. A. 621; *Dodge & Dent Mfg. Co. v. Penn. R. R. Co.*, 175 App. Div. 823, 162 N. Y. Supp. 549.

Moreover, if the liability of the defendant as carrier had ceased and that of warehouseman had begun when the goods were destroyed, it is an open question whether a proper construction of Section 1 of the bill of lading does not cast the burden of proving freedom from negligence on the carrier in possession of the goods. One of the provisions of that section is:

"When in accordance with general custom, on account of the nature of the property, or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence, and the burden to prove freedom from such negligence shall be on the carrier or party in possession."

The history of the adoption of this Uniform Bill of Lading will be found in 14 *Interst. Com. Comn. R.* (1908) p. 346.

For these reasons we conclude that the court below erred in excluding plaintiff's

evidence and directing a verdict for defendant, and that the judgment ought to be reversed, the verdict set aside, and the plaintiff awarded a new trial, and such will be the judgment entered here.

(89 W. Va. 236)

VICKERS v. VICKERS. (No. 4257.)

(Supreme Court of Appeals of West Virginia.
Oct. 18, 1921.)

(Syllabus by the Court.)

1. Husband and wife \S 283(2) — Husband must support wife unless guilty of offense entitling him to divorce a mensa.

While the marital relation exists, a husband must maintain and support the wife, and he cannot abandon her and escape that obligation, unless she has been guilty of some marital offense which would entitle him to a divorce a mensa et thoro.

2. Husband and wife \S 300—Trial court will not be reversed on conflicting evidence as to abandonment.

Where the husband abandons the wife, and she institutes suit for maintenance and support, and to justify his abandonment and non-support he charges adultery and cruel and inhuman treatment on the part of the wife, and the evidence is conflicting, contradictory, and unsatisfactory, and the lower court on such evidence has found that the charges have not been sustained, the appellate court will refuse to reverse, although it might have rendered a different decree if it had acted thereon in the first instance.

3. Husband and wife \S 300—Amount decreed for support not disturbed unless clearly erroneous, especially where lower court retains jurisdiction to change.

In such case the amount decreed for support and maintenance of the wife will not be disturbed, unless clearly erroneous, and especially so where the lower court retains jurisdiction to change the amount to meet changing conditions.

4. Husband and wife \S 298(1)—Wife held entitled in maintenance suit to reasonable counsel fees for former divorce suit.

In such suit, reasonable counsel fees expended by the wife in defense of a suit for divorce instituted against her since the abandonment, charging her with a grave marital offense, will be allowed, where it appears that in the divorce suit the right of the wife to recover the same in any other suit or proceeding has been expressly reserved and saved to her. The amount of such counsel fees is within the sound discretion of the lower court, and will not be disturbed unless the discretion has been abused.

5. Husband and wife \S 288—Wife may recover amount necessarily expended for her support after husband's abandonment although she has separate estate.

Where the husband abandons the wife, without sufficient cause, she may recover from

him, according to his ability, the amount necessarily and economically expended by her for support, according to her station in life, from the time of the abandonment, although she may have a separate estate of her own.

Appeal from Circuit Court, Cabell County.

Suit by Victoria T. Vickers against R. E. Vickers, for maintenance. From a decree allowing a monthly maintenance, and a further order allowing counsel fees in a divorce suit formerly pending, the defendant appeals. Affirmed, with modification, and remanded.

Harry S. Irons, George I. Neal, and F. M. Livezey, all of Huntington, for appellant.

J. W. Perry, Geo. J. McComas, Thomas R. Shepherd, and Williams, Scott & Lovett, all of Huntington, for appellee.

LIVELY, J. From a decree of October 15, 1920, allowing plaintiff \$250 per month for maintenance from the date of the institution of the suit, and until the further order of the court, together with an allowance of \$500 for counsel fees in a divorce suit formerly pending, defendant prosecutes this appeal.

The suit is for maintenance of the plaintiff, the wife, and the bill charges that the defendant, her husband, deserted her without just cause on January 1, 1918, and has thereafter failed and refused to live with her. Plaintiff avers that it requires the sum of \$500 each month to suitably maintain her; that she has expended for that purpose out of her estate, since the abandonment, approximately \$4,000, and the further sum of \$2,000 as counsel fees and expenses in defending a former divorce proceeding instituted against her by defendant; and she prays for suitable allowance for her maintenance and recovery of the sums expended.

Defendant admits that since the marriage they lived together as man and wife until 1911, but avers that from that time until he left her on January 1, 1918, they had no relations as such except to reside together in the same house on Fifth Avenue in the city of Huntington. Defendant also avers that when he left her and made his abode in the hospital, which he then owned in that city, he had cause and justification therefor; that she had been guilty of adultery about the year 1905, the legal evidence of which he had not obtained until about the time he left; and that her conduct toward him for many years constituted cruelty and inhuman treatment, and had impaired his health and destroyed his peace of mind, the acts and omissions which he asserts constitute cruel and inhuman treatment being set out in detail.

The marriage was solemnized in the year 1890, and three children were born, one of whom died in infancy, and the other two, a boy and a girl, aged about 20 and 17 years,

respectively, are witnesses, giving testimony of the unfortunate estrangement of the parents. Defendant at the time of marriage was beginning a successful career as a physician and surgeon, and by dint of energy, industry, and ability soon attained an enviable professional standing, and rapidly accumulated a fortune. His wife, a member of an old, aristocratic, wealthy, and influential family, was frugal and industrious, and it is evident that she thus largely contributed to his professional and material success. A few years after the marriage defendant erected a fine residence on Fifth avenue, in the residential section, furnishing it sumptuously, and they resided there until the time of the separation. It is now occupied by plaintiff. After moving into this home, differences began concerning their domestic life, followed by violent quarrels and bickerings. The conduct of the household affairs was a source of disagreement. What one desired or suggested, the other opposed. One instance will suffice to illustrate the regrettable trend in their domestic life. The husband built a porch to the house, opposed by the wife because it covered some pretty stone work. She refused to be reconciled, and would not sit on the porch for about two years. Their temperaments were incompatible, their wills in conflict, growing from bad to worse, until it appears that they became irreconcilable. Mutual jealousies arose. In 1905, defendant testifies, he discovered a compromising relationship existing between his wife and a Dr. Price, who was associated with him in his practice, and who had access to his home, his professional office at that time being located in the dwelling house; that afterwards she admitted that Dr. Price had hugged and kissed her, but denied that any further impropriety existed between them. Dr. Price was promptly discharged, and afterwards died about 1909. The wife became jealous of her husband, and suspected that improper relations existed between him and some of his female patients, and more especially one of the girl employees at the hospital, and she testifies that she heard and saw her husband kissing this particular employee. This the husband denied. In this air of mutual suspicion, "Trifles light as air are to the jealous confirmations strong as proofs of holy writ." In this atmosphere of distrust, love disappeared, and mutual condemnations and reprimands filled its place. Somber jealousy sat at the hearthstone and would not be driven forth. It was ever present, like the death heads at the feast, an impassive acolyte at the sacred family altar. The wife testified that from the beginning their married life had been filled with sorrow, and Dr. Vickers testified that his home had been a hell.

[1] Shall we enumerate the various mutual charges preferred, and detail the evidence ad-

duced in support of each? It would serve no useful purpose. It is reasonably well established that while the marital relation exists it is the duty of the husband to maintain the wife, and he cannot abandon her and escape his duties unless he can show that the wife has been guilty of some marital offense which would entitle him to a divorce from bed and board. *Alkire v. Alkire*, 33 W. Va. 517, 11 S. E. 11; *Martin v. Martin*, 33 W. Va. 695, 11 S. E. 12. Neither spouse is justified in abandoning the other unless the conduct of the one abandoned has been such that, when judicially determined, it constitutes good cause for such a divorce.

The grounds relied upon by defendant to defeat plaintiff's claim for support are: (1) Adultery; (2) cruel and inhuman treatment. We think the charge of adultery is not well established. It is alleged to have been committed in 1905 by plaintiff with Dr. Price, and the evidence of two servants, both negroes, is relied upon. Coupled with this evidence is the testimony of other persons that plaintiff and Dr. Price were friendly, often seen together in the home and elsewhere, and seemed to be fond of each other's society; then the alleged confessions of plaintiff that Dr. Price had hugged and kissed her. The plaintiff indignantly denies any improper relations with Price, and denies the alleged confessions. The incident of the soiled towels thrown down the back stairway, testified to by the woman servant, is unsatisfactory. She does not connect defendant therewith, except inferentially. Her testimony is vague and uncertain. The character and life of this witness is such as to lend little credence, little probative value, to her testimony. The testimony of Jas. Bullock, the negro manservant, relating to the bathroom incident, is contradicted so successfully both by witnesses and physical facts as to leave little weight.

Taking the evidence of these witnesses as true, there is no positive act of adultery proven. To establish adultery, positive and direct evidence is not required, but, if it is sought to be established by circumstantial evidence, such evidence must be so strong and clear as to carry conviction of the truth of the charge. *Huff v. Huff*, 73 W. Va. 331, 80 S. E. 846, 51 L. R. A. (N. S.) 282; *Martin v. Martin*, supra; *Anderson v. Anderson*, 78 W. Va. 118, 88 S. E. 653, 2 A. L. R. 1617; *Nicely v. Nicely*, 81 W. Va. 269, 94 S. E. 749. Moreover, it must be remembered that these alleged acts occurred in 1905, and never came to light until after the separation. It was the other alleged cause, the cruel and inhuman treatment, which induced the abandonment. There might have been thoughtless or impulsive indiscretions committed by each. How many of us are free from them? But, as was aptly said in *Martin v. Martin*, by Judge English:

"In assuming the marriage relation, it is understood that the contracting parties do so fully aware of the frailties and imperfections of human nature, and conscious of the fact that mutual forbearance must be practiced to enable them to pursue pleasantly the journey of life as companions; each party undertaking to overlook the moral wrongs and infirmities of the other. The best interests of society, decency, and morality combine in demanding that the obligations taken upon themselves by the parties who enter into the marriage contract should not be abandoned and disregarded upon the mere whim or caprice of either party, or upon slight cause, real or imaginary."

[2] What are the grounds alleged as constituting cruel and inhuman treatment? Alleged persistence of the wife in doing menial work, and her refusal to employ servants for that purpose; preparation and serving of unwholesome food in the home; unsanitary housekeeping; eavesdropping while defendant consulted his female patients in the hospital and elsewhere, and while directing the hospital business affairs; interfering with the workmen and the nurses and servants at the hospital; abuse of defendant for taking skilled nurses with him when called away to perform surgical operations of a serious nature; illiberal and unmotherly treatment of the children; and generally a systematic and persistent effort, in many ways too numerous to detail, calculated and designed to humiliate defendant in his social and professional life; the result of which, defendant avers, was to destroy his nerves, his peace of mind, and to undermine his health. Much evidence was taken in the attempt to substantiate these charges; on the other hand, much evidence is in the record to rebut these charges. Can we say that any of them have been satisfactorily established? If they have been successfully proven, do they constitute cruel and inhuman treatment as meant by the statute? Want of congeniality, incompatible temperament, jealousy, nagging, quarreling, angry words, and the like are not sufficient alone. The marital conduct and offenses must be such as to impair health.

Just before the abandonment defendant applied for and obtained a life insurance policy for \$50,000, after undergoing a medical examination for that purpose. He was sixty years of age at that time, and had practiced his arduous profession with constant energy and consummate ability. Had his health been impaired from any cause, a strict examination at that age for so large a life policy would likely have discovered impairment of health. Can we say that impairment of defendant's health has been satisfactorily established?

But on conflicting evidence, such as is shown by this record, this court gives peculiar weight to the judgment of the lower court. Even where the appellate court might have found otherwise in the first instance, it

will not disturb the findings of the lower court where the evidence is such that different minds might reasonably disagree. *Gates v. Gates*, 87 W. Va. 603, 105 S. E. 815; *McCraw v. Bower*, 62 W. Va. 417, 59 S. E. 175; *Richardson v. Ralphsnyder*, 40 W. Va. 15, 20 S. E. 854; *Sibley v. Stacey*, 53 W. Va. 293, 44 S. E. 420; *Bartlett v. Cleavenger*, 35 W. Va. 720, 14 S. E. 273; *Smith v. Yoke*, 27 W. Va. 639. Our conclusion, then, is to sustain the finding of the lower court that plaintiff is entitled to maintenance and support; and, having arrived at that conclusion, we are not disposed to disturb the monthly allowance fixed by the decree for that purpose.

[3] It appears that the sum of \$250 is allowed from the date of the institution of the suit, May 1, 1919, subject to credits of monthly installments paid by defendant pending the suit, such sum to be paid monthly, "until the further order of this court." The circuit court has seen fit to retain jurisdiction in this regard, and, should occasion and circumstances require, the amount can be enlarged or diminished to meet the changed conditions. It appears that plaintiff occupies the furnished dwelling house on Fifth avenue, and no doubt the judge took this fact into consideration when the decree was pronounced. At this time the maintenance and education of the two children devolve upon defendant, and he is abundantly fulfilling that expensive duty.

[4] It is insisted that it was error for the decree to allow attorneys' fees expended by plaintiff in defending a suit for divorce instituted against her by defendant, after he had left her, charging her with serious marital offenses, and which was afterwards dismissed on motion of defendant (plaintiff in that suit). It is asserted that such fees have no place in this suit, and should have been asserted in the proceeding in which they arose, and not having been decreed therein the claim is barred under the doctrine of res judicata, and she is now estopped from asserting a claim which she should have litigated in the former suit. But when we examine the decree dismissing that action, we find the following:

"That the dismissal of this case shall be without prejudice to defendant to institute any other suit or proceeding for the purpose of compelling plaintiff to furnish her support and maintenance, or to collect any costs or fees expended or contended for by her in this cause."

There is no doubt but that attorneys' fees could have been properly allowed her in that proceeding, and, having been expressly reserved, we can see no inequity in allowing recovery in this proceeding. Why should she be compelled to resort to an action at law? Why not adjudicate this money claim arising out of the marriage relation in a suit for maintenance? They are matters which

are closely related; besides, there is authority for the proposition that such fees fall within the category of necessities for which the wife may recover in proceedings for maintenance. 13 R. O. L. § 243; Porter v. Briggs, 38 Iowa, 166, 18 Am. Rep. 27; Conant v. Burnham, 133 Mass. 508, 43 Am. Rep. 532; Hamilton v. Salisbury, 133 Mo. App. 718, 114 S. W. 563. Under the facts of this case we are of the opinion that the court properly allowed the fees complained of as error, and that the amount thereof was in the discretion of the judge. We see no abuse of his discretion.

[8] The only question remaining is plaintiff's cross-assignment of error for failure of the court to decree to her the sum of \$2,444.15 expended by her out of her separate estate for support during the time intervening between the date of abandonment, January 1, 1918, to the date of the institution of her suit May 1, 1919, 16 months. The amount expended by her for this purpose is itemized, and she states that she lived as economically as possible, and purchased very little clothing, using almost exclusively the clothing she had purchased prior to the abandonment, and had no servants. We find no attempt to controvert her statement in this regard. Can she recover for these expenditures in this suit? It is the duty of a husband to support his wife, irrespective of her separate estate. It is an incident of the marriage relation, based on the marriage contract. Judge Ritz said in Norman v. Norman, 88 W. Va. —, 107 S. E. 407:

"The marriage contract imposed upon the husband the obligation to support and maintain his wife and the offspring of the marriage, and he cannot relieve himself of the obligations . . . by conduct which compels his wife to leave his home for her personal safety. The fact that the wife has a small amount of property in no way affects her right to compel her husband to support and maintain her and their infant child given to her custody. She is not compelled to make good his obligation out of her estate, but is entitled to receive from him sufficient sums to support and maintain her and the child intrusted to her custody in the station in life to which they belong, considering, of course, the capacity of the husband to earn money, and the income which he has from any property he may own"—citing Kittle v. Kittle, 86 W. Va. 46, 102 S. E. 790.

If a man deserts his wife, she may maintain an action against him to recover according to his ability the amount she has expended from her separate estate for her necessary support. 13 R. O. L. p. 1188, § 220, citing De Brauwere v. De Brauwere, 203 N. Y. 460, 96 N. E. 722, 38 L. R. A. (N. S.) 508. It will be observed that the amount expended by the wife for her necessities per month during this period of 16 months is less than the monthly allowance of \$250 fixed by the

court in its decree, and which begins with the institution of the suit on May 1, 1919, and less than the monthly sum voluntarily deposited by defendant for the same purpose. We do not find that any provision was made for her support during the time of separation and up to May 1, 1919. We note the answer states that plaintiff had ample means in her possession belonging to defendant at the time he left her to support her during that period, but we find no evidence to support that statement, and none has been pointed out in the briefs. We are unable to perceive on what theory this claim was disallowed. It is specifically claimed in the bill, fully proven, and is one of the issues. If the support can be decreed from the beginning of the suit, there is no good reason why it should not be also allowed from the date of the abandonment.

We modify the decree to the extent that plaintiff shall be allowed and decreed the sum of \$2,444.15, the amount expended by her out of her separate property for her support and maintenance from January 1, 1918, to May 1, 1919, affirm the decree in all other respects, and remand the cause.

Affirmed, with modification, and remanded.

(89 W. Va. 263)

WILLIAMSON v. HINES, AGENT.

(No. 4230.)

(Supreme Court of Appeals of West Virginia.
Oct. 18, 1921.)

(Syllabus by the Court.)

1. Continuance \S 30—Amendment of declaration by substituting official designation of plaintiff held not to warrant postponing trial.

Amendment of a declaration by the substitution of Walker D. Hines, Agent, as defendant, in lieu of Walker D. Hines, Director General of Railroads, does not warrant postponement of a trial of the action then begun or about to begin, unless defendant shows good cause for the delay.

2. Damages \S 213—Instruction limiting recovery to injury inflicted in railroad collision independent of injury suffered in other like collisions approved.

An instruction given in an action for damages for an injury sustained in a railroad collision, which limited the recovery to the injury so inflicted, independent of injuries suffered by plaintiff in other like or similar collisions specified, is not erroneous if he had become more responsive to injury because of such former collisions, which rendered him more susceptible to injury, of which susceptibility defendant was not aware at the time of the accident.

3. Damages \S 213—Instruction directing verdict for defendant if passenger's other injuries were unknown to carrier, held erroneous.

An instruction which directs a verdict for defendant, provided the jury should believe

plaintiff was, when he became a passenger, "in a highly nervous condition" because of former wrecks, and was not, therefore, a "fair average individual," and his condition was unknown to the carrier, and that the injury occurred without wanton negligence and but for such condition it would have been slight, if any, had he "been well" when the collision occurred, is erroneous, because it makes the knowledge of the carrier a condition precedent to the right to compensation for the injury inflicted.

Error to Circuit Court, Cabell County.

Action by Carl E. Williamson against Walker D. Hines, Agent, etc., for personal injuries. Judgment for plaintiff, and the defendant brings error. **Affirmed.**

Fitzpatrick, Campbell, Brown & Davis, of Huntington, for plaintiff in error.

A. A. Lilly, of Charleston, and J. S. Lilly, of Huntington, for defendant in error.

LYNCH, J.. The errors assigned by defendant below and plaintiff in error for the reversal of a \$5,000 judgment for plaintiff in an action for damages due to an injury inflicted upon him, as the declaration charges, in a collision of the train on which he was a passenger and an engine negligently permitted to stand on the track over which the train had the right to unobstructed passage on its eastward trip from Huntington to Charleston, and elsewhere over defendant's line of railroad, will appear as the discussion proceeds. The collision occurred December 18, 1918, and that it did occur in the manner indicated is not controverted. The only vital question to be determined upon this review has arisen on the motion to set aside the verdict of the jury and grant a new trial, which motions the trial court overruled, and entered judgment for the sum returned by the jury. All other assignments center upon the rulings upon the motions mentioned.

The only excuse offered for obstructing the track is that, as the east-bound train was nearly an hour late in leaving the station at Huntington, the agent of the company who drove the engine on the track concluded, without inquiry, that the train had run on its regular scheduled time. That supposition is not an extenuation of the negligence that was responsible for the collision, and defendant does not contend that it is. The declaration, the sufficiency of which the defendant challenged by demurrer, sets forth with certainty and particularity every fact and circumstance necessary to constitute good pleading, and we see no reason for any appropriate action thereon other than that taken by the court in overruling the demurrer, and defendant assigns no such reason.

[1] The substitution of the name Walker D. Hines, Agent, for Walker D. Hines, Director General of Railroads, as the defendant named in the summons and declaration,

worked no prejudice against him, and he does not show in what respect, if any, the substitution prejudiced his right of defense during the progress of the trial; the change in name having been made after the jury had been impaneled and had heard part of the evidence. Defendant did object to the motion to amend the pleading by the substitution of a different description of the person sued, and excepted to the action of the court upon the motion, but did not request a postponement, or show or attempt to show cause for postponing the trial, or, in so far as appears from the record, assign as erroneous the permission to amend and the amendment of the declaration, until after the allowance of the writ bringing the case here for review. There is no error in the procedure. *Harness v. B. & O. Railroad Co.*, 86 W. Va. 284, 297, 103 S. E. 866.

[2, 3] A discussion of the court's refusal to direct a verdict for defendant seems unnecessary, as clearly plaintiff was injured by the collision and was entitled to some compensation for the loss sustained by him, whether the injury so inflicted was temporary or permanent. He did receive some injury chargeable to defendant's negligence, a fact as to which there is no dispute. If he is to be credited, he spent \$1,000 to effect a cure for the impairment of his physical health due to the accident.

Our examination of the instructions requested by plaintiff, and given by the court, discloses no valid cause for unfavorable comment. Plaintiff's instructions A and B are not criticized by defendant, and we find them unobjectionable. His instruction C directed the jury's attention to like injuries inflicted upon plaintiff in a railroad accident in 1913, and an automobile accident in 1916, and told the jury that, if by reason thereof he was more susceptible to injury, nervousness, and pain at the date of the Chesapeake & Ohio wreck on December 18, 1918, and that on that date the defendant negligently injured the said Williamson, and he was damaged thereby, the jury should find for the plaintiff an amount sufficient to compensate him to the full extent of the injury inflicted by defendant, etc. The objection to this language goes to the failure of the plaintiff to inform defendant of his former injuries, presumably for the purpose of exacting from defendant's agents in charge of the train a higher degree of care as to plaintiff than that devolving upon them in case plaintiff had not theretofore received such or like injury affecting his health or strength. That such was the theory of defendant seems plausible when measured by his instruction No. 7, which the court refused to give, and of which refusal he complains. The language of instruction C fully guards against the danger of misinterpretation by the jury, and in effect advises the jury to assess the defendant with

such an amount of damages as will compensate plaintiff for the injuries inflicted by defendant, and not for injuries suffered by him in any other manner. Defendant's instruction No. 7, if given, may have induced the jury to believe that if a passenger having an infirmity, not apparent when a railroad company receives him as such, is injured in an accident, attributable to the company's negligence, he cannot recover unless the company is aware of his condition when it receives him as a passenger; that is, the instruction propounded makes susceptibility to injury the test. That is not a reasonable test. Suppose, as was the case in *Mann Boudoir Car Co. v. Dupre*, 54 Fed. 646, 4 C. C. A. 540, 21 L. R. A. 289, a married woman who, when received for railroad transportation, was in the early stage of pregnancy, of which condition the carrier had no knowledge, is subjected to unreasonable treatment by the agents of the carrier, for which and for other reasons she deemed it advisable or was required by them to leave and did leave the coach, in consequence of which she suffered a miscarriage and other harmful results, for which she sued and recovered a judgment, one of the lines of defense being the lack of the company's knowledge of plaintiff's condition at the time she became a passenger. In the opinion the court said:

"This theory, and the requested charge embodying it would require every pregnant woman to refrain from travel, to take all the risks of the negligence of public carriers, or to proclaim her condition to the servants of the carrier."

In *East Tenn., Va. & Ga. Railroad Co. v. Lockhart*, 79 Ala. 315, Louisa Lockhart, a child, being plaintiff, was a passenger on the railroad, and at the time was sick, and was required by defendant's agents to leave the train, which she did and walked to the station beyond which they had carried her, whereby her illness was seriously aggravated, and the court said, in substance, that ignorance of her condition was not an excuse, "and the defendant is as responsible, as if he had full knowledge of the fact." Also in *City of Roswell v. Thomas M. Davenport*, 14 N. M. 91, 89 Pac. 256, Davenport having obtained a judgment against the city for injury occasioned by a defective sidewalk, whereby the diseased condition of the plaintiff, of which defendant was not aware at the time of his injury, was aggravated, the lack of such knowledge did not affect the question of negligence. There is therefore no error in the action of the trial court upon the two instructions. It would be an extraordinary requirement if a passenger afflicted with some disguised disease or infirmity should be compelled to publish to the company's agent his physical condition in order to hold the company liable for the negligence of such agents.

Defendant claims to be aggrieved by an oral instruction not asked by either party to the action, but objected to by defendant. What the character, purport, and effect of the language used was nowhere appears in the record. It may have been harmless; it may not have influenced or tended to influence the jury. If defendant considered it sufficiently important to require the opinion of this court upon the propriety or harmful effect of the instruction, defendant should have made it a part of the record by a bill of exception.

[4] A further complaint goes to the refusal of defendant's instruction No. 5, which required a verdict for defendant if the jury believed the evidence sufficient to show: (1) That the ailments from which the plaintiff is suffering, in accordance with his allegations, were not caused by the injuries, or any of them, received in the collision of December 18, 1918; (2) that no substantial injury was received in such accident; (3) that there was no loss of time by the plaintiff; and (4) that his business was not interfered with.

A sufficient reason for refusing this instruction is the absence of proof of the facts upon which it is predicated. From the date of the accident, December 18, 1918, until March 6, 1919, plaintiff did no work and received no compensation except that voluntarily contributed by Barrett Bros., doing business in Pittsburgh, whose agent he was, and when he resumed the transaction of their business in the territory assigned to him he was unable to perform the service required to the same extent and with the same degree of efficiency as he had done before the accident; and from its date and for some months afterward his physical condition was such as to prevent him from engaging in any profitable occupation, and to require frequent medical treatment, either in a hospital in Pittsburgh or Huntington, or at the office of his medical adviser. This condition persisted even at the time of the trial, as did also the tenderness of the injured parts of his body, produced by the collision, and which then caused him pain and other serious inconvenience, more or less persistent. That such was the result of the accident the evidence does in some measure tend to show, and part of it relating to his ability to resume and the deferred resumption of the avocation pursued by him before the accident is without contradiction, and hence its inclusion would have been erroneous.

The character and seriousness of the accident and its effect upon plaintiff are matters submitted to and passed upon by the jury, and, unless the jurors failed to give due weight to the testimony touching that feature of the case, their verdict must stand.

[5] As heretofore said, the collision resulted from the gross indifference for the safety of defendant's passengers, and as a result

thereof plaintiff was thrown forward against a table in the club coach, located near the partition dividing the car into its two compartments, and at which he was sitting for the purpose of ordering and eating breakfast, thereby causing him pain in the right lower quadrant of his abdomen, and the severance or dilaceration of the nerves contained under the part so affected, some of them extending to the scrotum. From the ailments so produced or aggravated, if produced by the accidents heretofore referred to, plaintiff still suffered at the time of the trial, after the lapse of 16½ months, during which period he was examined by experienced surgeons and treated by competent physicians, most of whom were unable to discover a likelihood of persistency or permanency in the injury, but one or two of whom did, and they are corroborated by his wife and himself as well as others. And, although we might be inclined to agree with defendant and a majority of those who testified in defendant's behalf in believing the verdict and judgment to be excessive, that belief cannot ordinarily authorize appellate interference by granting a new trial. *Hicks v. Romaine*, 116 Va. 401, 82 S. E. 71; *Hill v. Norton*, 74 W. Va. 428, 82 S. E. 363, Ann. Cas. 1917D, 489.

From December 18, 1918, the date of the accident, until March 6, 1919, he did no work and received no compensation except wages paid by his employer, and then was inefficient to some extent by reason of the injury, and for that reason unable to cover the territory assigned to him by the company in whose business he was employed. In the meantime he was under the observation and care of one or more physicians, and part of the time in a hospital in Pittsburgh and another in Huntington. It was therefore the duty of the jury to determine whether the injury was permanent or temporary, and, as they have done so, it is incumbent on us to affirm the judgment.

(89 W. Va. 232)

STATE ex rel. HATFIELD v. FARRAR, Mayor. (No. 4448.)

(Supreme Court of Appeals of West Virginia. Oct. 18, 1921.)

(Syllabus by the Court.)

1. Municipal corporations ~~§~~182—Mayor may not suspend chief of police, such power being vested in city commission.

By section 42, c. 20, Acts 1919, Municipal Charters, jurisdiction and power to suspend the chief of police of the city of Williamson is vested in the city commission; and the mayor of that city has no authority to suspend or remove him.

2. Municipal corporations ~~§~~90—Majority of qualified members of tribunal is necessary to quorum, and not a majority of all elected.

Under a statutory provision saying in general terms a majority of the members of a public tribunal, composed of a prescribed number of officers, shall be necessary to form a quorum, a majority of its members in office at a given time suffices, and, if there are vacancies, a majority of the whole number elected to membership is not required.

3. Municipal corporations ~~§~~90—Removal of member of tribunal does not ipso facto create vacancy, and he must be included in determining necessary number for quorum.

Upon the assumption that a member of a city commission composed of elected members renders himself ineligible longer to hold his position by removal from the city and state after induction into office, such removal does not ipso facto create a vacancy, and a majority of those in office at the time including such member is required to constitute a quorum.

4. Municipal corporations ~~§~~90—There is no vacancy for disqualification until vacancy shall have been declared by quorum.

In such case there is no vacancy until the fact of disqualification shall have been ascertained and determined and the vacancy declared by a quorum so constituted.

5. Municipal corporations ~~§~~90—Resolution by majority of commission after excluding one disqualified and reciting vacancy held void.

An order or resolution adopted by a majority of the members of such commission after excluding such member from the count, and reciting vacancy in his office by reason of such removal, is void on its face.

Original proceeding by the State, on the relation of E. C. Hatfield, against W. A. Farrar, Mayor, for peremptory writ of mandamus to restore relator to the office of Chief of Police of the City of Williamson. Writ awarded.

Joe P. Hatfield, of Williamson, Jno. T. Simms, of Charleston, and John B. Morrison, for relator.

Douglas W. Brown, of Huntington, for respondent.

POFFENBARGER, J. The relator seeks a peremptory writ of mandamus to restore him to the office of chief of police of the city of Williamson, from which an order issued by the mayor of that city purports and attempts to suspend him.

[1] By the charter of the city (chapter 14, Acts of 1915, Municipal Charters, as amended by chapter 20, Acts of 1919, Municipal Charters), the jurisdiction to suspend that officer is vested in the commission of six members, which governs the city. See section 42 of Acts of 1919. No provision of the present charter empowers the mayor to do so.

As the law of the city formerly was, it seems the mayor was empowered by a valid

ordinance to remove the chief of police from office, and the amendatory act of 1915, Municipal Charters, continued in effect all ordinances then in force and not inconsistent with the provisions of that act, until amended or repealed. That statute put the power of suspension of the chief of police in the city manager. This of necessity impliedly repealed the ordinance. The act of 1919, amending the act of 1915, puts that power in the commission. Hence lack of authority in the mayor to suspend the relator is clear.

Any implication of such authority in him, arising out of the general powers conferred upon him, is excluded by this express provision. A mere unnecessary implication cannot stand against express terms inconsistent therewith. Moreover, it is very unusual to place a power of appointment or a motion in the hands of two distinct officers or tribunals. In such case there would be an inevitable conflict of authority, often leading to trouble between the repositories of such power and public embarrassment.

[2, 3] The return, however, sets up removal of the relator by the commissioners, between the issuance of the alternative writ and the return thereof, by a resolution or order passed or adopted by three of them, claiming to have acted in a meeting at which, under the circumstances, they constituted a quorum. The commission, theoretically, is by-partisan. In the return it is asserted that ordinarily no meeting could be held in the absence of any of the members representing one of the political parties, because neither of the other two would attend. Now it is claimed one of those three has resigned, abandoned, or forfeited his office by removal from the city and the state. The three members of the other party, deeming themselves then to be a sufficient number to constitute a quorum, held a meeting, declared vacant the office of the migrating member, and passed the resolution above mentioned, and here interposed as a defense.

If the resolution was passed in a duly constituted meeting of the commissioners, it would no doubt bar the relief sought because the award of the writ would be fruitless and unavailing. *Hall v. Staunton*, 55 W. Va. 684, 47 S. E. 265. As the resolution, if valid, would make the writ useless and futile, the objection to the filing thereof, on the ground of its adoption after award of the alternative writ, is untenable. But, if the meeting in which it was adopted was not duly constituted and could not validly do what it undertook to do, the objection can be sustained on the ground of invalidity of the resolution. The vital question then is whether the three members constituted a quorum.

As the charter provision respecting a quorum is general, simply saying a majority of the commissioners shall be necessary to form a quorum (Acts 1915, § 15), the presence

of three sufficed, if the commission was then composed of only five members. *State v. Huggins*, Harp. (S. C.) 139; *Coles v. Williamsburgh*, 10 Wend. (N. Y.) 659; *State v. Wilkesville Tp.*, 20 Ohio St. 288; 29 Cyc. 1688. Otherwise it did not. If removal of Commissioner Sammons from the city and the state ipso facto put an end to his membership of the tribunal, it consisted of only five members at the date of the meeting, but, if it did not so terminate his membership, and action of the commission was necessary to its termination upon that ground, the commission then consisted of six members, and attendance of four was required for a quorum.

[4, 5] In the absence of positive legal provisions indicative of intention to adopt a different rule on the subject, a vacancy in office occurs by: (1) Expiration of the term; or (2) death of the incumbent; or (3) his resignation; or (4) his removal from office. *McQuillin*, Mun. Cor. § 478. This author adds two more, abolition of the office and disqualification of the incumbent to hold it. The first of these two is an impossibility. There can be no vacancy in a nonexistent office. The other is disqualification by express legislation. *People v. Highland Park*, 88 Mich. 653, 50 N. W. 660; *People v. Morrell*, 21 Wend. (N. Y.) 575. Likely Judge Christian thought a vacancy occasioned by death of the incumbent was too apparent for mention when he said in the *Bland and Giles County Judge Case*, 33 Grat. (Va.) 443, that—

“An office is determined *proprio vigore* by resignation, expiration of term, and removal by competent authority. But in other cases the office is not determined ipso facto by the occurrence of the cause. There must be a judgment of a motion after a judicial ascertainment of the fact.”

This language is partially quoted with approval in *Johnson v. Mann et al.*, 77 Va. 265, 270.

In parliamentary law, which governs in cases of the class to which this one belongs, an office is vacated by refusal of the elected member to accept it, communicated to the proper authorities; refusal to qualify; resignation; and death. In all other instances, such as expulsion, adjudication of a controverted election, disqualification by act of the party, and acceptance of an incompatible office, ascertainment of the fact and declaration of the existence of the vacancy are necessary. *Cush. L. & Pr. Leg. Assemblies*, §§ 471 to 478, inclusive. Application of this rule to the case now under consideration harmonizes with our decisions in those cases in which persons elected to municipal offices are alleged to be ineligible. They are admitted, subject to inquiry and determination of the question of their eligibility. *Price v. Fitzpatrick*, 85 W. Va. 76, 100 S. E. 872; *Tru-*

nick v. Town of Northview, 80 W. Va. 9, 91 S. E. 1081. As to the fact of disqualification by removal from the subdivision in which an officer holds his position, he is entitled to be heard, if he desires a hearing. He must have notice, if it can be conveniently given, and be allowed his "day in court," and he cannot be deemed to be out unless nor until he shall have had these privileges.

Upon these principles and conclusions, the writ asked for was awarded.

(89 W. Va. 254)

WOOD & BROOKS CO. v. D. E. HEWITT LUMBER CO. (No. 4297.)

(Supreme Court of Appeals of West Virginia. Oct. 18, 1921.)

(Syllabus by the Court.)

1. Sales §23(3)—Written offer to purchase lumber does not become contract until accepted.

An offer in writing to purchase lumber to be manufactured and delivered by the offeree, not signed by him, does not become a contract until he accepts it.

2. Sales §23(3)—Acceptance need not be actual, but is inferable from conduct.

Acceptance to enlarge such an offer into a contract need not be actual; it may be inferred from the acts and conduct of the offeree in respect thereof.

3. Sales §23(3)—Shipment of lumber pursuant to offer held acceptance.

A partial and reasonably prompt shipment by the offeree of more than half of the quantity and quality of lumber purchased for delivery, and delivered to and accepted by the offeror, pursuant to the terms and conditions of the offer, amounts to an acceptance by the offeree.

4. Frauds, statute of §129(2)—Performance of part of offer of sale held not sufficient to obviate inhibition of statute.

Performance in part of an offer to purchase lumber to be manufactured and delivered by the offeree as required by the offer, when not signed by the offeree, is not sufficient to obviate the inhibition of the statute of frauds (clause 7, § 1, c. 98, Code 1913 [sec. 4171, cl. 7]).

5. Frauds, statute of §45(2)—Contract in writing not signed as required not inhibited unless it appears therefrom that it does not admit of performance within year.

Clause 7, § 1, c. 98, Code 1913 (sec. 4171, cl. 7), does not inhibit an action based on a breach of a contract in writing, not signed by defendant, as therein specified, unless it should appear from the terms and conditions thereof that the contract does not admit of performance within a year from its date.

6. Frauds, statute of §44(4)—Written offer to purchase lumber held not within statute.

Where a written offer bearing date in October, to purchase lumber of a prescribed quan-

tity and quality to be manufactured by the offeree in the ensuing winter months for delivery during the following summer, it is not within the inhibition of clause 7 of section 1 of the statute of frauds, chapter 98, Code 1913 (sec. 4171, cl. 7).

7. Sales §416(2)—Evidence of acquiescence in delay held competent in action for breach.

Where a contract for the purchase of lumber to be manufactured and delivered by defendant within the time and upon the terms and conditions therein specified is breached by him a few years after the expiration of the time limit, each of the parties thereto acquiescing in the delay during such period, the statutory limitation not applying; and plaintiff, though diligent, was unable to purchase lumber of the kind and character prescribed in the contract within the year the breach occurred, for delivery that year, but could and did purchase it for delivery the next year, the evidence showing the facts to be as stated was competent and justifiable.

8. Frauds, statute of §48—Postponement of completion acquiesced in does not prevent plaintiff's suing for breach, where full performance within year was possible.

Postponement of the completion of a contract concurred and acquiesced in by the parties thereto does not affect the right of the plaintiff to sue for its breach, where full performance within a year from its date was possible, and the parties contemplated compliance within that time.

9. Continuance §30—Defendant's motion because of amendment of declaration was properly rejected where not showing how he might be prejudiced.

A motion for a continuance, predicated upon an amendment of a declaration to admit proof introduced by plaintiff during the early stages of the trial, properly is rejected where defendant, although objecting to the amendment, proceeds with the trial without showing in what respect, if at all, he is likely to be prejudiced by a continuation of the trial thus begun.

10. Contracts §29—Where evidence is conflicting as to existence of contract, question is for jury.

Where plaintiff affirms and defendant denies the existence of a contract binding upon both of them, and each introduces evidence upon that phase of the controversy, consisting of letters and acts and conduct of the parties pertaining thereto, thereby producing a conflict, the question of the existence of such contract is for the jury to determine, and an instruction submitting that question to them for determination is not erroneous when properly prepared.

Error to Circuit Court, Cabell County.

Action by Wood & Brooks Company against D. E. Hewitt Lumber Company. Verdict for plaintiff set aside, and plaintiff brings error. Reversed, verdict reinstated, and judgment entered on the verdict for plaintiff.

L. L. Willson and Geo. S. Wallace, both of Huntington, for plaintiff in error.

Fitzpatrick, Campbell, Brown & Davis, of Huntington, for defendant in error.

LYNOH, J. The trial court set aside a verdict for plaintiff in an action for damages for a breach of an alleged contract, in the form of an order, for the sale and delivery of lumber, the order being as follows:

Wood & Brooks Co., Ontario St., Buffalo, N. Y.

Oct. 18, 1915.

D. E. Hewitt Lumber Co., Huntington, W. Va.:

Please enter our order for the following:

Ship: N. Y., C. & St. L.

Via: Ship to Black Rock station, Buffalo, N. Y.

500,000 feet 5/4 basswood, white No. 1 common and better, all white one face 80% white the other, suitable for piano keys, subject to our inspection at point of shipment.

Price \$39.00 delivered Buffalo 2% cash 10 days from receipt of car. 1916 delivery.

If you cannot deliver as ordered, please advise us immediately.

Wood & Brooks Company,
Per N. R. Luther.

[1, 2] Defendant below and in error neither signed nor formally accepted the order, and for these and other reasons denies liability on the grounds that if the order be a contract it does not on its face require performance within a year from its date, wherefore it is void under section 1, clause 7, chapter 98, Code (sec. 4171). The order considered apart from the correspondence between the parties to the action, and their acts and conduct respecting the transaction, may be subject to the criticism urged against it. While it requires delivery in 1916, the requirement could have been fulfilled after October 18 of that year. But the correspondence throws light upon the intent of the parties as to the order.

It is an offer to purchase basswood timber, and if accepted directly or inferentially it becomes a binding contract to deliver the timber called for, whether signed or not signed by the offeree. If viewed in the light of the subsequent correspondence, the acts of the parties, and the usages and customs of business of that character there is disclosed an intention on the part of each of them to comply with its terms. If the contract could have been performed within a year from its date, it is not within the terms of the statute.

[5] Decisions construing the statute show a tendency to limit its application to contracts which cannot by a reasonable and fair interpretation admit of performance within a year (*Franklin Sugar Co. v. Taylor*, 37 Kan. 435, 15 Pac. 586; cases cited 25 R. O. L. 454), or in which it affirmatively appears that performance cannot be had within that time (*Walker v. Johnson*, 96 U. S. 424, 24

L. Ed. 834). Our authorities sustain and strengthen this view:

"An oral contract which may, in any possible event, be fully performed according to its terms within a year, is not within clause 7 of the state of frauds" (*McClanahan v. Otto-Marmet Coal & Mining Co.*, 74 W. Va. 543, 82 S. E. 752), and, "A verbal contract the terms of which do not expressly provide for performance beyond a year or by fair and reasonable construction contain anything inconsistent with complete performance within that time, is not within the statute of frauds" (*Reckley v. Zenn*, 74 W. Va. 43, 81 S. E. 565).

[8] As plaintiff's letter of October 18, 1915, that also being the date of the order, contains nothing which indicates that more than a year is to be required for completing the contract, and as A. M. Hewitt, the secretary and treasurer of the defendant company, admits that the quantity of lumber to be furnished was a small order, or, as he says, not more than 6 per cent. of the annual capacity of the defendant's plant, and that the quantity could have been cut and shipped before the summer of 1916, the contract could not be considered as one necessitating more than a year for its performance.

The fact that because of a series of delays, more or less willingly acquiesced in by plaintiff, the deliveries were as a matter of fact continued for more than a year is immaterial; it is the fact that the contract could have been performed within the necessary 12 months that carries the contract without the statute. *Ford Lbr. & Mfg. Co. v. Cobb*, 138 Ky. 174, 127 S. W. 763; *Van Woert v. Albany & S. R. Co.*, 67 N. Y. 538; *Reynick v. Allington & Curtis Mfg. Co.*, 179 Mich. 630, 146 N. W. 252. Nor does the statute apply to an obligation not in writing to pay money, though payment is not to be made within one year. *Rake's Adm'r v. Pope*, 7 Ala. 161; *Reed v. Gold*, 102 Va. 37, 45 S. E. 868; *Hodgens v. Shultz*, 92 Ill. App. 84; *Dant v. Head*, 90 Ky. 255, 13 S. W. 1073, 29 Am. St. Rep. 369.

It is urged by defendant that the parties by the order and correspondence manifested an intention to extend performance over a time exceeding the statutory period. Neither the offer nor defendant's letters warrant such construction, as the former, construed in connection with the acts of defendant, rather evince a purpose to consummate the sale within the 12 months. In fact Mr. Hewitt in his letter of September 7, 1916, admits that such was his intention, but this feature we regard as indecisive. "Intention or expectation of the parties is immaterial." *McClanahan v. Otto-Marmet Coal & Mining Co.*, cited. All the cases cited by defendant to sustain its contention seem to involve contracts which on their face have their performance postponed beyond a year. Such contracts are of course within the statute. 3 *Minor's Inst.* (2d Ed.) 196.

That the sufficiency of the memorandum may be gathered from letters and writings and not from parol evidence is well settled. *Rahm v. Klerner & Sons*, 99 Va. 10, 37 S. E. 292, but it is equally true that an offer in the form of a letter and an acceptance in like form may, if each refers to the same subject, be sufficient to constitute the writing called for by the statute. 2 Page, Contracts, § 1321; *Smith, Law of Frauds*, p. 586. In defendant's letter last referred to, written some three months after the first of several shipments of timber in June, 1916, pursuant to the order, appears the following clause: "When we took this order for 500,000 feet, we expected to cut that much this year." This letter, properly signed by defendant, is strongly suggestive of a completed memorandum.

[4] Defendant's statement that part performance does not take a contract out of the statute seems quite correct, the law on that point being very well presented in a monographic note appended to *Diamond v. Jacquith*, L. R. A. 1916D, 880, at 886, as follows:

"The rule that part performance will prevent the operation of the statute so far as performance has gone can, by the nature of things, have no application to actions for the breach of contract. In such actions recovery is based, not upon what has been done under the contract, but upon the loss accruing from what has not been done. Therefore, even in jurisdictions which have adopted that rule, there can be found no ground upon which to base a right of recovery for the breach of a contract not to be performed within a year."

Many cases are there cited in support of this rule. But the principle thus stated has no application here, because plaintiff has not found it necessary to rely, and has not relied upon part performance as taking the case out of the express provisions of the statute. Performance in part only re-enforces the conclusion predicated upon writings passed between the parties touching the matter out of which the litigation has arisen.

[3] The proposal was to buy basswood timber for 1916 delivery, and as such it was a valid offer to purchase, and the acts of defendant in cutting and shipping part of the timber, viewed in the light furnished by the written correspondence, constituted an effective acceptance or ratification of the offer. They thereby satisfied the requirements of the statute, and defendant is liable for any loss sustained by plaintiff by noncompliance with its terms.

One contention of defendant is (page 11, brief) that no contract was ever consummated, and that any subsequent shipments of timber were by virtue of later understandings. This argument is founded upon the theory that an offer to ripen into a contract must be accepted within the time specified, and if no time is specified, then within a reasonable time, with the further contention

that the offer was not accepted within a reasonable time, and that, its acceptance having been delayed indefinitely, there could be no assent to its terms and no agreement to perform its obligations. So far as defendant's exposition of the law is concerned it seems correct. *Hanly v. Watterson*, 39 W. Va. 214, 19 S. E. 536; 1 Page, Contracts, § 139, cases cited, note 5. In the application of these principles, however, defendant appears to stress too heavily the failure on his own part to immediately notify plaintiff of his assent to the offer. While there has been some practical difficulty in applying the doctrine, courts have generally, though not universally, held that an offer to buy becomes a binding agreement when the offeree performs an act from which acceptance may be implied. 35 Cyc. 52; *Colgin v. Hanly*, 6 Leigh (Va.) 85. It follows, therefore, that since plaintiff's offer prescribed no specific form of acceptance, it may be implied from conduct as well as from words. 1 Page, Contracts, § 188; *Clark, Contracts*, p. 24.

The record shows that defendant notified plaintiff by letter, dated April 3, 1916, that 12 cars of basswood were ready for shipment, and desired that the inspector, Mr. Pratt, be sent down from Buffalo to pass upon its quality. As plaintiff did not want the wood so early in the season, the inspector was not sent at once, for which reason the first car was not shipped until June 14, between which time and June 24 9 cars, containing 160,490 feet of timber, were delivered to the carrier and later accepted by plaintiff. Such unqualified act on the part of defendant was surely sufficient to indicate to plaintiff an intent to perform the contract according to its terms. The law is settled that the shipment of a part of an order of goods is an acceptance of the whole order. 1 Page, Contracts, § 156; *Monarch Portland Cement Co. v. Creedon*, 94 Neb. 185, 142 N. W. 906. It was shown in the proof that it is customary to cut the timber in the winter when there is no sap in the trees, and ship the lumber in the following summer. That such was the custom defendant knew, and plaintiff relied on it, as appears by the letter of April 7, 1916, in which it is stated:

"We shall not accept any basswood from any one until the month of June, which is none too late for it to have dried out properly for shipment."

Shipments prior to the spring or early summer of 1916 would seem, under such circumstances and usage, to have been unusual and unwarranted. It seems, therefore, that the shipments made, even without any notice to the buyer, are, to say the least, strongly indicative of an intention to effectuate a valid acceptance of the offer. 35 Cyc. 55, cases cited. As stated in Page, Contracts, § 156, decisions which reach different results are generally founded on differences in the

wording of the orders, trade usages, or other circumstances not present here.

There is an additional circumstance to be considered in this connection which strengthens plaintiff's position, and that is the statement in its letter of October 18, 1915, as follows:

"If you cannot deliver as ordered, please advise us immediately."

While it is a general rule of law that acceptance may not be inferred from mere silence, such silence under some circumstances may be taken as some evidence of assent. Particularly is this true in case the offer states that acceptance will be assumed in case there is no reply. While plaintiff's request for a reply in case delivery was impossible does not say that acceptance would be assumed, it is possible that defendant may have regarded it in that light. In view of this circumstance, the former dealings between the parties, the custom of the trade to deliver no basswood during the winter months, it was reasonable that plaintiff should have recognized that defendant's silence might possibly have meant an assent. On this subject see Williston, Contracts, § 91A.

At any rate, it is apparent that plaintiff, when accepting the timber shipped, regarded the offer as in force, and that, according to a recent English decision (1913), is evidence upon the question. *Morrell v. Studd & Millington*, 2 Ch. Div. 648.

Plaintiff's right to recover for the loss sustained because of defendant's failure to deliver lumber of the character described in the order, and at the time and place therein specified, is strengthened further and in effect conclusively by the admission of both plaintiff and defendant that they intended the order to be filled within a year from its date, and that it could have been filled within that time. Such being their intentions with respect to performance, defendant's ability to perform within a year, and its performance in part within that time, considered in connection with all the facts and circumstances developed by the proof, including the correspondence, put the contract beyond the operation of the statute.

Defendant professes to perceive serious error in the jury's assessment of damages carried into the verdict. As the position so taken involves various aspects of the facts presented, a further view of the record is necessary.

[7, 8] Plaintiff's original offer contemplated prompt delivery of the basswood lumber. As a matter of fact, only 160,490 feet were shipped in 1916, and by letter dated September 7, of that year, Mr. Hewitt advised plaintiff that, although he had expected to cut the full 500,000 feet "this year," labor troubles had so far retarded the progress of defendant's

work that it had been impossible to reach that boundary of timber wherein defendant's basswood was located. This explanation he followed by a reminder that basswood had advanced several dollars in price, and concluded:

"We hope you will not compel us to furnish stock next year at these old prices on the last year's contract."

On September 19, plaintiff replied, denying a charge of defendant that they were paying higher prices to other people for basswood, expressing some dissatisfaction that defendant had not shipped a larger quantity during the year, and insisting upon completed performance during 1917. Defendant answered:

"We will let the order stand as it is and cut all the 5/4 basswood we possibly can on your order."

These letters are the best evidence of the understanding of the parties in regard to the contract during 1917. True, several letters were exchanged in January, but those of the plaintiff merely expressed disappointment at defendant's failure to give more definite information as to the amount of lumber of the kind ordered plaintiff might expect during the year, and those of defendant explained the impossibility of forecasting the quantity accurately. The letters of March and April dealt principally with the details of shipment of the 1917 deliveries and the dispatching of Mr. Pratt to inspect the lumber, preparatory to its shipment. Defendant's letter of July 3, however, besides advising plaintiff that 4 cars were ready for shipment, added, "This will be all we will have this year." Plaintiff's reply of July 6 again expressed disappointment at the small quantity shipped, and concluded:

"Perhaps you are planning to cut it in the coming season instead. Will you please advise us immediately concerning this?"

Defendant, in answering this letter three days later, ignored this inquiry, and nothing further passed between the parties as to the continuance of the contract until April 6, 1918, when plaintiff wrote, asking when defendant desired Mr. Pratt to inspect the lumber and how much of it would be shipped during the season. Defendant replied on April 18, just 8 months after the last car was shipped, stating that all lumber was being sold to the government, and that—

"You must realize that we could not ship lumber to-day at prices made in 1915."

This, we believe, was the first intimation plaintiff had that defendant did not contemplate shipping all of the basswood called for in the order. From this time forward plaintiff was at liberty to consider the contract breached by defendant. As appears from

the testimony of Mr. Luther, secretary of the plaintiff company, he "immediately got busy and made inquiries at Michigan, Indiana, West Virginia, Virginia, and Wisconsin for quotations on specifications, the same as in this order to the D. E. Hewitt Lumber Company." This effort on his part was fruitless until July, at which time the best market price obtainable was \$60 and \$62 per thousand, delivered in Buffalo, 1919 delivery. Plaintiff's damage, as found by the jury, was based upon the difference between \$39 per thousand, the price named in plaintiff's order, and the quotation of \$60 and \$62, just referred to. Defendant urges insistently that this was an improper measure of damage: First, because the contract was breached not in April, 1918, but on July 3, 1917, when defendant advised plaintiff that 4 cars would "be all we will have this year"; and, second, because the quotation of \$60 and \$62 covered, not 1918, but 1919 delivery.

As to defendant's first contention, it is to be noted that by the terms of the original offer all of the basswood was to have been delivered during 1916; only a part was shipped, however, and plaintiff's secretary, though disappointed, acquiesced in the delay. Five cars were shipped during April, 1917, and in July plaintiff received the letter relied upon by defendant as a repudiation of the contract. This letter, properly interpreted, is not sufficient to justify the conclusion insisted upon by defendant. Its plain import is that 4 cars would be all defendant "will have this year." It omitted the excuses or explanations contained in the correspondence of the preceding year, but falls far short of the "unequivocal and absolute" renunciation of the contract which the law requires. *Bannister v. Victoria Coal & Coke Co.*, 63 W. Va. 502, 61 S. E. 338; *Elliott, Contracts*, § 2032. In view of this circumstance, the evidence introduced by the defendant as to the market value of basswood in 1917 does not affect the issue.

The general statement of the law in regard to damages in cases of this character, as recently set forth by this court, is as follows:

"For breach of contract for the sale of personalty, by nondelivery of the property, the measure of damages ordinarily is the difference between the contract price and the market value of the articles at the time and place specified for delivery." *Wilson v. Wiggin*, 77 W. Va. 1, 87 S. E. 92

—and where no specific time is fixed for delivery, the market value will be estimated as of the time of the refusal to deliver (*Sutherland, Damages* [4th Ed.] § 651; 5 *Elliott, Contracts*, § 5108; *Guice v. Crenshaw*, 60 Tex. 344; *Summers v. Hibbard*, 153 Ill. 102, 111, 38 N. E. 899, 46 Am. St. Rep. 872), and the same rule applies where delivery is postponed from time to time (*Sedgwick, Dam-*

ages [9th Ed.] § 737; *Roberts v. Benjamin*, 124 U. S. 64, 8 Sup. Ct. 393, 31 L. Ed. 334). Defendant contends, however, that although the breach may have occurred in April, 1918, proof of the market value in July for 1919 delivery is not a proper basis for recovery. Such position is without proof to sustain it. While it is quite true that the buyer in such a case must act with promptness in obtaining goods to replace those undelivered (*David v. Whitmer & Sons*, 46 Pa. Super. Ct. 307), the evidence shows that diligent efforts were made at once to secure quotations on basswood of the character specified in plaintiff's offer, and although inquiries were directed to dealers in several states, plaintiff obtained no definite answers until July, when, according to Luther, the lowest price then obtainable was for 1919 deliveries. Certainly this circumstance in no way prejudices defendant's rights in the controversy. Investigation discloses several cases in which the agreement related to property not to be found in the market, and in such cases it is held that if the course pursued by the purchaser in obtaining other like property was the only way it could be obtained, or was a reasonable or prudent way of obtaining it, the difference between the contract price and the higher cost of the property thus obtained may be recovered by the purchaser as damages naturally arising from the breach itself. *Sutherland, Damages* (4th Ed.) § 652, cases cited. In our judgment plaintiff's conduct fully satisfied this test, and we find no error in the damages as found by the jury.

[8] The refusal to grant defendant a continuance after plaintiff was permitted to amend the first count of the declaration during the progress of the trial is complained of. As has been pointed out, plaintiff's theory of the case is that, as plaintiff acquiesced in delays in the fulfillment of the contract, it was extended beyond the time fixed in the original offer. In order to establish this proposition, plaintiff offered as evidence, and filed as exhibits, many letters exchanged between the parties, some of which have been referred to.

Immediately upon their introduction, defendant moved to strike from the evidence any letter after the year 1916, which tended to prove or show any continuation or modification of the contract. The legal foundation for this motion, according to defendant's brief, lay in the fact that the two counts of the declaration alleged the purchase of the lumber specified in the order for 1916 delivery, and that therefore the letters, to whose admission it objected, were foreign to the case. At this point, counsel for the plaintiff asked leave to amend the declaration in order to show that by mutual consent the contract was carried through the years from 1915 to 1918. The leave the court granted, and the declaration accordingly was

amended, and to this action defendant excepted, and moved for a continuance upon the ground of lack of preparation on its part to show the market price after 1917, which motion the court overruled, and the defendant again excepted.

Section 8, chapter 131, Code (sec. 4912), authorizes amendments of a pleading when necessary to warrant proof offered and admitted, to the end that substantial justice may be promoted, and to grant a continuance should good cause therefor be made to appear. In the statute there is no language to warrant the statement sometimes expressed that the defendant is entitled to a continuance "as a matter of right," nor do our decisions so hold. *Koen v. Fairmont Brewing Co.*, 69 W. Va. 94, 70 S. E. 1098; *Adams v. Adams*, 79 W. Va. 546, 92 S. E. 463. These decisions are conclusive that cause satisfactory to the trial court must be shown. As in the *Adams Case*, the amendment did not affect the merits of the action, nor did the proof thereunder introduce any element in the case which the defendant might not have anticipated under the original declaration, which did not purport to fix the date of the breach. No doubt the same witnesses called in by defendant to prove the market value of basswood during 1917 were as well qualified to testify as to its value during the succeeding year. The necessity of a continuance was not made apparent to the trial court, nor do we see any.

[10] The right of the plaintiff to benefit by the language used in his instruction No. 1 is questioned by defendant on the theory that it submits to the jury the existence of a contract between the parties as of October 18, 1915, when, as the truth is, it was the duty of the court to determine that fact, if fact it was, and for this proposition *E. T. Barnum Iron Works v. Prescott Construction Co.*, 86 W. Va. 173, 102 S. E. 860, is cited. In that case, however, the contract upheld and enforced depended entirely upon the correspondence between the parties, as the opinion shows. Here there were letters, it is true, but they are inconclusive unless they are construed in conjunction with other facts and circumstances found in the record, and as there is some conflict as to their effect upon the issue involved, the jury is the proper body to find a solution for the conflict.

The rule laid down in 13 C. J. 782, also cited in the *Iron Works Case*, *supra*, is this:

"But where letters introduced in evidence by plaintiff in proof of the contract sued on do not constitute in themselves a completed contract, but merely negotiations with a view to a contract, as they are supplemented by oral testimony, it is proper to submit to the jury the question whether it was in fact completed,"

—and to support the rule so stated, the author cites *Harvard Pub. Co. v. Syndicate*

Pub. Co., 94 Fed. 754, 86 C. C. A. 470; *Crossley v. Summit Lumber Co.*, 187 S. W. 118 (Mo. App. 1916); *Dougherty v. Briggs*, 231 Pa. 68, 79 Atl. 924. These citations sustain the text quoted, and the rule is especially applicable to the question here considered, relating, as it does, to defendant's acceptance or non-acceptance of plaintiff's order; that of course being a question for the jury to settle, as held in each of the cases last cited, and also in *Camp v. Wilson*, 97 Va. 265, 33 S. E. 591. This instruction, therefore, was not improperly given.

So far as it is incumbent upon us to enter upon a discussion of other instructions requested by plaintiff, it is only necessary to refer to what has been said on the subject in other connections. The order to be entered here, pursuant to this opinion, will be to reverse the judgment of the circuit court, reinstate the verdict, and enter judgment thereon, and award to plaintiff the costs expended by him in that court and here.

(80 W. Va. 246)

**BOARD OF EDUCATION OF DISTRICT OF
TOWN, RALEIGH COUNTY, v. DUNK-
LEY. (No. 4309.)**

(Supreme Court of Appeals of West Virginia.
Oct. 18, 1921.)

(Syllabus by the Court.)

1. Landlord and tenant §63(3).—Tenant may not dispute landlord's title without first surrendering possession.

A tenant is not allowed to dispute the title of his landlord without first surrendering possession; and while in possession he may not collude with another, who claims to hold an adverse or hostile title, and thus prejudice the right of possession of his landlord.

2. Landlord and tenant §66(2), 68.—When tenant disclaims under lease or attorns to one other than landlord, his possession becomes tortious and adverse, and landlord may dispossess.

When a tenant disclaims to hold under his lease, and brings notice of that fact to his landlord, then the relation of landlord and tenant ceases, and he becomes a trespasser and his possession is adverse, and the landlord may at once dispossess him. If the tenant claims the fee to be in another, or attorns to another, he must give notice to his landlord, and then his possession becomes tortious and adverse, and the right of entry in the landlord is complete, and he may sue at any time within the period of limitation.

3. Landlord and tenant §65.—Purchaser from landlord succeeds as landlord of tenant holding premises.

A purchaser of land for value on which there is a tenant holding under the vendor succeeds his vendor as landlord of that tenant, un-

less there is a stipulation to the contrary; and if the tenant desires to repudiate his tenancy and to make his occupancy adverse he must give notice thereof to his new landlord and refuse attornment. If he does not do so, and continues under the lease without such notice and without protest, the relation of landlord and tenant continues and remains unimpaired.

Error to Circuit Court, Raleigh County.

Action by the Board of Education of the District of Town, Raleigh County, against J. W. Dunkley for unlawful detainer. Verdict and judgment in favor of the defendant, and plaintiff brings error. Reversed and remanded.

Bumgardner & Preston, Ben H. Ashworth, and David D. Ashworth, all of Beckley, and David Lilly, of Ghent, for plaintiff in error.

C. M. Ward and W. H. File, both of Beckley, for defendant in error.

LIVELY, J. From a verdict and judgment in an action of unlawful detainer in favor of the defendant, plaintiff prosecutes this writ of error.

The controversy arises over possession of one acre of land in or near the city of Beckley, on which is erected a frame dwelling house. It appeared that the Beaver Coal Company deeded this tract of land in the year 1901 to the Beckley Seminary to be used for educational purposes, or as a playground or park in connection with the Beckley Seminary. The Beckley Seminary took possession of the land and caused the brush and some timber to be removed therefrom, and in the year 1905 erected a dwelling house thereon, which dwelling house was occupied by defendant at the time this action was instituted. In the year 1907 the Beckley Seminary conveyed this acre of land to the Christian Women's Board of Missions, a corporation, for educational purposes. A short time thereafter this last grantee erected a building on some land near by which it had purchased from other grantors, and conducted a sectarian school therein until the year 1917. About the year 1915 the Christian Women's Board of Missions employed the defendant as janitor of their school buildings and put him in possession of the house on the lot of land in controversy as its tenant. He was paid a stipulated price per month, including the use of this dwelling house, for his services. In October, 1917, the Christian Women's Board of Missions deeded this one acre of land in controversy to plaintiff, the board of education. According to the testimony of two members of the board of education, they retained the defendant as janitor for their school buildings and permitted him to remain in the dwelling house for about two years after they obtained title to the property. During all this time the board paid the electric light, water, and fuel bills

for this house. The payment of these bills by the board is not in dispute. In the early part of the school year of 1919 the school board, before that time having erected a new school building, desired the defendant, Dunkley, to clean up the old Institute building, for which he had previously acted as janitor, and which was near the lot of land in controversy, for the purpose of using the same temporarily until the congestion of pupils terminated, and, through its secretary, Mr. Ashworth, employed Mr. Dunkley to do that service, including janitor service. For this service defendant claimed \$75 per month, including rent, and rendered a bill for seven weeks' work, amounting to \$131.25, and wrote the board a letter to that effect, saying that this bill was due November 31st, and "I would like to have this as soon as possible, as I need it to settle my bills, and oblige. This statement is true and correct." In the fall of 1919 the board, by its record, directed Mr. Ashworth, its secretary, to notify defendant to vacate the property on January 1, 1920. The secretary testifies that he verbally notified defendant to that effect, and afterwards, about the 26th or 27th of February, 1920, served a written notice on him to vacate the house on or before the 1st of April, following. To collect his account of \$131.25 for cleaning and janitor service, defendant sued the board of education, and it appears that his evidence in that suit was taken down by a shorthand reporter. He was asked this question:

"What was your contract with the board of education? A. It was only a verbal contract. They were to pay me \$75 per month and give me my rent 12 months a year; the \$75 from the time school commenced until it closed. I commenced generally a week before the school commenced to get everything ready, and then a week after school closed cleaning up."

He was then asked:

"Whom did you have that arrangement with? A. With the board of education."

He was also asked:

"Did you pay the board any rent for July, August, or September, 1919? A. No; but I worked the following year over there, all the year, and my rent run from September until September. Q. You mean the previous year? A. Yes; I mean the previous year."

In the trial of this unlawful detainer case the witness Dunkley, the defendant, was confronted with this testimony and asked if he made those statements, and he replied:

"That was the contract I had with the C. W. B. M."

He was asked if he had made that statement in the former trial, and he replied:

"If that is my testimony I suppose I did, but I was mistaken in the people it was made with."

Defendant, to maintain the issue on his part, testified that he had gone into this house in the year 1915 under a contract with an agent of the C. W. B. M., and that a Mr. Howell, who was the last agent of the C. W. B. M., went away to sell the property, and that he was told by Howell that the property would go back to a Mr. T. K. Scott, would revert back to him, and he was instructed to look to Mr. Scott for directions and as his landlord. He testified that he never had any contract with the board of education with reference to renting the dwelling house in controversy, but that he served as janitor for their school buildings in the year 1917 and 1918. He then testified that in the fall of 1919 the board did not intend to have school in the old building, and, not having sufficient room in the new building, the secretary of the board came to him and asked him to clean up the old building, which he did, and acted as janitor in the months of October and November, in all seven weeks, and when he went to the board to get his pay he was told that they would pay him his bill when he moved out of the house, and he was notified to move out of the house by the first of the year—that is, January 1, 1920. He refused to move, and instituted a suit at law to recover his salary for seven weeks, in which suit he gave the foregoing testimony. He testified that he had a verbal contract with T. K. Scott for the premises, and, being asked when this contract was made, he could not remember whether the contract was made before he received the notice on the 25th of February, 1920, to vacate, or not. He was not certain when that contract was made. He testified that he had been paying rent to Scott, but could not remember whether he had paid any rent in February, 1920, or not. He was unable to say who had been paying the water, light, and fuel for the house up to March, 1920. He was asked if he had ever been the tenant of the board, and replied, "Not that I know of." T. K. Scott was examined as a witness for the defendant, and introduced into the evidence a contract which he had made with the Beckley heirs in the year 1908 by which he was to survey out parcels of land which were supposed to belong to the Beckley heirs and which had not been disposed of; if necessary, to institute suits to recover the same, for which he was to receive a one-half interest in all of the lands so secured to the Beckley heirs in that way. If he failed in any of the litigation, he was to pay the costs; if he was successful in such litigation, then the Beckley heirs were to pay one-half the costs, and they were then to execute to him a deed for a one-half interest in all of the lands so surveyed, recovered, and secured to them. Mr. Scott was a surveyor. He also produced a deed which he had executed in the year 1909

to the C. W. B. M., conveying to that organization a one-half undivided interest in a two-acre tract which tract included the one acre in controversy, and which had a clause therein that, if the property which was conveyed ceased to be used by the grantees for educational purposes, that his title, which he was then deeding, should thereby revert to him. He also introduced the record of a suit instituted about the year 1910 or 1911 by the school commissioner against T. K. Scott and others, which was for the purpose, among other things, of declaring as forfeited to the state of West Virginia these two acres of land, one acre of which is the subject of this controversy, for non-entry on the tax books in the name of John Beckley. Such proceedings were had in this suit that in about the year 1913 the court decreed that this land, these two acres, was forfeited to the state for nonentry in the year 1878; that the heirs of John Beckley had the right to redeem within a certain time by paying the amount of back taxes; and that upon their failure to so redeem the land would be sold by a special commissioner, who was appointed for that purpose. At this state of the proceedings the C. W. B. M. filed a petition, claiming that this two-acre tract belonged to them, and making certain allegations with reference thereto which it is unnecessary to set out here, and on that petition an order was entered setting aside the former order giving the Beckley heirs the right to redeem, and enjoining the commissioner from making sale of the land. That proceeding stopped them, so far as this tract of land is concerned. The witness T. K. Scott introduced before the jury a deed dated the 15th day of April, 1920, from the Christian Women's Board of Missions to himself, making a reconveyance to him of the two-acre tract, a one-half interest of which he had deeded to them in the year 1909. He then testified that defendant, Dunkley, was his tenant, and that he had made him such by two written contracts, one executed or written about the 24th day of February, 1920, which was to run until the following September, and that on the last date a new contract had been made which extended the lease to March 1, 1921. It will be observed that this first contract was executed just about the time the notice of the board of education to give possession of the property was served on Dunkley. A motion was made to strike out and exclude from the jury all of the testimony of Scott and the documentary evidence introduced by him, the deeds and school land proceedings, which motion was overruled, and to which ruling plaintiff excepted.

The court seemed to be under the impression that the best title to the land would control the possession thereof, and tried the case on that theory. Three instructions were

given for defendant which proceeded upon that theory, all of which were objected to by the plaintiff, and it will only be necessary to refer to one of the instructions to show upon what theory the court proceeded. Instruction No. 2 is as follows:

"The court instructs the jury that, if you believe from the evidence that the Christian Woman's Board of Missions held the land on controversy in this case under a deed from Beaver Coal Company and also under a deed from T. K. Scott, and at the time it reconveyed the land so purchased by it from the said Beaver Coal Company to the board of education of town district, and also at the time it reconveyed the land which had been conveyed to it by T. K. Scott back to the said T. K. Scott, then the right to possession of the said land depends upon the title to the same, and, unless the jury believes that the said plaintiff has proved by a preponderance of evidence that its title is a better title than the title claimed by the defendant, J. W. Dunkley, they will find for the defendant T. K. Scott."

It will be observed that the plaintiff and its predecessors in title had possession and occupancy of this one-acre tract since the year 1901. It is not necessary to say in this proceeding whether its title was good or bad. There is no controversy over the fact that from the year 1915 defendant was the tenant of the Christian's Women's Board. He says so expressly in his testimony. When confronted with his former testimony in the suit to recover for his services rendered in the fall of 1919 as janitor in the old building, in which he had stated that his occupancy was under the board of education, he said again that he had meant to say that his contract was with the C. W. B. M. Being the lessee and tenant of the C. W. B. M. at the time they sold and delivered possession of the property to the board of education in 1917, by operation of law he became the lessee and tenant of the purchaser. At common law this was not true.

[1,2] A tenant neither owed fealty nor rent to the assignee until he had assented to the assignment by attorning to the purchaser. However, to remedy this inconvenient principle of the common law, a statute was passed (4 Anne, c. 16) which made assignments of reversions valid in all cases without attornment. This statute has been held to be effective in the states which have adopted the common law. 24 Cyc. pp. 1173, 1174. Under section 1 of chapter 93 of the Code (sec. 4127) a grantee of any land let to lease shall enjoy against the lessee the like advantage by action or entry for any forfeiture or by action upon any covenant or promise in the lease which the grantor might have enjoyed. The possession is the gist of this controversy, and not the title to the land. It is not material to inquire who has the superior title, Scott or the

board. Section 1, c. 89, Code (sec. 4065), expressly says that, if the entry is lawful or peaceable, and the tenant shall retain the possession of the land after his right has expired without the consent of him who is entitled to the possession, the party so turned out of possession, no matter what right or title he had thereto, or the party against whom such possession is unlawfully detained, may within three years after such unlawful detainer sue, etc. It is elementary that the tenant cannot dispute the title of his landlord. In a suit for unlawful detainer against a tenant it is not necessary for the landlord to show any title. An acknowledgment by the tenant that he went into possession under the landlord is sufficient to entitle the landlord to recover the possession. Defendant could not dispute the title of the Christian Women's Board nor will he be permitted to dispute that of its immediate successor, the plaintiff in this case. *Stover v. Davis*, 57 W. Va. 196, 49 S. E. 1023; *Voss v. King*, 33 W. Va. 236, 10 S. E. 402; *Tiffany, Landlord and Tenant* (1910 Ed.) § 209. It is reasonably clear that defendant admitted his tendency by special contract with the board when he testified in the suit to recover his janitor's services, and wherein he rendered his account, including his rent. His claim that in this suit he was talking about a contract he had with the Christian Women's Board does not relieve him for he could not dispute the title in that way. Moreover, Scott had no title to this land in 1917; his title, if it can be called such, was not obtained until the spring of 1920, when the lot was reconveyed to him. He has had no possession, and attempts to get possession by entering into a written contract with Dunkley about the time that the board of education is trying to put Dunkley off. If defendant desired to change his fealty and hunt up another landlord after the board had given him notice verbally or by writing to vacate the premises, it was his duty to first surrender possession to those under whom he had been holding. He cannot render his possession adverse except by a disclaimer and the assertion of an adverse right brought home to his landlord.

"If he takes a secret lease or conveyance for the land from a third party claiming to be the owner, without the knowledge of his landlord, the character of his possession will not be changed. So an adverse claimant who gets into possession of the land by tampering with the tenant cannot resist the landlord's claim where the tenant himself could not." *Voss v. King*, supra; *Harman v. Lambert*, 76 W. Va. 370, 85 S. E. 660.

[3] But it is claimed by defendant that Howell, the agent of the Christian Women's Board, told him when the property was sold to plaintiff in 1917 that he should look to

Scott. That direction could not avail against the board. It does not appear that any reservation of that kind came to the knowledge of the board, and the possession delivered to the board was the possession of the grantors under which defendant held his tenancy. If defendant then desired to attorn to Scott, it was his duty to so notify the board. He did not do so, nor did he recognize Scott as his landlord, nor pay rent to him until the board had notified him to vacate, when he immediately enters into a written lease from Scott, and begins paying him rent. During all of his tenancy the board paid for water, light, and fuel for the dwelling. Suppose he had made no agreement with the board except to act for it as janitor, and that the two members who testified that his rent was included as a part of his wages were mistaken. The simple fact that he was in the house as a tenant of its grantee when it bought the property and took possession would preclude him from denying the tenancy unless at that time he served notice that he was holding under another landlord. It would be presumed that he was continuing as tenant.

"When a tenant remains in possession after the expiration of his original term, by permission, the implication is that he continues in possession under the conditions of the former demise." *Hobbs v. Batory*, 88 Md. 68, 37 Atl. 713; *Kendall v. Moore*, 30 Me. 327; *Commissioner v. Clark*, 88 N. Y. 251.

If defendant then desired to repudiate his tenancy and assert that he was holding under another landlord, that fact should have been brought home to the board, and then the relation of landlord and tenant would have ceased, and it would have been the duty of the board to evict him within the statutory time. Then his possession during the statutory time (3 years) would have been adverse and tortious. *Wild v. Serpell*, 10 Grat. 405; *Miller v. Williams*, 15 Grat. 213; *Stover v. Davis*, 57 W. Va. 196, 49 S. E. 1023.

There is no evidence, even of an inferential character, in the record that defendant ever repudiated his tenancy under the Christian Women's Board, or under its successor in title, the plaintiff, or ever recognized or proclaimed Scott as his landlord until after the notice to vacate. When he refused possession this suit promptly followed. He will not be allowed to deny the title and possession under which he took his tenancy. It follows that the defense of adverse title in Scott relied upon is not available in this action, and the evidence thereof should have been rejected, and that the instructions based on that defense should have been refused. The judgment is reversed, verdict set aside, and a new trial awarded.

Reversed and remanded.

CUNNINGHAM v. BIRCH RIVER LUMBER CO. et al.. (No. 4203.)

(Supreme Court of Appeals of West Virginia.
Oct. 25, 1921.)

(Syllabus by the Court.)

1. Justices of the peace §58(3)—Judgment not void for recital that claim was in excess of jurisdictional amount where rendered for less.

A judgment of a justice for less than \$300 rendered upon a trial before such justice, in which there was no defense made, will not be held void for lack of jurisdiction because there is a recital that the plaintiff's claim was for an amount in excess of \$300. It will be presumed that there were admitted offsets which reduced the claim to the amount for which the judgment was rendered.

2. Evidence §383(3)—Certified transcript is prima facie evidence of judgment.

A transcript of the record of a judgment from the docket of a justice of the peace, certified as provided by law, is prima facie evidence of such judgment in any proceeding where it becomes necessary to prove the same.

3: Evidence §345(2)—Transcript of judgment by other justice must show him successor of one rendering judgment or having lawful custody of docket.

Where the transcript of a justice's judgment is relied upon as proof of the same, and is certified by a justice other than the one who rendered the same, the certificate must show that the justice so signing it is the successor of the one who rendered the judgment, or is the person having lawful custody of his docket, or these facts must appear from some competent evidence in the case.

4. Corporations §517—Corporation's answer should be signed by president with corporate seal affixed.

The answer of a corporation should be signed by its president with its corporate seal affixed.

5. Equity §427(1)—Defendant could rely on denial in answer, although exception to answer should not have been overruled.

Where, in a suit brought to enforce a judgment of a justice, the defendant, a corporation, files an answer denying the existence of such judgment, to the filing of which the plaintiff objects and excepts because the same is not signed by the president of such corporation, and does not have its corporate seal affixed thereto, which objection and exception is overruled and said answer filed, and a decree rendered in favor of the plaintiff establishing the validity of the alleged judgment without competent proof thereof, such decree cannot be upheld upon the ground that the court should have sustained the objection to the filing of said answer, and the exception thereto. The defendant filing such an answer under such circumstances may rely on the denial therein contained.

6. Equity ¶259—On sustaining exception to answer as not properly authenticated, leave should be given to file new answer.

Upon sustaining an exception to an answer because the same is not properly authenticated, leave should be given to file a new answer authenticated in the manner required by law.

7. Judgment ¶866(2)—Judgment not barred so long as right to sue out *scire facias* to revive same remains.

A judgment is barred by the statute of limitations, and not by the equitable doctrine of laches, and so long as the right to sue out an execution exists, or there is a right to sue out a *scire facias* to revive the same, the judgment is not barred.

8. Judgment ¶735—Holder of judgment lien subsequent to vendor's lien not barred from asserting judgment against the judgment debtor because not setting up same in suit to enforce vendor's lien.

The holder of a judgment lien upon real estate, subsequent in time to a vendor's lien against the same, will not be barred from asserting such judgment against the judgment debtor because he did not set the same up in a suit to enforce the vendor's lien.

9. Judgment ¶801—Before decreeing sale in creditors' suit, court should ascertain if rents, issues, and profits will not pay lien.

In a lien creditors' suit, before decreeing a sale of the real estate of the defendant debtor, the court should ascertain that the rents, issues, and profits will not pay off the liens against such real estate within five years.

10. Judgment ¶801—In suit to enforce lien any party holding lien may file petition without being made formal party.

In a lien creditor's suit any party holding a lien upon the lands sought to be subjected may file a petition asserting such lien without being made a formal party to such suit, and he may do this for the purpose of showing that an apparent lien in his favor has been discharged.

11. Judgment ¶801—When holder of apparent lien files a pleading in lien creditor's suit averring satisfaction, the court should not dismiss him, but decree satisfaction and provide for release.

When the holder of an apparent lien against real estate, which is sought to be subjected to sale in satisfaction of the liens against it, files a pleading in such suit averring that the lien in his favor has been fully satisfied and discharged, the court should not dismiss such party from the suit, but should decree such lien satisfied and provide for the execution of a release thereof.

12. Justices of the peace ¶131—Judgment not a valid lien prior to docketing in county clerk's office.

A judgment of a justice is not a valid lien upon real estate conveyed by the judgment debtor to a bona fide purchaser prior to the docketing of such judgment in the office of the clerk of the county court in which such real estate lien.

13. Judgment ¶767—Entry of judgment in lien docket in county clerk's office must be sufficiently full and accurate to inform intending purchasers to constitute lien on real estate.

The entry of a judgment upon the judgment lien docket in the office of the clerk of the county court must be sufficiently full and accurate to inform intending purchasers or other interested parties of the facts which it is essential for them to know, and such that a reasonably careful search in the particular quarter indicated will not fail to disclose the judgment.

14. Judgment ¶768(2)—Clerical error in entry of justice court judgment upon county clerk's lien docket will not render it void where furnishing sufficient notice to purchasers.

A clerical error in the entry of a judgment upon the judgment lien docket in the office of the clerk of the county court, showing its rendition upon a date slightly different from the date of its actual rendition, will not render such docket entry void, where it appears that the matter contained in the entry upon the judgment lien docket is sufficient to fully inform an interested party of the facts necessary for his protection.

15. Judgment ¶801—In lien creditors' suit where plaintiff's judgment is the only lien on land, it is proper to decree sale without referring to commissioner to audit liens.

Where, in a lien creditor's suit, it appears that the plaintiff's judgment is the only lien against real estate, and the amount thereof is clearly ascertainable from the proof introduced, it is not error to decree a sale of such real estate in satisfaction of such lien without referring the cause to a commissioner to audit the liens.

Appeal from Circuit Court, Nicholas County.

Suit by Charles Cunningham against the Birch River Lumber Company and others to enforce a lien of a judgment. Decree for the plaintiff, and the defendant lumber company appeals. Reversed and remanded.

Alderson & Breckinridge, of Richwood, for appellant.

G. G. Duff, of Summersville, and R. M. Cavendish, of Sutton, for appellee.

RITZ, P. This suit was brought for the purpose of enforcing the lien of an alleged judgment in favor of the plaintiff against the real estate of the defendant Birch River Lumber Company, and from a decree granting the relief desired this appeal is prosecuted.

The bill as amended alleges that the plaintiff, on the 6th day of June, 1914, obtained a judgment against the defendant Birch River Lumber Company before a justice of the peace of Nicholas county, for the sum of \$277.75, with interest and costs, which judg-

ment was duly docketed in the office of the clerk of the county court of that county; that through some inadvertence the docket entry in the county clerk's office indicates that the judgment was rendered on the 4th day of March, 1916, instead of the 6th day of June, 1914; that upon discovering this error in the docket entry plaintiff caused the same to be corrected by docketing another abstract of the judgment in the county clerk's office. The bill also alleges that execution was duly sued out on the judgment in June, 1914, and that the same was returned "no property found"; that the defendant was the owner of the minerals underlying a tract of 1,030 acres of land situate in Nicholas county upon which said judgment became a lien; that it appeared from the records of said county that the grantor of said defendant lumber company had a vendor's lien against the said real estate for a considerable sum of money, which in fact had been entirely paid off and discharged, for which reason said grantor should be required to release the same, and he was accordingly made party defendant to the bill; that the plaintiff's judgment is the only subsisting lien against said real estate. The defendant lumber company demurred to the bill, and upon the demurrer being overruled it filed an answer in which it denied that there was any such judgment as that set up and relied on in plaintiff's bill; that any judgment was ever rendered against it in favor of the plaintiff as described in plaintiff's bill; that process was ever served upon it in any such cause; and that execution had ever been issued and returned not satisfied upon any such judgment. The answer further asserted that even if there was such a judgment, the plaintiff was barred from asserting the same by laches; and, further, that any such question between the plaintiff and the said lumber company was res judicata, by reason of the final determination of another suit in which both the said plaintiff and the said lumber company were parties. The answer further alleged that the lumber company had purchased a tract of land of 1,030 acres from one C. E. Mollohan who had reserved a lien as vendor in the deed conveying the same to the lumber company, and that in a deed made in settlement of the suit above referred to as being a bar to the plaintiff's right to recover, Mollohan agreed, in consideration of the conveyance to him of the surface of the 1,030 acres of land, to pay all of the liens against the same, and asked the court to grant the relief, if the plaintiff was entitled to any, against Mollohan instead of against the defendant. The defendant Mollohan also filed an answer in which he averred that the purchase-money notes secured by the vendor's lien had been transferred by him to sundry parties named in the answer, and that he did not know whether the same had been paid off or not. The answer

of the lumber company was excepted to upon the ground that it was not properly executed, not being signed by the president or executed under the seal of the corporation. There was also filed by the plaintiff a special reply to this answer in which he asserted that the judgment relied upon in this suit was not involved in the suit referred to in the lumber company's answer, but was the result of a settlement had between him and the lumber company, by which the amount due him was ascertained to be \$277.75, the amount of the judgment, which amount said lumber company agreed to pay, and advised the defendant that it was not necessary that the same be set up in said chancery suit; that the said judgment was obtained by him long after the said chancery suit was instituted, but while the same was pending. It does not appear that the court ever passed upon the exception of the plaintiff to the answer of the defendant lumber company, but treated such answer as sufficient. The defendant lumber company, at the time the final hearing of the cause was requested, moved for a continuance in order that it might have an opportunity to take testimony to support its answer. This motion was denied, and a final decree rendered in which the plaintiff's judgment was ascertained to be a valid and subsisting lien against the mineral interests owned by the defendant lumber company in the 1,030 acres of land; further ascertaining that there were no other liens against said interest for which reason a reference of the cause to a commissioner was unnecessary, and decreeing said interest to sale in satisfaction of said lien unless the same was paid within 30 days from the adjournment of the court.

[1] The defendant in its assignment of errors contends that the circuit court erred in 27 different particulars to its prejudice in the conduct of the cause. It first insists that it was error to overrule its demurrer to the plaintiff's bill as amended. This is based upon the fact that the transcript of the judgment filed as an exhibit with the bill shows that the plaintiff's claim was for \$427.76, an amount in excess of the justice's jurisdiction. The transcript does not indicate for what amount the summons was issued. It does show upon its face, however, that the defendant made no appearance to the suit, and that the justice of the peace, after hearing the plaintiff's evidence and trying the case ex parte, found that the plaintiff was entitled to recover \$277.75, and rendered judgment for that sum. Can we say that the judgment is void because the plaintiff's claim is said to be for an amount in excess of the justice's jurisdiction? It appears that there was no defense made to the suit, and if plaintiff was really claiming \$427.76 we cannot understand why he did not get a judgment for at least \$300, the amount of the justice's juris-

diction. There is no direct showing in the record that the suit was brought for more than \$300, nor does it appear that the plaintiff claimed that he was entitled to recover more than \$277.75. In fact, it may be said that the contrary appears, for that is all that he did recover in a suit to which there was no defense. There is no presumption against the validity of a judgment of a justice of the peace, nor do we think the fact that the record recites that the plaintiff's claim was for \$427.76 is enough to show that the justice was without jurisdiction. Undoubtedly there must have been offsets admitted by the plaintiff which reduced it to the amount for which judgment was actually rendered, which must have been for all that the plaintiff claimed upon the hearing.

[2] The defendant lumber company also claims that the court erred in decreeing that the plaintiff had a valid judgment against it, for the reason that there was no competent proof of the same. Of course, the bill alleges that a judgment was rendered, and that the same is a valid and subsisting lien against the real estate of the lumber company, and there is exhibited what purports to be a transcript of this judgment from the docket of the justice of the peace. This allegation of the bill is denied. The answer says that no judgment was ever rendered against the defendant in favor of the plaintiff; that no process was ever served upon the defendant in any such suit; and that no execution was ever issued upon any such judgment and returned, as shown by said transcript. The transcript shows that the summons was returned duly executed, and it further shows that upon the rendition of the judgment an execution was issued and placed in the hands of a constable, and that the same was returned "no property found." If this transcript can be read as evidence in the cause, it shows prima facie that the plaintiff has such a judgment as he sets up and relies upon, which prima facie case might be rebutted as the recitals of a justice's docket are not conclusive. If, however, as contended by the defendant lumber company, the transcript cannot be read as evidence, there is no proof of the allegation of the bill that such a judgment exists, and the same being denied by the answer the plaintiff was not entitled to the decree entered in his favor.

[3] The objection of the defendant to the transcript of the judgment as evidence is based upon the fact that the certificate appended to the transcript purports to be made by one Peter C. Tinney, a justice of the peace of Nicholas county, on the 7th of January, 1919, while the judgment purports to have been rendered by A. M. Lewis, a justice of the peace of said county. The certificate of Tinney does not show that he is the successor of said Lewis as justice of the peace, or that he is the custodian of the docket of said

justice of the peace, nor do either of these facts appear from any other evidence in the case. Section 182 of chapter 50 of the Code (sec. 2738) provides that whenever it is necessary to prove a judgment of a justice of the peace, the docket in which it is entered, or a transcript thereof certified by him, or his successor in office, or the person lawfully having the custody of the docket, shall be evidence of the same. There is no showing here that the party who certifies this judgment is the successor of the justice of the peace who rendered it, or is the proper custodian of the docket of said justice of the peace. In the case of Jackson, Wiant & Co. v. Conrad, 14 W. Va. 526, it was held that in order to make such a transcript evidence when certified by another than the justice of the peace who rendered the judgment, such certificate must show that such other was either the successor in office of the justice rendering the judgment, or is the person lawfully having the custody of such docket, or these facts must appear from some competent evidence in the case. In other words, it must be shown that the transcript comes from an authoritative source. Otherwise, it cannot be read as evidence. It follows that the plaintiff has failed to prove by any competent evidence that he in fact has a judgment against the defendant lumber company.

[4, 5] The plaintiff, however, seeks to avoid the effect of this lack of proof because his exception to the answer of the lumber company should have been sustained for the reason that the same was not executed by its president under its corporate seal. This exception was filed to the answer. It does not appear from the record that the court below ever passed upon it. It does appear, however, that he treated the answer as filed, and allowed the plaintiff to file a special reply in writing thereto, from which action it may be said that he in effect overruled the exception. It is quite true that the answer of a corporation should be executed on its behalf by its president, or one of its chief officers under its corporate seal. *Teter v. R. R. Co.*, 35 W. Va. 433, 14 S. E. 146. But can the plaintiff sustain his decree upon this failure of the defendant to so authenticate its answer?

[6] The court below treated the answer as in, and in effect overruled the exception. If he had sustained the exception to the answer, his duty would have been to give the defendant leave to have it properly authenticated, and all we can do now in passing upon this exception is to sustain the same and grant leave to the defendant to file an answer properly authenticated, if he desires to do so. The plaintiff could not be entitled to take a decree pro confesso, unless the defendant refused to tender a further answer after leave given for that purpose. It is

similar to those cases where the court below erroneously overrules a demurrer to a pleading and grants relief not justified by the pleading. In such cases we have always held that this court upon reversing the decree granting the relief will give the plaintiff leave to file an amended pleading, instead of rendering a decree in favor of his adversary. *Billingsley v. Menear*, 44 W. Va. 651, 30 S. E. 61. We are therefore of opinion that the plaintiff's lack of proof to support his judgment cannot be dispensed with upon the theory that the court allowed the defendant to file an answer not properly authenticated. For the purpose of the decree entered by the court below, this answer was in the case.

[7, 8] The defendant also insists that plaintiff's lien is barred by laches. There is nothing in this contention. The lien of a judgment is barred by the statute of limitations, and not by the equitable doctrine of laches, and so long as the right to sue out an execution exists, or there is a right to sue out a scire facias to revive the same, the judgment is not barred. *Werdenbaugh v. Reid*, 20 W. Va. 588.

There is no more merit in the defendant's contention that the former suit set up and relied upon brought by Cox et al. against the defendant lumber company is res judicata as to the plaintiff's judgment. It is true the bill alleges that that was a general creditors' suit. It further appears, however, from the bill that it was brought to enforce liens for purchase money against the land. There is exhibited with the answer only the decree of reference, and it appears from this decree that the only liens which the commissioner was directed to report upon were the vendor's lien and certain liens claimed by a cross-bill filed in the case for manufacturing the lumber from the land. If this decree of reference is justified by the pleadings, which are not made a part of this record, then it was no more than a suit to enforce the vendor's lien against the land, and the plaintiff was not required to set up his judgment in that case. Of course, if there had been a surplus realized from a sale of the land in the suit brought to enforce the vendor's lien, it may be that the plaintiff here could have asked in that suit to have that surplus applied to the discharge of his subsequent judgment lien, but an arrangement was made by which the vendor's lien was paid off, as well as the costs of the suit, and the suit dismissed without any sale of the subject-matter being had. While the plaintiff, under some circumstances, may have had his judgment lien enforced in that suit, it was not necessary that he do so, and unless it was actually brought into the pleadings the dismissal of that suit would in no wise affect the plaintiff's right to enforce his judgment in this suit. There is nothing in the record here which indicates that the judgment now sought to be enforced

was in any wise involved in the suit relied upon as a bar.

[9] It is further contended by the defendant lumber company that it was error for the court below to decree the land to sale in the absence of a finding that the rents, issues, and profits thereof would not pay off the plaintiff's lien and the costs of the suit in five years. There is no averment in the bill that the rents, issues, and profits are not sufficient to discharge the liens within that time, nor is there any finding in the case to that effect. The statute controlling such proceedings requires that this be done, and inasmuch as this case must go back in order that the plaintiff may have an opportunity to prove his judgment by competent evidence, if he desires to do so, this defect can then be remedied.

[10, 11] The action of the court in not determining that the vendor's lien reserved in the deed from Mollohan to the defendant lumber company had been discharged, and in dismissing the holders of the vendors' lien notes from the suit, is assigned as error. It appears that when the defendant Mollohan filed his answer asserting that he had assigned certain of these notes to divers parties, whose names he gave in his answer, the plaintiff was given leave to amend his bill and bring in these holders of the notes as parties to the suit, and the cause was remanded to rules for that purpose. He did sue out process against these parties, but he did not file any amended bill. All of the parties appeared and filed answers asserting that the vendors' lien notes which had been assigned to them had been fully paid off and discharged. Upon this showing the court below did not decree the vendor's lien satisfied, and require or provide for the execution of a release of that lien, but simply dismissed these parties from the suit. In an ordinary chancery suit it is not only necessary to serve process upon a party to make him a defendant in a suit, but there must be some allegation in the bill against him upon which a prayer for relief is predicated, and as stated there is no allegation in the bill against these new parties. But this is a lien creditors' suit, and under the statute any one holding a lien of any kind may come in and file a petition, and in effect be made a party plaintiff, whether he has been theretofore a party to the suit or not. The answers of these several holders of vendors' lien notes may be treated as petitions by them. It appeared at that time that they were the holders of notes secured by a vendor's lien unreleased upon the record, and it was proper for them to come into the case and assert that lien. It would likewise be proper for them to come in and assert that that lien had been discharged. The court should not have dismissed them from the suit, but should have entered a decree upon the showing made by

their answers, treated as petitions, that the vendor's lien was discharged, and provided for a release of the same.

The defendant lumber company also insists that it was error for the court not to require the defendant Mollohan to pay any lien which the plaintiff might be found to be entitled to, because of the fact that it conveyed back the surface of this land to Mollohan in consideration that he satisfy certain liens. The defendant contends that he undertook to satisfy all of the liens upon the land at the time in consideration of this reconveyance of the surface to him. The deed reconveying the land to him appears in the record and shows that the only lien he agreed to pay off in consideration of the reconveyance was the vendor's lien. The plaintiff's lien set up in this case does not fall within that class, and there was therefore no error in not decreeing the same against Mollohan upon the showing made.

[12] It is also insisted that it was error not to find that the plaintiff's judgment was a lien upon the whole of the 1,030 acres of land, instead of simply upon the mineral interest of the defendant lumber company. This judgment was not docketed until March 15, 1916. The defendant lumber company reconveyed the surface of the land to Mollohan on the 10th of December, 1915. So far as Mollohan is concerned, as a purchaser of the surface of the land, the judgment was void at the time he made the purchase, and the court did not err in holding that it was a lien only upon the interest that the defendant lumber company owned in the land at the time the judgment was docketed. There is no showing that Mollohan had any actual notice of the judgment at the time he received the conveyance in December, 1915, and even if he did have such notice, the interest conveyed to him would not be liable to be sold to satisfy the lien until the interest retained by his grantor was exhausted.

[13, 14] The defendant also contends that the entry of the judgment in the judgment lien docket in the county clerk's office in June, 1916, was void, for the reason that the judgment was therein described as having been rendered in March, 1916, instead of in March, 1914. Is this error such as to invalidate the entry in the judgment lien docket? It is quite true that the entry in the judg-

ment lien docket must be sufficiently full and accurate to inform intending purchasers or other interested parties of the facts which it is essential for them to know, and such that a reasonably careful search in the particular quarter indicated will not fail to disclose the judgment. 23 Cyc. 1354. Here the only error is the date of the judgment. The names of the parties are correctly given; the name of the justice of the peace before whom the judgment was rendered is correctly given; the amount of it; and all other data which could be of any service to one inquiring as to the validity of the judgment are correctly stated. There can be no doubt that any one examining the judgment lien docket could easily have found this judgment from the data furnished thereby, and we are of opinion that the error in the date of the rendition of the judgment is not of such character as to render void the entry upon the judgment lien docket. The difference in time in the actual rendition of the judgment and the date given as the date of its rendition in the docket entry is not so great but that one instituting an inquiry upon the information contained in the judgment lien docket could easily have located the judgment in the office of the justice of the peace.

[15] It is also insisted that the court erred in decreeing a sale of the land without first referring the cause to a commissioner to ascertain the liens against it. It appears from the court's decree that the plaintiff's judgment is the only valid subsisting lien against the real estate. Where this is the case the court need not make a reference to a commissioner to audit the liens, but may direct a sale of the lands if the pleadings and exhibits show clearly the amount due on the judgment set up in the bill. *Howard v. Stephenson*, 33 W. Va. 116, 10 S. E. 66.

It follows from what we have said that the decree of the circuit court will be reversed, the exception of the plaintiff to the answer of the defendant lumber company sustained, and the cause remanded, with leave to the said defendant to properly authenticate its answer, if it desires to do so, and for further proceedings to be had in said cause, in accordance with the principles above enunciated.

MILLER, J., absent.

(182 N. C. 437)

PENN-ALLEN CEMENT CO., Inc., v. PHILLIPS & SUTHERLAND. (No. 413.)

(Supreme Court of North Carolina. Nov. 16, 1921.)

1. Appeal and error \S 122—Fragmentary appeals not entertained.

The Supreme Court will dismiss an appeal from an adjudication that plaintiff recover of defendant a certain amount on two causes of action, and that the cause be retained for trial as to a third cause of action, without passing on a counterclaim.

2. Appeal and error \S 801(4)—Supreme Court may express opinion on merits on dismissal of appeal.

On dismissal of a fragmentary appeal, the Supreme Court may in its discretion express its opinion upon the merits so far as it may be a guide in further proceedings in the court below.

3. Appeal and error \S 916(1)—Matters in answer admitted to be true by judgment on pleadings.

Judgment having been rendered for plaintiff on the pleadings, all that is set up in the answer is, for the purposes of an appeal, admitted to be true.

4. Monopolies \S 23—No recovery on contract by reason of discrimination.

Where seller of cement violated Act Cong. Oct. 15, 1914, \S 2 (U. S. Comp. St. \S 8835b), by discriminating against buyer as to the price, the contract was unlawful, and seller was entitled to recover, if at all, only upon a quantum meruit for cement delivered and accepted.

Appeal from Superior Court, Scotland County; Ray, Judge.

Action by the Penn-Allen Cement Company, Inc., against Phillips & Sutherland. From act of court in adjudging that plaintiff recover certain sums on two causes of action and retaining a third cause for trial, defendants appeal. Appeal dismissed.

This is an action to recover the price of four carloads of cement. There are three causes of action stated in the complaint. On September 17, 1920, the plaintiff shipped the defendants one carload, 231 barrels of cement, at \$6.09 per barrel, less freight and war tax, making \$1,039.03, which amount was paid to the plaintiff by the defendant. On September 18, 1920, the defendants sent the plaintiff a telegram to ship them two more carloads of 231 barrels each, which were received by the defendants, for which the plaintiff now seeks to recover \$2,079.87 in his first cause of action. On September 27, 1920, the plaintiff shipped another carload of cement, which contained 231 barrels, which at the same price amounted to the sum of \$1,039.26 and is the plaintiff's second cause of action, and another carload of 289 barrels, which

the defendants refused to accept, was the third cause of action. The defendants based their refusal upon the ground that the shipment of 289 barrels was in excess of the 231 barrels which they had ordered, and, further, because they allege that they had ascertained that the plaintiff had discriminated in the price of said cement, in that it had charged the defendants \$1.10 per barrel more for said cement than it had charged other purchasers within the United States, in violation of section 2, c. 323, 38 U. S. Statutes which was illegal, and they set up and pleaded as a counterclaim a rebatement of \$1.10 on each of the first four carloads, and that by reason of said illegal price and the excessive quantity in the last shipment they had refused to receive the last carload, and pleaded as a counterclaim the \$460.09 as freight and war tax paid by them on said last carload.

The defendants also pleaded as a counterclaim threefold damages by reason of the overcharge of \$1.10 per barrel on said four carloads, making a total of \$2,142.57, and threefold the damages of \$28.90 per month from October 15 for storage on the carload refused.

The court adjudged that the plaintiff recover of the defendant \$2,079.87, with interest thereon from October 17, 1920, on the first cause of action, two carloads, and the further sum of \$1,039.26, with interest from October 27, 1920, on the second cause of action, and retained the cause for trial as to the third cause of action. Appeal by defendants.

Cox & Dunn, of Laurenburg, for appellants.

Walter H. Neal, of Laurenburg, for appellee.

CLARK, C. J. [1] The court entered judgment upon the pleadings in favor of the plaintiff upon the first and second causes of action, and "retained the cause for trial as to the third cause of action stated in the complaint," and took no action as to the counterclaim pleaded by the defendants.

This court has uniformly held that it will not entertain fragmentary appeals.

"The court will not entertain appeals brought up in a fragmentary manner. The whole case must come up on appeal. *Hines v. Hines*, 84 N. C. 122; *Comms. v. Satchwell*, 88 N. C. 1; *White v. Utley*, 94 N. C. 511; *McGehee v. Tucker*, 122 N. C. 186, 29 S. E. 833. An appeal from the ruling upon one of several issues will be dismissed. The trial and appeal must be upon the whole case. *Hines v. Hines*, 84 N. C. 122; *Arrington v. Arrington*, 91 N. C. 301."

"The trial of an action should embrace and determine all the matters at issue, so that a final judgment may be entered, and any errors committed may be corrected upon one appeal.

Fragmentary appeals will not be tolerated. Therefore, in an action to recover land, with damages for its detention, where the issue as to the title and right to possession was tried, but the issue as to damages was reserved to be afterwards tried if it should be adjudged that the plaintiff was entitled to recover, the Supreme Court would not entertain an appeal for reviewing alleged errors on the trial of the issue submitted. *Hicks v. Gooch*, 93 N. C. 112; *Rodman v. Calloway*, 117 N. C. 13, 23 S. E. 37."

"Fragmentary appeals will not be allowed when the subject-matter could be afterwards considered and error corrected without detriment to the appellant. But this rule does not apply to interlocutory orders, the granting or refusal of which may produce present injury or loss. *Davis v. Ely*, 100 N. C. 283, 5 S. E. 239; *Guilford v. Georgia*, 109 N. C. 810, 13 S. E. 861."

The later decisions have all followed this rule, among them, *Shelby v. Railroad*, 147 N. C. 537, 61 S. E. 377; *Moore v. Lumber Co.*, 150 N. C. 261, 63 S. E. 953; *Smith v. Miller*, 155 N. C. 242, 71 S. E. 353; *Shields v. Freeman*, 158 N. C. 123, 73 S. E. 805; *Chadwick v. Railroad*, 161 N. C. 209, 75 S. E. 852; *Walker v. Reeves*, 165 N. C. 35, 80 S. E. 885; *Chambers v. Railroad*, 172 N. C. 555, 90 S. E. 590; *Joyner v. Reflector*, 176 N. C. 277, 97 S. E. 44; *Headman v. Commrs.*, 177 N. C. 261, 98 S. E. 776, and many other cases besides those disposed of by P. C., the ruling being so well settled.

In *Joyner v. Reflector Co.*, 176 N. C. 277, 97 S. E. 44, Allen, J., said:

"This appeal is premature and must be dismissed, because the order appealed from disposes of only one question of many arising upon the record (*Hinton v. Ins. Co.*, 116 N. C. 222; *Richardson v. Express Co.*, 151 N. C. 61); but upon dismissal, the exceptions, duly taken, are preserved to be passed on upon appeal from the final judgment. *Gray v. James*, 147 N. C. 141."

The two latest cases probably are *Hoke, J.*, in *Lipsitz v. Smith*, 178 N. C. 100, 100 S. E. 247, and *Thomas v. Carteret*, 180 N. C. 111, 104 S. E. 75, where Brown, J., says:

"We are of opinion that this appeal is premature, and under the rules of the court it must be dismissed *ex mero motu*. It is well settled by numerous decisions that this court will not entertain premature or fragmentary appeals. *Cameron v. Bennett*, 110 N. C. 277; *Milling Co. v. Finley*, 110 N. C. 412."

The defendants should have noted their exceptions and have brought up the case when a final judgment was entered. Of course until final judgment was entered no exception could issue, for otherwise the plaintiff might have collected on its judgment while defendants' demand by way of counterclaim was left undetermined. The costs of the appeal will be divided between the parties.

[2] Though the case must go back, the court may in its discretion, as it sometimes has done, express its opinion upon the merits so far as it may be a guide in the next trial. *Milling Co. v. Finley*, 110 N. C. 412, 15 S. E. 4; *State v. Wylde*, 110 N. C. 503, 15 S. E. 5, and citations to those two cases in *Anno. Ed.*

[3, 4] Judgment having been rendered upon the pleadings, all that is set up in the answer is for the purposes of the appeal admitted to be true. United States Compiled Statutes, § 8835b (Act Oct. 15, 1914, ch. 323, § 2) forbids "discrimination in price between purchasers of commodities, where the effect may be to lessen competition or tend to create a monopoly," as unlawful, and provides:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities," etc.

This shipment was from Penn-Allen, Pa., to the defendants in Scotland county, and the judgment upon the pleadings admits the allegation in the answer for the purposes of this appeal that there was a discrimination and overcharge against the defendants of \$1.10 per barrel. The contract was therefore unlawful, and at most the plaintiff was entitled to recover the amount charged, deducting \$1.10 per barrel upon the two carloads set out in the first cause of action and on the carload in the second cause of action, for which they are liable, not upon the contract, which is unlawful, but upon a quantum meruit, having accepted the shipment. The judgment rendered upon the pleadings on the first and second causes of action is erroneous and is set aside. This matter will be open to both parties as *res nova* on the new trial.

As to the third cause of action, the defendants claim that they are not liable both by reason of the carload, 289 barrels, being in excess of the usual carload 231 barrels ordered, and by reason of the \$1.10 per barrel excess in price. No judgment having been rendered as to this cause of action, the allegations in the answer are not taken to be true, as in regard to the first and second causes of action, and we have nothing to review.

As to the counterclaim for threefold damages for the cost of the storage of the fifth and last carload and the threefold damages of \$2,142.57 by reason of the overcharge of \$1.10 per barrel on the other four carloads which the plaintiff claims under the provisions of the United States Compiled Statutes of 1916, section 8829, being section 7 of the Anti-Trust Act of July 2, 1890, the plaintiff contends that the defendants cannot recover the treble damages by counterclaim pleaded in an action to collect the purchase price, but must pay for the goods and bring an independent action in the federal

court under Compiled Statutes, § 8835d (Act Oct. 15, 1914, ch. 323, § 4). This matter also has not been passed upon by the court below, and there is nothing for us to consider.

The appeal must be dismissed, and upon the trial of the whole action an appeal will lie from the final judgment upon the whole controversy.

Appeal dismissed.

(182 N. C. 518)

BUILDERS' SASH & DOOR CO. v. JOYNER.
(No. 63.)

(Supreme Court of North Carolina. Nov. 16, 1921.)

Estoppel §—44—After-acquired title held not to inure to grantees by way of estoppel as against one having prior registered title.

Where S. and wife mortgaged land owned by them by a deed duly registered, and the wife after foreclosure of the mortgage repurchased the land and conveyed to plaintiff, the title acquired by such repurchase did not inure by way of estoppel to the benefit of one to whom they had previously conveyed, whose deed was registered subsequent to the mortgage as against plaintiff, who had the prior registered title.

Appeal from Superior Court, Nash County; Calvert, Judge.

Action by the Builders' Sash & Door Company against W. D. Joyner for trespass and to remove cloud on title. Judgment for plaintiff, and defendant appeals. Affirmed.

The court charged the jury that on the facts in evidence, if accepted by them, they would find for plaintiff.

E. B. Grantham, of Rocky Mount, for appellant.

Battle & Winalow, of Rocky Mount, for appellee.

HOKE, J. The evidence tended to show that on February 27, 1913, Davis conveyed the lot to Jones Smith, and it is not controverted by the parties that under this deed said Jones Smith acquired the true title. For plaintiff it is shown: That on February 28, 1913, Jones Smith and wife, Nellie Smith, conveyed the land to J. B. Ramsey to secure a debt to B. H. Bunn, said deed being duly registered in the county on April 11, 1913; deed of foreclosure, under said deed of trust, to Mrs. Ella B. Ramsey dated December 11, 1914, registered January 9, 1915; third deed of bargain and sale for value from the purchaser, Mrs. Ella Ramsey, to Nellie Smith, dated August 20, 1917, registered August 22, 1917; and a warranty deed from Jones Smith and wife, Nellie, to plaintiffs, dated November 24, 1917, registered January 25, 1918. And for defendant:

First, deed of bargain and sale with covenant warranty from Jones and Nellie Smith, his wife, to William Bullock, dated April 10, 1913, registered March 11, 1914. Second, mortgage deed from William Bullock and wife to J. N. Bone, securing a debt, dated March 10, 1914, registered March 11, 1914; Third, deed from J. N. Bone, mortgagee, to W. D. Joyner, defendant, pursuant to foreclosure under the mortgage deed, dated October 10, 1918, registered February 5, 1917.

There was proof also and without contradiction that plaintiff had acquired its title and paid for same without any actual notice and knowledge of defendant's claim or the deeds upon which it is made to rest.

From this statement it appears that the plaintiff's claim of title rests upon a connected line of deeds beginning under a deed from the true owner, Jones Smith, duly registered in the county on April 11, 1913, that of defendant under deeds beginning by a deed from Jones Smith and wife, with covenants of warranty, registered in the county March 11, 1914, and plaintiff's title from the true owner having the prior registry should prevail in the case unless, as defendant contends, the title of plaintiff's immediate grantor, Nellie Smith, inured to support and validate the deed of bargain and sale made by said Nellie Smith and her husband to William Bullock, which was registered March 11, 1914, and passing the title from Nellie Smith eo instanti, that the same was subsequently acquired under the deed from Ella Ramsey, etc.

This doctrine of title by estoppel, and under which a subsequently acquired title inures to make good a former deed of the grantor, made at a time when such grantor had no title, has been approved and applied in several decisions with us, and is very generally recognized. *Hallyburton v. Slagle*, 132 N. C. 947, 44 S. E. 655; *Wellborn v. Finley*, 52 N. C. 228-237; *Hagensick v. Castor*, 53 Neb. 495, 73 N. W. 932; *Van Rensselaer v. Kearney et al.*, 52 U. S. (11 How.) 297-327, 13 L. Ed. 703; *Doe v. Oliver*, 2 Smith's Lead. Cas. p. 568. The headnote in this last case thus stating the principle: "The interest when it accrues feeds the estoppel."

Whether this mode of acquiring title shall be regarded as a conveyance taking effect as of the date of the former deed, or as an equitable principle made available under common-law forms as suggested by Mr. Rawle in his valuable work on Covenants, is not a settled position, numerous cases have undoubtedly treated it as a conveyance, but in many of them the position was recognized as necessary to enable the claimant under the former deed to properly protect the estate against the intervening acts of trespassers and others, strangers to the title; but as against purchasers of this title the

better doctrine is that this mode of acquiring title rests upon equitable principles and is not available against purchasers who have acquired the legal title for value and without actual notice. Both Mr. Rawle and Mr. Bigelow in their work on Estoppel favor this view (Rawle on Covenants, §§ 259-265; Bigelow on Estoppel, p. 418 et seq.), and the same position is maintained by Judge Hare in his note to *Doe v. Oliver*, Smith's Lead. Cas., supra.

Whatever may be the weight of judicial decisions on this subject, under general principles, the better considered authorities are agreed that under and by virtue of our registration acts the prior registry shall prevail as against a title of estoppel except as to a purchaser with notice. And in determining this question of notice the decisions hold that a purchaser having the prior registry is not affected with constructive notice by reason of deeds or claims arising against his immediate or other grantor prior to the time when such grantor acquired the title, but the deed or instrument first registered after such acquisition shall confer the better right. *Wheeler v. Young*, 76 Conn. 44, 55 Atl. 670; *Way v. Arnold*, 18 Ga. 181-193; *Bingham v. Kirkland et al.*, 84 N. J. Eq. 229; *Calder v. Chapman*, 52 Pa. 359, 91 Am. Dec. 163; *Ford v. Unity Church Society*, 120 Mo. 498, 25 S. W. 394, reported also in 23 L. R. A. 561, with an instructive note on the subject, 41 Am. St. Rep. 711; 2 Dev. on Deeds, p. 1332.

In the construction of our registration laws this court has very insistently held that no notice, however full and formal will supply the place of registration. *Dye v. Morrison*, 181 N. C. 309, 107 S. E. 138; *Fertilizer Co. v. Lane*, 173 N. C. 184, 91 S. E. 953; *Quinnerly v. Quinnerly*, 114 N. C. 145, 19 S. E. 99. And under such interpretation there is doubt whether this doctrine of title by estoppel would be allowed to prevail against one holding by a prior registry, whether with or without notice. In the Georgia case heretofore cited (18 Ga. at page 193) Judge Lumpkin gives decided intimation that the doctrine of title by estoppel no longer prevails as against the provision and policy of our registration acts. The question, however, does not arise in this record, as all the evidence is to the effect that the plaintiff, having the prior registered title, acquired the same for full value and without notice of defendant's claim.

Plaintiff contends also that the doctrine of title by estoppel does not apply to a married woman who has joined in a conveyance of her husband's land, though the deed may contain general covenants of warranty, and the wife's interest does not appear on the face of the instrument, and cites authorities which seem to favor this view. 10 R. C. L. p. 741, and cases cited. Under terms of the

deed in this case and the broad provisions of our enabling statutes known as the Martin Act (Cons. St. § 2507), the position may be otherwise in this jurisdiction, but we now make no definite ruling on the question, preferring to rest our decision on the right arising to plaintiff by reason of the priority of registration and the purchase without actual notice of defendant's claim.

There is no error, and the judgment for plaintiff is affirmed.

No error.

(182 N. C. 425)

ALLEN v. GARDNER. (No. 399.)

(Supreme Court of North Carolina. Nov. 16, 1921.)

1. Trial \S 165—Plaintiff's evidence alone considered on motion for nonsuit.

The evidence for plaintiff is alone to be considered on a motion for nonsuit.

2. False Imprisonment \S 39—Malice and probable cause held questions for jury.

In an action for false imprisonment brought by a regular in the United States army against the commanding officer of the National Guard engaged in preventing rioting, evidence held to make question for the jury as to whether the imprisonment was without probable cause and malicious; plaintiff's evidence tending to show that no rioting was in progress, and that he was arrested merely because he refused to sleep at the National Guard barracks instead of a hotel.

3. False Imprisonment \S 8—Commanding officer of National Guard liable for sending arrested United States soldier to jail.

If the commanding officer of the National Guard engaged in preventing rioting believed plaintiff, a regular in the United States army, to be a member of his command, he should have sent him to the barracks instead of under guard to the city jail upon his insisting on going to a hotel, instead of to the barracks, to sleep.

4. Militia \S 1—Can act only by authority and in execution of civil power.

The supremacy of civil authorities over the military is at the very basis of our form of government, and the military can act only by authority and in execution of the civil power.

5. Militia \S 19—Soldier liable for acts with or without orders or in excess of orders.

A soldier is responsible for damages for wrongful acts done by him whether with or without orders or in excess of his orders; his being a member of the military giving him no license to do those things which a civilian cannot do.

6. Militia \S 19—Officer arresting person must not use unnecessary force and is liable for oppression or any willful injury.

A military officer may legally arrest a person in given instances, but no more force must be used than is necessary, and, if the power is

exercised for purpose of oppression or any injury is willfully done, he will be liable.

7. False Imprisonment ¶40 — Instructions held sufficiently favorable to defendant commanding officer of National Guard.

In an action against officer of National Guard by a regular in the United States army for false imprisonment, instructions held sufficiently favorable to defendant.

8. False Imprisonment ¶40—Instruction on malice properly refused.

In an action for false imprisonment against a commanding officer of the National Guard engaged in preventing rioting, an instruction that plaintiff could not recover unless defendant was moved by personal ill will or malice toward plaintiff was properly refused.

9. Appeal and error ¶927(3)—In reviewing motion for nonsuit only evidence favorable to plaintiff can be considered.

While the jury could consider the evidence favorable to defendant, the court on appeal in reviewing the denial of a nonsuit is privileged to consider only the evidence in favor of plaintiff and with the most favorable inferences from it in his favor.

Appeal from Superior Court, Davidson County; Finley, Judge.

Action by James R. Allen against June T. Gardner. From a judgment for plaintiff, defendant appeals. Affirmed.

This was an action for false imprisonment. The plaintiff alleges that he was wrongfully arrested and imprisoned in the city jail of Charlotte under the orders and directions of the defendant, in command of the First Regiment, North Carolina National Guard. The defense was that the defendant was acting under the orders of the Governor to quell a threatened riot in that city, and arrested the plaintiff upon a reasonable apprehension that it was his duty to do so.

The pleadings raised the issue whether the conduct of the defendant was in good faith or was arbitrary and unwarranted. The jury found all the issues against the defendant, who makes no exception except as to the refusal to nonsuit and the refusal to give certain prayers for instruction, which, as the record shows, the court substantially gave. From the verdict and judgment the defendant appealed.

Phillips & Bower, of Lexington, and J. S. Manning, Atty. Gen., for appellant.

P. V. Critcher and J. R. McCrary, both of Lexington, for appellee.

CLARK, C. J. [1,2] The evidence for the plaintiff, which alone is to be considered on a motion for nonsuit, was to the effect that the plaintiff was not a member of the defendant's command "the First North Carolina National Guard," but was a regular in the

United States army on furlough, whose uniform and hat distinguished him from the members of the National Guard. The evidence also shows that he was a man of good character and went to Charlotte at the invitation of the officers of the Lexington Company to act as a bugler at the 20th of May celebration the next day. He had taken no bedding or other equipment with him, and therefore, not being prepared to sleep in the barracks of the National Guard on the night of the 19th, he was on his way to the hotel, all of which, he testifies, he explained fully and respectfully to the defendant when he was arrested, but avers that the defendant arbitrarily and unjustly, without reasonable cause and without any necessity to prevent a riot and without authority, sent him to jail.

The testimony of plaintiff and his witnesses is that at the time of the plaintiff's arrest and imprisonment and for some time previously the streets had been cleared of both civilians and soldiers with the exception of the guard of soldiers, and at the time of the plaintiff's arrest there was no commotion or disturbance going on anywhere. When the plaintiff was halted by one of the sentinels, he promptly obeyed the command, and when asked where he was going replied that he was a member of the regular army and did not belong to the National Guard, and was going to the hotel to get a bed to sleep on; that Col. Gardner, the defendant, told the plaintiff that "he would have to go back to the barracks." The witnesses testify that the plaintiff in a respectful manner repeated to Col. Gardner the above statement, and stated his object was to find a bed to sleep, whereupon the defendant told him that he would have to respect him, and the plaintiff in a most respectful manner did salute him, but the defendant replied that "He did not give a d—— for his salutes," and in an angry manner told the plaintiff that he "would give him a bed" and ordered the witnesses to take him under arrest and carry him to jail, which was done, and the plaintiff was thrown into the city prison, with the humiliating circumstances of its filth and odors and disorderly inmates, where he was kept confined until the next morning, when he was released, as the defendant claims, on his orders.

[3] If the defendant deemed the plaintiff was a member of his command, he should have been sent back to the barracks, and there is no evidence which justifies his being sent under guard to the city jail, which was a humiliation to a soldier, and which was especially unwarranted as to the plaintiff, who for the purposes of this occasion was a civilian, attending the celebration as the guest of the officers of the Lexington Company.

The evidence of all these witnesses, with slight contradiction from the defendant's witnesses, was that the manner and conduct of the plaintiff was calm, quiet, respectful, and inoffensive, and that the conduct of the defendant was angry, offensive, arbitrary, and without reason or necessity, and that the plaintiff disobeyed no order of the defendant, and that his arrest and imprisonment was unnecessary to preserve the peace and order of the city, in order to prevent any further trouble, if there had been any prior trouble worthy of mention, which the record does not disclose. The witnesses testify to seeing only one man apparently hurt, and the plaintiff, when arrested, knew nothing of any riot or disturbance having occurred.

On the motion to nonsuit the evidence for plaintiff must be taken as true. The jury upon the issues submitted found that the arrest and imprisonment was without probable cause and was malicious.

[4] With every allowance for the excitement and confusion, and the possible misunderstanding of the situation, there was evidence properly submitted to the jury upon which they found their verdict. The supremacy of the civil authorities over the military is at the very basis of our republican form of government, both state and federal, and the military can act only by authority and in execution of the civil power.

"A member of the state militia, whether a private or an officer, in active service, is not relieved from civil liability, for his acts while so engaged, on the ground that he acted in obedience to orders received through the regular military channels." *Frank v. Smith*, 25 A. & E. 319, and notes.

[5, 6] A soldier is responsible for damages for wrongful acts done by him, whether with or without orders or in excess of his orders. His being a member of the military does not give him license to do those things which a civilian cannot do. A military officer may legally arrest a person in given instances, but no more force must be used than is necessary, and, if the power is exercised for the purpose of oppression or any injury is willfully done, he will be answerable. 18 R. C. L. 1082.

[7] The requirement of reasonable good faith and probable cause and the evidence tending to show arbitrary and oppressive use of authority by the defendant are fully and correctly set out in the judge's charge, who instructed the jury that, if the plaintiff refused to go to barracks when there was danger of the renewal of a riot, or if the defendant had reasonable ground to believe that the plaintiff's going up the street in uniform might excite the negroes, or tend to bring on a renewal of the trouble, they should answer

the second issue as to probable cause in favor of the defendant.

The court further charged the jury that under the circumstances the defendant's conduct should not be weighed in golden scales, and if he acted in good faith and under good reasons, the jury should answer the issue in his favor.

The court further charged the jury that, if the plaintiff went with the soldiers to Charlotte as their guest, he was under obligation to abide the military rules and regulations and render obedience to the officers of the militia, and had no right to resist any lawful command of the defendant, who had a right to prevent the plaintiff from going up town if there was reason to apprehend that it might cause trouble between the whites and blacks. Indeed, the larger part of the charge was the statement of the contentions for the defendant and giving at length substantially the instructions asked by his attorneys. These were as favorable as he could expect, if not indeed in some respects too much so.

[8, 9] The court properly refused to give the prayer that the plaintiff could not recover unless the defendant was moved by personal ill will or malice towards the plaintiff. While the jury could consider the evidence that tended more favorably towards the defendant, as already stated, the court on appeal is privileged to consider on the motion to nonsuit only the evidence in favor of the plaintiff and with the most favorable inferences from it in his favor.

The facts have been found by the jury upon evidence that, if believed, justified their findings, and without any erroneous statement of the law prejudicial to the defendant. No error.

(182 N. C. 434)

ANDERSON V. TOWN OF ALBEMARLE. (No. 412.)

(Supreme Court of North Carolina. Nov. 16, 1921.)

1. Appeal and error \S 1046(3)—Where verdict was directed at close of all the evidence, appellant may not complain that he was compelled to open.

In proceedings to levy assessment on property for street improvement where the verdict was directed at the close of all the evidence, appellant may not complain that the burden of proof was put on him by requiring him to open the case.

2. Municipal corporations \S 484(1)—Party attacking assessment roll for street improvements has burden of proof.

The assessment for street improvements is prima facie evidence of a valid assessment and of the regularity and correctness of all prior

proceedings, and one attacking its validity has the burden of proof.

3. Municipal corporations \S 484(3)—Exclusion of testimony by property owner that his property was not benefited held correct.

In proceedings to levy an assessment upon property for street improvements, exclusion of testimony of the property owner that his property was not benefited was correct.

4. Municipal corporations \S 484(2)—Determination of governing board as to what lands would be benefited by improvements is conclusive.

The question of benefits by street improvements is one of fact, and the governing board of a municipality under legislative authority is vested with the power to determine what lands will be benefited, and their determination is conclusive upon the owner, except in rare cases.

5. Municipal corporations \S 508(1)—Assessments for improvements according to benefit reviewable on appeal.

The assessment to each property owner for street improvements by apportionment according to benefits is subject to review by appeal.

6. Municipal corporations \S 429—Paving of entire width of street not necessary in order to assess abutting property for improvements.

Under Pub. Laws 1915, c. 56, § 13, authorizing an assessment to be made against property abutting on the street, section 5, requiring petition for improvements to be signed by a majority of the owners of the lots abutting upon the street or streets, or part of a street proposed to be improved, section 6, requiring that the proportion of the costs be assessed upon abutting property, and section 8, providing that one-half of the cost of improvements shall be assessed on lots abutting directly on the improvements, it is sufficient if the property assessed adjoins the street improved, and is not necessary that the paving for which the assessment is made extend the entire width of the street.

7. Municipal corporations \S 429—"Abutting on the improvement"; "abutting property" defined.

"Abutting on the improvement" means abutting on the street that is improved, and this does not require that the pavement shall extend the entire width of the street. By the term "abutting property" is meant that between which and the improvement there is no intervening land.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Abutting.]

8. Municipal corporations \S 429—To be assessable for street improvements land need not abut directly on street.

Land need not necessarily abut directly on the part of the street that has been improved to subject it to liability for its share of the cost of the improvement.

Appeal from Superior Court, Stanly County; Bryson, Judge.

Proceedings by the Town of Albemarle to assess property for street improvements. From assessments on property of J. N. Anderson, he filed exceptions and appealed from the commissioners to the superior court, and from judgment for the town, said Anderson appeals. No error.

The commissioners of Albemarle, under authority of chapter 56, Pub. Laws 1915, assessed against the plaintiff for improvements on the street in front of his lot on North street the sum of \$207.05. He filed exceptions and appealed. In the superior court the court instructed the jury, if they believed the evidence, to answer the issue \$207.05 with interest, and the plaintiff appealed to this court.

Raper & Raper, of Lexington, and R. L. Brown, of Albemarle, for appellant.

R. L. Smith & Son, of Albemarle, and Manly, Hendren & Womble, of Winston-Salem, for appellee.

OLARK, C. J. [1] The plaintiff excepted and assigned as error that the court refused to require the defendant to open the case and thereby required him to take the burden of proof. Since at the close of all the evidence the court directed the verdict, it could make little difference upon whom the burden of proof was placed.

[2] The assessment had been made by the commissioners under chapter 56, Laws 1915, and it had been reviewed and approved by them on exceptions filed by the plaintiff. The assessment roll is prima facie evidence of a valid assessment, and of the regularity and correctness of all prior proceedings. McQuillin, Mun. Corp. § 2117, which he says is based upon the general maxim that public officers are presumed to have acted rightly until it is otherwise made to appear. In the absence of any showing to the contrary, assessments are presumed valid, and he who attacks their validity has the burden of establishing by competent evidence the contrary. Justice v. Asheville, 161 N. C. 62, 76 S. E. 822.

[3] The second exception is to the refusal of the court to allow the plaintiff to testify that the work done on the street did not in any manner benefit his property or enhance its value. It is not open to the property owner to say that the improvement is not a benefit to the property. Doubtless, if the owner's opinion on this point was to govern, there would be few streets or sidewalks improved in their entire length.

[4] The question of benefit is one of fact, and the governing board of a municipality under legislative authority is vested with the power to determine what lands will be benefited by the improvements, and their determination is conclusive upon the owner of the ground charged with the costs of the

improvements, except in rare cases. *Felmet v. Canton*, 177 N. C. 52, 97 S. E. 728; *Justice v. Asheville*, 161 N. C. 62, 76 S. E. 822; *Tarboro v. Staton*, 156 N. C. 504, 72 S. E. 577.

[5] There are several methods of apportioning the costs of improvements, but there are two which are generally recognized—I. e., apportionment according to benefits and apportionment according to frontage—but the liability of the land to assessment is determined by the municipality under the authority of the Legislature. The assessment to each owner when the apportionment is according to benefit is subject to review by appeal.

This matter is fully discussed 25 R. O. L. at page 138, and the general principles applicable on the question of assessment of benefit is discussed 25 R. O. L. 160. The general principles of apportionment when made, as in this case, according to frontage are set forth 25 R. O. L. 144 et seq.

[6] The plaintiff excepted to the action of the court in directing the jury to answer the issue in favor of the town upon these grounds:

(1) The petition does not sufficiently describe the local improvement to be undertaken. An examination of the record shows, in our judgment, an entirely sufficient description of the improvements to be undertaken.

(2) The second objection is that the order of the board prescribed that the street should be "improved by covering the same with sheet asphalt," whereas only 30 feet in the middle was paved, leaving a space of 22½ feet between the plaintiff's property and the paved portion of the street, and the principal point of this appeal lies in the contention that the plaintiff's lot does not "abut on the improvement."

If there was force in this objection, then the town could not impose any part of the improvement of a street upon the adjacent landowners unless the street was paved to its entire width. In the good judgment of the board of the town of Albemarle this was not required at the present time by the needs of traffic in that town, and to have done this would have more than doubled the assessment upon the plaintiff's property, of which he already complains.

Section 13 of the statute authorizes the assessment to be made against "the property abutting upon said street or streets," and in another place says "abutting on the improvement." We take it that the intention of the statute which authorizes the apportionment of the charge mentioned in the statute and assessed by the board, according to frontage, is that the lots abutting on the street which is improved shall be assessed, and not that the town shall be required to improve the entire width of the street.

Section 5 of the act requires that the petition shall be signed by a majority of the

owners of the lots "abutting upon the street or streets or part of a street proposed to be improved," and section 6 says that the proportion of the costs is to be assessed "upon abutting property." Section 8 provides that one-half of the total cost "of a street or sidewalk improved * * * shall be specially assessed upon the lots and parcels of land abutting directly on the improvements according to their respective frontage thereon," and section 13, as above stated, refers to the assessment being against "the property abutting upon said street or streets."

[7] We think it clear that all these mean the same thing, and that the words "abutting on the improvement" means abutting on the street that is improved, and that this does not require that the pavement shall extend the entire width of the street when this would be an unnecessary cost, and would greatly enhance the burden of which the plaintiff in this case complains. By the term "abutting property" is meant that between which and the improvement there is no intervening land. *Millan v. Charlton*, 145 Iowa, 648, 124 N. W. 766.

[8] Land need not necessarily abut directly on the part of the street that has been improved to subject it to liability for its share of the cost of improvement. Indeed, premises separated from a street by a small stream, but having access to the street by means of bridges, are premises abutting on the street, though the owner of the premises is not the owner of the bed of the stream, and he is liable to assessment provided he has the right of ingress and egress over the intervening land to the improvement. 25 R. O. L. p. 112, and cases cited under notes 8, 9, 10, and 11.

If the plaintiff's contention that the property sought to be assessed must "abut" upon the improvements by coming in actual contact with the improvement could be maintained, then the common practice of paving the middle of a sidewalk, leaving a strip of unimproved sidewalk between the property line and the paved portion, and leaving another strip between the curb and the paved portion, must be abandoned, since the property which abuts the sidewalk could not be assessed, because it does not abut the improved part of the sidewalk.

The common sense, practical meaning of the legislation is that lots abutting the street that is improved, either with respect to the roadway or the sidewalk, are benefited thereby, and should be assessed for a proper proportion of the cost over and above that portion of the cost paid by the city by reason of the general benefit. It cannot be said that the street or sidewalk is not improved because it is not paved the entire width.

In this case the street in front of the plaintiff's property is 75 feet in width, and the traffic over it at this time did not, in the judgment of those to whom the law has com-

mitted the making of the improvement, require the paving of the entire width of the street. In the course of time the town of Albemarle will assuredly increase in population and wealth, so that the traffic will require the street to be paved the entire width, and then the plaintiff or his successor in title will be charged with the additional costs which he is now complaining that he is spared by the action of the authorities. No error.

(182 N. C. 410)

PINNIX v. SMITHDEAL. (No. 393.)

(Supreme Court of North Carolina. Nov. 9, 1921.)

1. Frauds, statute of §74(1)—Agreement to divide profits on sale of realty not within statute.

A contract to divide the profits on a sale of realty purchased by defendant for resale is not within the statute.

2. Limitation of actions, §46(3)—Does not run until time for division of profits.

Under a contract to divide the profits on a sale of realty purchased in defendant's name, where it was expressly agreed that the division was to take place after a sale, limitations did not begin to run until a sale was made.

3. Limitation of actions §46(1)—Repudiation of agreement held not to start running of statute.

Under an agreement to divide the profits on a sale of realty purchased in defendant's name, defendant, by a verbal repudiation of the agreement, could not force plaintiff to presently commence suit, and he was entitled, at his election, to wait until a sale was had.

4. Appeal and error §882(3)—Party claiming agreement to be indefinite not entitled to complain of submission on quantum meruit.

Where, in an action for a share of the profits from a deal in real estate under an alleged agreement, defendant by plea and testimony endeavored to show that the facts were too indefinite to establish an express agreement, he could not insist on appeal that the evidence did not justify the submission of the case on quantum meruit.

5. Limitation of actions §195(3)—Plaintiff held to have burden of proof.

While the law puts the burden of pleading the statute of limitations on defendant, when it is properly pleaded the burden is on plaintiff to show that his cause of action comes within the statutory period, and it was error to charge that the burden was on defendant.

6. Appeal and error §1172(3)—Error as to one issue held to require new trial on both issues.

In an action for one half of the profits from a deal in real estate, the error in charging that the burden of proof was on defendant as to the defense of limitations required a new trial

as to the other issue of damages as well, where the court submitted the case as one on an express agreement and on a quantum meruit, and it could not be said with certainty that the recovery was not based on a quantum meruit, but recovery on that theory would have been barred by limitations.

7. Joint adventures §4(1)—Division of profits on a sale of real estate held estimated on improper basis.

Under an express agreement to divide the profits on a sale of real estate purchased in defendant's name and with his money for purpose of resale, it was error to charge defendant with the full selling price and all rents collected, without allowing anything for interest on the investment or for taxes or other incidental expenses.

8. Joint adventures §5(3)—Question of interest on investment should not have been left to jury, where rents charged against defendant.

In an action for one-half of the profits on a sale of real estate purchased in defendant's name and with his money, where rents were charged against defendant, the allowance of interest on defendant's investment was a matter of right and should not have been left to the jury's discretion.

9. Appeal and error §1172(3)—When error as to one issue will not affect result stated.

It is only where two issues are separate questions, and it is clear that the finding on one could in no way have injuriously affected the decision of the other, that an error committed in the determination of one issue will not be allowed to affect the result.

Appeal from Superior Court, Guilford County; Finley, Judge.

Action by M. H. Pinnix against L. A. Smithdeal. From a judgment for plaintiff, defendant appeals. New trial ordered.

The action is to recover one-half of profits accrued from a deal in real estate, alleged by plaintiff to be due from defendant. There was denial of liability and plea of statute of limitations. On issues submitted the jury rendered the following verdict:

"(1) What amount, if any, is plaintiff entitled to recover of defendant? Answer: \$2,218.24, with interest at 6 per cent. from March 6, 1921.

"(2) Is plaintiff's claim, or any part thereof, barred by the statute of limitations? Answer: No."

King, Sapp & King and Fentress & Jerome, all of Greensboro, for appellant.

Wilson & Frazier, of Greensboro, for appellee.

HOKE, J. There were allegations with evidence on part of plaintiff tending to show that in September, 1914, plaintiff, an agent who had made some successful deals in real estate, was approached by defendant with a request that if plaintiff found a desirable in-

vestment of that kind defendant would advance the money, and on resale they would divide the profits equally; that soon thereafter plaintiff found a piece of property in Greensboro, known as the Hawkins place, and same was purchased by defendant pursuant to agreement. It being considered desirable that some improvements should be made on the property, plaintiff undertook to supervise this work, and about the time or soon after it was completed and the property rented, plaintiff, in December, 1914, suggested that the agreement between them be reduced to writing. The parties having met for that purpose, there was a dispute between them as to how much interest defendant should be allowed on the money he had advanced for the purchase and improvements.

The evidence showed that defendant had procured this money by a sale of some bank stock on which he was realizing 8 per cent., payable semiannually, and he contended the agreement was that in adjustment of this matter he was to be allowed the same per cent. Plaintiff denying this, no written or further agreement was made about it; defendant testifying, in reference to this interview, that when the disagreement arose plaintiff said he would proceed to sell, and defendant replied: "No; you won't sell my property. You haven't invested a cent in it."

[1] The facts in evidence tended further to show that defendant retained control and possession of the property, renting it, etc., till March 5, 1919, when he sold same at a profit, according to plaintiff's testimony, of \$4,436.48; one-half of same, \$2,218.24, being plaintiff's share as per their agreement, and defendant's evidence being to the effect that the entire profits were about \$2,000 or a little more. And there were other facts in evidence which may have tended to render the alleged agreement indefinite. There was also evidence as to the character of plaintiff's service in supervising the improvements and the time he gave to this work; that, on sale being made, plaintiff had demanded the share of the profits alleged to be due him, and payment was refused. Upon this, a sufficient statement to a proper apprehension of the questions presented, the case was submitted to the jury in two aspects of liability; one under and by virtue of the express agreement to divide the profits, and another on a quantum meruit for services rendered, in case the first position should not be sufficiently proved. As to the express agreement, the contract, if so established, being for a division of profits on and after a sale of realty is not within the statute of frauds. *Bourne v. Sherrill*, 143 N. C. 381, 55 S. E. 799, 118 Am. St. Rep. 809; *Michael v. Foll*, 100 N. C. 178, 6 S. E. 264, 6 Am. St. Rep. 577.

[2-4] And under the express terms of the agreement, this division of the profits to take place after the sale, the statute of limitations would not begin to run until a sale was had,

and defendant, by his mere verbal effort to repudiate the agreement in 1914, even if his words amounted to that, could not force the plaintiff to presently commence suit, but he was entitled at his election to await for division the time that the agreement specified, under principle approved in *Smith v. Allen*, 181 N. C. 56, 106 S. E. 143; *Helsabeck v. Doub, Administrator*, 167 N. C. 205, 83 S. E. 241, L. R. A. 1917A, 1; *Smith v. Lumber Co.*, 142 N. C. 26, 54 S. E. 788, 5 L. R. A. (N. S.) 439; *Markham v. Markham*, 110 N. C. 356, 14 S. E. 963. And as to the quantum meruit, while there seems to be very little evidence to justify a submission of that question, the objection is not open to defendant on the record, as he, by plea and all the testimony available to him, was endeavoring to show that the pertinent facts were too indefinite to establish an express agreement, in which event the issue could have been properly submitted on a quantum meruit. On authority he should be precluded from insisting on an exception so entirely inconsistent with the position maintained by him in the trial of the cause. *Lipsitz v. Smith*, 178 N. C. 100, 100 S. E. 247; *Brown v. Chemical Co.*, 165 N. C. 421, 81 S. E. 463; *Railroad v. McCarthy*, 96 U. S. 258, 24 L. Ed. 693.

[5] On the second issue, that as to the statute of limitations, the court charged the jury that the burden of the issue was on the defendant, and the question was considered under that ruling. The law puts the burden of pleading the statute of limitations on a defendant, but, when properly pleaded, the burden is then on the plaintiff to show that his cause of action comes within the statutory period. *Sprinkle v. Sprinkle*, 159 N. C. 81, 74 S. E. 739. The charge of his honor therefore is clearly erroneous.

[6, 7] And on the record we are of opinion that there should be a new trial as to both issues. As heretofore stated, the first issue was submitted in two aspects, on the express agreement and on a quantum meruit. As to the first, the statute of limitations could in no event affect the question, as the suit was commenced within a few days after the sale. But on the second ground of imputed liability the statute of limitations would bar the claim; the evidence showing that the services involved in such a position were rendered more than four years before suit brought, and although it would seem that the jury, in determining the first issue, have accepted plaintiff's version of the matter both as to an express agreement and the amount due thereunder, we cannot be so assured of this as to say that the error in the statute of limitation may not in any way have affected the result. While we have found no error in the determination of the first issue, which is covered by any exception, it is clear from a perusal of the evidence that the profits claimed on a resale have been estimated on an improper basis. Under an alleged express

(109 S.E.)

agreement for profits on a sale of the property, defendant has been charged with the full amount of the sale, all of the rents collected, and has been allowed nothing either for interest on the investment or for taxes or any other expenses incident to the ownership and control of the property or the collection of the rents.

Considering the question briefly in a recent decision (*Samatt v. Klaff*, 181 N. C. 503, 107 S. E. 2, the court said:

"'Profit' implies, without more, the gain resulting from the employment of capital, the excess of receipts over expenditures * * * and so understood the expenses must be deducted before the profits can be ascertained."

[8] Apart from this, and in the absence of express agreement affecting the matter, in any fair estimate of profits, when rents are considered as an item of charge, the interest on the capital invested must be allowed for by way of reduction. The court seems to have left this question of interest to the jury, but in a case of this character, the adjustment of profits growing out of a contract, the allowance of interest at the legal rate is of right and should not be left to a jury's discretion. *Bond v. Cotton Mills*, 186 N. C. 20, 81 S. E. 936.

[9] In this aspect of the record we cannot say of a certainty that the jury may not have awarded recovery on the theory of a quantum meruit, and merely adopted plaintiff's estimate as a guide to the conclusion arrived at. We are not inadvertent to a decision at the present term to the effect that, when an issue determinative of the controversy has been properly settled, an error committed in the determination of a second issue will not be allowed to affect the result. *Poindexter v. Call*, 109 S. E. 28, at the present term. But this is where the two are on separated questions, and it is clear that the finding on one could in no way have injuriously affected the decision of the other. But not so here, where the finding of the issue on the statute of limitations under an erroneous ruling may have very real significance from the manner in which the first issue was presented and necessarily considered by the jury.

For the error indicated, plaintiff is entitled to a new trial on both issues; and it is so ordered.

New trial.

(182 N. C. 448)

CAUBLE v. SOUTHERN EXPRESS CO.
et al. (No. 400.)

(Supreme Court of North Carolina. Nov. 9, 1921.)

1. Appeal and error \Leftrightarrow 1064(1)—Instructions submitting wrong measure of damages held harmless in view of evidence.

In shipper's action against express company for damage to cash register sustained

during transportation, instruction giving measure of damages as the difference between the value of the property just before the injury and its value at time of trial held harmless, where the cash register was of the same value at time of trial as immediately following the injury.

2. Appeal and error \Leftrightarrow 1170(1) — New trial granted by Supreme Court only to subserve ends of substantial justice.

In view of Pell's Revisal, § 507, the Supreme Court will not grant a new trial except to subserve the real ends of substantial justice, and unless there is a prospect of ultimate benefit to the appellant.

3. Carriers \Leftrightarrow 137½, New, vol. 3 Key-No. Series — Carrier permitted to keep damaged goods on shipper's recovery of value before shipment.

In a shipper's action for damage to a cash register, the carrier will be permitted to keep the register on shipper's recovery of the value thereof preceding shipment.

Appeal from Superior Court, Guilford County; Finley, Judge.

Action by F. P. Cauble against the Southern Express Company and another. Judgment for plaintiff and defendants appeal. Affirmed as modified.

This action was brought to recover damages for the injury to or destruction of a cash register, sold by the plaintiff (who lived and carried on his business at High Point, N. C.) to the Bank of Hickory Grove, at a town by that name in the state of South Carolina, the machine having been shipped via the American Railways Express Company to the consignee at that place. It is alleged that when shipped it was in perfect condition, but when it arrived at its destination it was found to be in a very ruinous state, and the manufacturer could not repair it, even at great cost, because its number had been lost, so it was left in the possession of the American Railways Express Company. The jury assessed the damages at \$300, and defendants appealed from the judgment on the verdict.

John A. Barringer, of Greensboro, for appellants.

Wilson & Frazier, of Greensboro, for appellee.

WALKER, J. (after stating the facts as above). The defendant's first exception, and assignment of error set forth in the case on appeal, is to the charge of the court as to the rule of damages by which the jury was to be guided in assessing the amount which the plaintiff was entitled to recover. It appears the judge charged the jury that the rule of damages was the difference between the market value of the cash register before the injury complained of and the market value of the cash register at the time of the trial,

which was more than a year afterwards. The defendant contends that this is not the correct rule, which is the difference between the market value of the property just before the injury and the said value immediately after the injury, and not the value of the property a year or more after the negligence complained of.

Judge Allen lays down the rule in the following language in the case of *Farrall v. Garage Co.*, 179 N. C. 393, 102 S. E. 617:

"The correct and safe rule is the difference between the value of the machine before and after its injury."

[1, 2] But plaintiff, in making this objection to the measure of damages, overlooks, or rather leaves out, the fact that, although the charge measured the damages by the difference in the value of the cash register before the injury to it and one year after the injury, it appears that the injury to the machine was the same just after it was done as it was one year afterwards, and there was no decrease in its value between the two dates, so that there was practically, and even theoretically, no harm done. When the aid of this court is invoked to grant a new trial, the motion for the same will be carefully weighed by us, and will be denied unless the merits are made clearly to appear. Courts do not lightly grant reversals, or set aside verdicts, upon grounds which show the alleged error to be harmless, or where the appellant could have sustained no injury from it. There should be, at least, something like a practical treatment of the motion to reverse, and it should not be granted except to subserve the real ends of substantial justice. The motion should be meritorious, and not based upon merely trivial errors committed, manifestly without prejudice. Reasons for attaching great importance to small and innocuous deviations from correct principles have long ceased to have that effect, and have become obsolete. The law will not now do a vain and useless thing. The foundation of the application for a new trial is the allegation of injustice, and the motion is for relief. Unless, therefore, some wrong has been suffered, there is nothing to be relieved against. The injury must be positive and tangible, not theoretical merely. For instance, the simple fact of defeat is, in one sense, injurious, for it wounds the feelings. But this alone is not sufficient ground for a new trial. It does not necessarily involve loss of any kind, and without loss or the probability of loss there can be no new trial. The complaining party asks for redress, for the restoration of rights which have first been infringed and then taken away. There must be, then, a probability of repairing the injury; otherwise the interference of the court would be but nugatory. There must be a reasonable prospect of placing the par-

ty who asks for a new trial in a better position than the one which he occupies by the verdict. If he obtains a new trial he must incur additional expense, and if there is no corresponding benefit he is still the sufferer. Besides, courts are instituted to enforce right and restrain and punish wrong. Their time is too valuable for them to interpose their remedial power idly and to no purpose. They will only interfere, therefore, where there is a prospect of ultimate benefit. *Brewer v. Ring and Valk*, 177 N. C. 476, at pages 484, 485, 99 S. E. 358, citing many authorities, and among them *Hilliard on New Trials* (2d Ed.) §§ 1 to 7; *State v. Smith*, 164 N. C. 476, 79 S. E. 979; *Schas v. Asso. Society*, 170 N. C. 420, 424, 87 S. E. 222, *Ann. Cas.* 1918A, 679; *S. Graham and Waterman on New Trials*, 1235; *Hulse v. Brantley*, 110 N. C. 134, 14 S. E. 510; *Alexander v. N. C. Trust Co.*, 155 N. C. 124, 71 S. E. 69; *McKeel v. Holloman*, 163 N. C. 132, 79 S. E. 445. See, also, *Grice v. Ricks*, 14 N. C. 62; *Gray v. Railroad*, 167 N. C. 433, 88 S. E. 849; *Blacklock v. Clark*, 133 N. C. 309, 45 S. E. 642; *Reynolds v. Railroad*, 136 N. C. 345, 48 S. E. 765; *Pell's Revisal*, p. 237, § 507.

Surely when this rule, which is both sensible and just, is applied to the facts in hand, there is nothing to be gained by granting a new trial, for the reason stated by the defendant, and it would, practically considered, be unwise to do so, as the motion, so far as it relates to this ground upon which it is based, is without any genuine merit. If defendant (Director General) had shown that the debris of this machine was of any real value, he would have been entitled to a deduction from the recovery, to the amount of it, as found by the jury, but he did not do so. But it will appear hereafter that this is really immaterial, as we will direct that the machine be kept by the defendant, who can dispose of it in his discretion, and in that way get the benefit of its value, if it has any. This was defendant's principal exception on the merits.

Plaintiff moved in this court to amend process and complaint so as to show more clearly that the injury to the cash register was not caused by the Southern Express Company, but by the defendant Director General of Railroads, having charge of the American Railways Express Company, during the period of federal control, as a war measure, and we allowed the amendment. This disposes of the defendants' contention that the Southern Express Company was the only one sued in this action and that the Director General (in charge of the American Railways Express Company) was not sued, nor was the last-named express company. While we have sufficiently answered the last contention by reference to the amendment of process and pleadings, or complaint, we are of the opinion the amendment was not neces-

sary, but was, perhaps, resorted to as a cautionary measure. The record plainly shows that the summons was addressed to "Walker D. Hines, Director General of the American Railways Express Company," and was served, according to the sheriff's return thereon, "on J. R. Parks, Agent of Walker D. Hines, Director General of American Railways Express Co." and also on the agent of the Southern Express Company, on January 9, 1920. The bond for costs was made payable to the Amer. Railways Express Company. The case was entitled on the record below, "Cable v. Walker D. Hines, Director General," and sometimes as "Cable v. Amer. Railways Express Co.," and was, in all of these names, submitted to the jury. This would seem to be most ample to show, and show conclusively, that the Director General and both express companies were served with process, and the complaint is drawn, accordingly, expressly naming both express companies and the Director General.

The other exceptions are either merely formal or entirely without merit.

The trial of this case was errorless, and it is remanded, with instructions to dismiss the action, with costs to be taxed as to the Southern Express Company, which it appears had no connection with the transaction (*McAllister v. Express Co.*, 179 N. C. 558, 103 S. E. 129); and, as to the Director General of the American Railways Express Company, we affirm the judgment.

[3] The cash register, as above indicated by us, will remain in the possession of the defendant Director General, having charge of the American Railways Express Company, as his property, so that he may get the benefit of its value, if it has any.

Judgment affirmed, as modified.

Affirmed, as modified.

(N. C. 199)

IN RE EDENS' WILL. (No. 287.)

(Supreme Court of North Carolina. Nov. 9, 1921.)

1. Appeal and error \S 692(1)—Ruling excluding question not considered where answer not shown.

Where record does not show what answer witness would have made to excluded question, or what appellants proposed to prove by the excluded evidence, exceptions complaining of the exclusion will be overruled.

2. Appeal and error \S 1032(1)—Error must be shown to have prejudiced appellant.

A judgment will not be reversed in the absence of a showing that the erroneous ruling constituted a denial of some substantial right of the appellant.

3. Wills \S 329(4)—Refusal to charge jurors to attach importance to testimony of subscribing witnesses not reversible error.

On caveat to will based on ground of mental incapacity and undue influence, where subscribing witnesses to the will testified not only as to the mental condition of the testatrix when making the will, but also as to other matters which existed and transpired at other times and places both before and after the date of attestation, refusal to charge jury to attach importance to the testimony of the subscribing witnesses held not reversible error.

4. Wills \S 303(1)—Subscribing witness' testimony as to matters which transpired at time and place other than that of attestation not entitled to special weight.

Testimony of subscribing witness to will is not entitled to greater weight than testimony of other witnesses where it relates to matters which transpired at a time and place other than that of attestation.

5. Wills \S 384—Refusal of instruction held harmless in view of testimony.

On caveat to will, refusal to charge jurors to attach importance to testimony of subscribing witnesses held harmless as to caveators where testimony of such witnesses as to matters which did not transpire at time and place of attestation was favorable to contention of caveators.

On Motion for New Trial.

6. New trial \S 140(3)—Evidence insufficient to warrant new trial on ground of intoxication of juror.

Evidence held insufficient to warrant new trial on ground that one of the jurors was intoxicated during the trial.

Appeal from Superior Court, Robeson County; Daniels, Judge.

Proceeding to probate will of Letilla M. Edens, deceased, to which Allen Edens filed a caveat. No error. Motion for new trial denied.

Issue of *devisavit vel non* raised by a caveat to the will of Letilla M. Edens. Alleged mental incapacity and undue influence are the grounds upon which the caveat is based.

Allen Edens, a bachelor, and his maiden sister, Letilla M. Edens, whose will is the subject of this controversy, owned as tenants in common a valuable farm situated in Robeson county, upon which they lived and worked together for quite a number of years. From time to time they took into their home some young man to act as overseer of their farming interests. W. W. Rowland was employed in this capacity for many years, then Alton McGirt, and finally John C. Crawford, one of the propounders, who came to them when quite a young man and remained with them until they died.

Allen and Letilla Edens had but one living

brother, Frank Edens, who likewise was never married. They also had two sets of nieces and nephews, children of two deceased brothers, and these nieces and nephews are the caveators in this action.

The record is replete with evidence tending to show an estrangement between the testatrix and her relatives from the time of the death of her brother, Allen Edens, in 1917, until her own death in 1919. There is also evidence of John C. Crawford, one of the beneficiaries, having ingratiated himself in her favor and acting somewhat in the capacity of a confidential adviser in relation to her business affairs. And, further, there is evidence appearing on the record tending to show that, prior to the making of her will, the testatrix became so embittered and allowed her prejudices to become so aroused that at times she would work herself into a frenzy, fly into a violent rage, and abuse her relatives, calling them "knaves, robbers, thieves, kings, kaisers, and the celebrated heirs and gang." She was 71 years of age at the time of her death; and she left a considerable estate. Mrs. Ward testified:

"She was an unusually good conversationalist, very intelligent until the last few years of her life. I began to notice a change in her habits decidedly in 1915. From then on the change in her condition grew worse."

There was a strain of hereditary insanity in the family of the testatrix.

Under the will the old Edens homeplace was devised to John O. Crawford, a stranger in blood, and this is urged as evidence of an unnatural mind.

There was much evidence, pro and con, on the question of mental capacity, and some evidence on the issue of undue influence; but, upon these controverted matters, the jury's answer established the validity of the will.

The motion for new trial was made on the ground that one of the jurors was intoxicated during the trial. The evidence in support of the motion consisted of four affidavits that affiants knew juror claimed to have been intoxicated, that they were present during the trial, and that at different times during the trial such juror was plainly under the influence of intoxicating liquor to the extent that he staggered and needed assistance. In opposition to the motion there were the affidavits of the other jurors, with the exception of one who had died since the trial, that there was nothing to indicate that such juror was under the influence of liquor at any time during the trial, the affidavit of the juror himself, who denied having been intoxicated, and the affidavits of others who saw and came in contact with him during the time of the trial, contradictory of facts stated in affidavits in support of the motion.

From a verdict and judgment in favor of the propounders, the caveators appealed.

Johnson & Johnson and McNeill & Hackett, all of Lumberton, Sinclair, Dye & Clark, of Fayetteville, and McLean, Varser, McLean & Stacy, of Lumberton, for appellants.

C. W. Tillett, of Charlotte, Stephen McIntyre, of Lumberton, G. B. Patterson, of Maxton, and Britt & Britt, of Lumberton, for appellees.

STACY, J. [1,2] There are a number of exceptions appearing on the record relating to the admission and exclusion of evidence, but none apparently raises any new question of law which would seem to merit an extended discussion. In several instances it does not appear what answer the witness would have made to the excluded question, nor what the caveators proposed to prove by the evidence which they wanted to offer. Therefore, as we cannot determine what bearing these rulings may have had upon the result, the exceptions must be overruled. *Armfield v. Railroad*, 162 N. C. 24, 77 S. E. 963; *Fulwood v. Fulwood*, 161 N. C. 601, 77 S. E. 763; *Dickerson v. Dall*, 159 N. C. 541, 75 S. E. 808; and numerous cases of like import. The other evidentiary exceptions, or those relating to the court's rulings on questions of proof, are not sufficiently meritorious to warrant a reversal or new trial. Verdicts and judgments are not to be set aside for harmless error, or for mere error and no more. To accomplish this result, it must be made to appear not only that the ruling was erroneous, but that it was material and prejudicial, amounting to a denial of some substantial right. *Cotton Mills v. Hosiery Mills*, 181 N. C. 33, 106 S. E. 24; *Burris v. Litaker*, 181 N. C. 376, 107 S. E. 129; *State v. Smith*, 164 N. C. 476, 79 S. E. 979; and *Cauble v. Express Co.*, 109 S. E. 267, at the present term.

[3] In apt time, and in due form, the caveators requested his honor to give the following special instruction:

"The court charges you that you may attach, because the law attaches, such importance to the testimony of the subscribing witnesses to the will, for that they are known as the witnesses of the law, and the law requires them, not only for the purpose of witnessing the signature of the instrument as to form, and requires them to take certain precautions as to signing in each other's presence and in the presence of the testator, and that they see the testator sign, to protect against fraud, but they are required especially to see that the testator is of sound and disposing mind and memory and is of such mind and memory at the precise point of time when the papers are executed, and that in passing upon the testimony of the witnesses to the will you may observe this rule and consider their testimony in the light of the duty which the law casts upon them with reference to her mental capacity in executing the will."

It is stated that this prayer was taken from the opinion of this court in the case of

Cornelius v. Cornelius, 52 N. C. 593, and the caveators contend that his honor's refusal to give it should be held for reversible error. Marshall, C. J., in *U. S. v. Burr* (Fed. Cas. No. 14,693) 4 Cranch, 470, says:

"Every opinion, to be correctly understood, ought to be considered with a view to the case in which it was delivered."

The facts of the two cases thus presented for comparison are quite different. In *Cornelius v. Cornelius* the testator had been badly wounded some two weeks before he made his will. Having grown worse from his injury, he sent for a physician and the two subscribing witnesses. At the request of the testator, the doctor prepared his will and the witnesses duly attested it. Upon the question of mental capacity—it being alleged that the testator was in extremis when his will was signed—the witnesses testified in detail as to what occurred, and the observations they made of the testator's condition, at the time of declaration and publication. Under these circumstances, it was clear that the subscribing witnesses were in a better position to know the mental condition of the testator at the precise time in question than any one else, and their testimony related only to his condition at that particular time. In the case at bar, however, the subscribing witnesses not only testified as to the mental condition of the testatrix at the time of the execution of her will, but they were also examined about other matters and things, which existed and transpired at other times and places, before and after the date of attestation.

[4] The law charges a subscribing witness with the duty of observing the condition of the testator at the time his will is executed, and to see that no wrong is committed, but as to what may transpire at some other time and place, especially at a subsequent date, when the witness is under no special duty to observe the testator, the law would attach no peculiar importance to his testimony in regard to these matters simply because he was a subscribing witness to the will. Attesting witnesses are witnesses of the law in regard to matters occurring at the time of attestation. They are therefore charged with the duty of observing the attendant circumstances and conditions surrounding the making of a will, but we apprehend they stand on the same footing with other witnesses when they undertake to speak of matters not coming within the scope of their knowledge and observation as such witnesses.

[5] As the prayer of the caveators is general in its terms, and not confined to that part of the testimony of the subscribing witnesses which related only to what transpired when they were charged with this special duty, we think his honor's refusal to give it, as

requested, should not be held for reversible error. On the other hand, if the prayer, by correct interpretation, was intended to apply to the testimony of the subscribing witnesses only when they were charged with this special duty as witnesses of the law, still we think the caveators are not in position to complain; because the evidence of these witnesses, in this particular, was favorable to the propounders. It was only when they spoke of other matters that their testimony seemed to lend color to the contentions of the caveators.

The remaining exceptions are without special merit; and, upon a perusal of the entire case, we conclude that the judgment on the verdict in favor of the propounders must be upheld.

No error.

On Motion for New Trial.

PER CURIAM. [6] There was a motion for a new trial filed in this cause upon the ground of the alleged misconduct of a juror. Caveators aver that the information concerning the instant matter, came to their attention after the adjournment of the term of court, at which the case was tried, and after the same had been docketed here. Upon an examination of the affidavits filed by both sides in regard to the present motion, we are of opinion that it must be overruled; and it is therefore disallowed.

(117 S. C. 426)

BONEY v. CORNWELL et al. (No. 10720.)

(Supreme Court of South Carolina. Oct. 10, 1921.)

1. **Boundaries** ⇨22—Deed calling for land bounded by railroad construed as to boundary.

Deed conveying land described as bounded by railroad conveys merely to the edge of the right of way strip, if the railroad company has a fee-simple defeasible title thereto, but, if the railroad has merely an easement, it conveys to the center of the track, in absence of a showing that the parties intended that grantee should take only to the edge of the right of way strip.

2. **Eminent domain** ⇨317(2)—Railroad's charter construed to give railroad merely an easement in land used for right of way, without payment of compensation on owner's failure to sue for compensation within two years.

Under railroad's charter under Act Dec. 19, 1848 (11 St. at Large 533), providing that in absence of contract with owner land appropriated by the railroad for right of way purposes should be presumed to have been granted to the railroad on owner's failure to apply for assessment of value within two years after construction of the road, provided that on execution sale of the road or part thereof the right and

title to the land shall immediately revert to the original owner, unless purchaser at sale shall keep up road for use of public, the railroad thereby acquired, not the fee in such land, but merely an easement of right of way.

3. Trial \Leftrightarrow 296(2)—Holding that railroad owned land in fee, instead of having merely an easement, held not cured by instruction.

In suit involving issue of whether deed describing land as bounded by a railroad conveyed land merely to the edge of the right of way or conveyed to the center of the track, erroneous holding that railroad had a fee-simple title to the strip of land used as right of way, instead of merely an easement therein, held not cured by instruction requiring jury to decide the boundaries called for by the deed.

4. Adverse possession \Leftrightarrow 115(1)—Question for jury.

In a law action to recover real estate, the question of adverse possession is a jury question.

5. Boundaries \Leftrightarrow 40(3)—Whether adjoining owners agreed as to line is a jury question.

In law action for recovery of real estate, whether adjoining owners agreed as to location of dividing line is a jury question.

6. Ejectment \Leftrightarrow 148—Whether defendants made permanent improvements is a jury question.

In law action for recovery of real estate, question of whether defendants made permanent improvements on land is a jury question.

7. Estoppel \Leftrightarrow 119—Question for jury in law action.

In law action to recover land, the question of estoppel to claim the land is a jury question.

Appeal from Common Pleas Circuit Court of Chester County; T. J. Mauldin, Judge.

Action by J. W. Boney against Mary Jane Cornwell and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

The paragraph of the charter referred to in the opinion follows:

XX. Be it further enacted, that in the absence of any contract or contracts with the said company in relation to lands through which the said road or its branches may pass, signed by the owner thereof, or by his agent or any claimant or person in possession thereof, which may be confirmed by the owner thereof, it shall be presumed that the land upon which the said road or any of its branches may be constructed, together with a space of 65 feet on each side of the center of the said road, has been granted to the company by the owner or owners thereof; and the said company shall have good right and title thereto, and shall have, hold, and enjoy the same, as long as the same be used, only for the purpose of said railroad, discharged from all persons' liens, and no longer, unless the person or persons owning the said land at the time that part of the said road which may be on the said land was finished, or those claiming under him, her, or them, shall apply for an

assessment of the value of the said lands, as hereinbefore directed, within two years next after that part of said road was finished; and in case the said owner or owners, or those claiming under him, her, or them, shall not apply within two years next after the said part was finished, he, she, or they shall be forever barred from recovering said land, or having any assessment or compensation therefor; provided, nothing herein contained shall affect the rights of femes covert or infants, until two years after the removal of their respective disabilities; and provided also, that if the said road, or any part thereof, should be sold at execution sale, for the debts of said company or otherwise, then, and in that case, all the right and title to the land which may have been condemned by virtue of this act shall immediately revert to the original owners, unless the purchaser or purchasers at such sale shall keep up the road for the use of the public, in the same manner and under the same restrictions as by this act it is contemplated the Charlotte & South Carolina Railroad Company should do.

Gaston & Hamilton, of Chester, for appellants.

Glenn & Glenn and S. E. McFadden, all of Chester, for respondent.

COTHRAN, J. Action for the recovery of certain real estate, described in the complaint, containing 13 acres, more or less, tried before Judge Mauldin and a jury, upon certain issues submitted involving title and right to possession. The verdict was in favor of the plaintiff, and the defendants have appealed.

While the complaint seeks the recovery of the entire tract of 13 acres, as a matter of fact the contest is limited to a narrow strip containing between 2 and 3 acres, upon which is located a storehouse, a dwelling house, and other buildings; the remainder of the tract being in the possession of the plaintiff, whose title thereto is not contested. We quote from the appellant's argument:

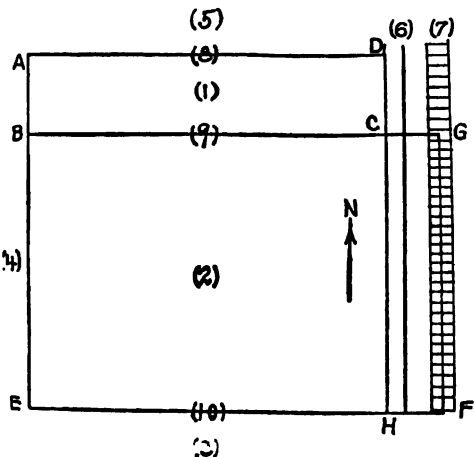
"The land in dispute is the small area of about two acres, on which are located the store building, dwelling, and barn."

A large body of land, of which the 13-acre tract was a part, belonged to Jane I. Cornwell, who was the widow of Elijah Cornwell and the stepmother of his two sons, Eli Cornwell and Dr. W. J. W. Cornwell. The plaintiff claims that on February 15, 1878, Jane I. Cornwell conveyed the 13-acre tract to her stepson Dr. Cornwell; that Dr. Cornwell died in July, 1910, intestate, leaving as his sole heir at law his daughter Mary C. Holler; that on January 7, 1916, Mary C. Holler conveyed to him 63 acres of land, consisting of 50 acres which Dr. Cornwell had previously owned and as to which there is no dispute and the 13-acre tract. The two tracts adjoin each other; the 50-acre tract lying south of the other.

(199 S.E.)

The defendants claim under the will of Jane I. Cornwell, dated February 10, 1870, taking effect at her death in February, 1878, a few days after the execution of the deed to Dr. Cornwell above referred to. By the will she devised her entire estate to her stepson Eli Cornwell, in trust for the use and benefit of himself and his wife, Mary C. Cornwell, during their joint lives and to the survivor for life, and after the death of both to be equally divided between the children of Mary C. Cornwell then living and the children of such as may have predeceased her. Eli Cornwell is dead; Mary C. Cornwell, his widow, is living; she is a defendant in this action, along with the other defendants above named, her children.

The controversy over the disputed area will be better understood by reference to the following rough draft of the situation:



- (1) A B C D — Disputed area.
 (2) A E H D — Location of 13 acres as claimed by plaintiff.
 B E F G — Location of 13 acres as claimed by defendants.
 (3) — 50-acre tract owned by Dr. Cornwell.
 (4) — Barbara Corder land.
 (5) — Other lands of estate of Jane I. Cornwell.
 (6) — Columbia Highway.
 (7) — C., C. & A. R. R.
 (8) — McLarnon line.
 (9) — Hardin line.
 (10) — Original dividing line between Dr. Cornwell and Jane I. Cornwell.

There is no dispute as to the location of the southern line (10) between the 13-acre tract and the 50-acre tract (3) owned by Dr. Cornwell, nor as to the location of the western line between the 13-acre tract and the Barbara Corder land (4); the controversy is as to the location of the northern line between the 13-acre tract and the other land owned by Jane I. Cornwell (5), of which the 13-acre tract was a part; the plaintiff contends that the true line is that run by the surveyor Mc-

Larnon, indicated as (8) on the draft, which would give him the boundaries A E H D, inclosing the disputed area A B C D; the defendants contend that the true line is that run by the surveyor Hardin, indicated as (9) on the draft, which would give the plaintiff the boundaries B E F G, excluding the disputed area A B C D, and giving it to them under the will of Jane I. Cornwell.

The description of the 13-acre tract contained in the deed from Jane I. Cornwell, to Dr. Cornwell, dated February 15, 1878, is the source of the uncertainty and the basis of the controversy. It is as follows:

"All that piece, parcel or tract of land on the west side of the C., C. & A. R. R., containing 13 acres, bounded on the north by lands of Jane I. Cornwell, on the east by C., C. & A. R. R., on the south by Dr. W. J. W. Cornwell, on the west by Barbara Corder land."

The locus of irritation is the descriptive line "on the east by C., C. & A. R. R." Does that mean that the eastern boundary line of the 13-acre tract is the center of the railroad tract, or the western line of the strip constituting the railroad right of way? The right of way of the railroad at this point is 65 feet on each side of the center of the tract, which, on the western side, reaches to about the western edge of the Columbia highway.

It is apparent that, the southern line (10) of the 13-acre tract being fixed, the western line separating it from the Barbara Corder land (4) being also fixed, and the deed calling for 13 acres, the alternative correctness of the McLarnon line or the Hardin line depends upon the proper location of the eastern line as being the edge of the right of way or the center of the railroad track. The survey of Hardin extended the disputed dividing line (9) across the Columbia Highway (6) to the center of the railroad track (7), inclosing an area of 13 acres; the survey of McLarnon extended the disputed dividing line (8) only to the Columbia Highway (6), also inclosing an area of 13 acres. The question, therefore, whether or not the disputed area is included within the description contained in the deed from Jane I. Cornwell, to Dr. Cornwell, depends upon the basis upon which the dividing line should have been run. Should it have had its terminus at the western edge of the right of way or at the center of the railroad track? It is apparent that the further east the dividing line should be extended the further south will be its location.

[1] This question turns in a measure upon a proper construction of the charter rights of the railway company under section 20, Act of 1848 (11 Stat. 539), which will be reported. Did the railway company secure a fee-simple defeasible title to the strip of land or did it secure simply an easement? If the former, the terminus of the northern dividing

line should be at the western edge of the right of way strip; if the latter, under the cases of *Wright v. Willoughby*, 79 S. C. 438, 60 S. E. 971, and *Foster v. Foster*, 81 S. C. 307, 62 S. E. 320, the terminus should be at the center of the railroad track. In the first event the McLarnon line is the true dividing line; in the second the Hardin line, unless as declared in the case of *Wheeler v. Wheeler*, 111 S. C. 87, 94, 96 S. E. 714, it may be shown that the parties intended the edge of the right of way strip and not the center of the track.

The appellants contend that under the section of the railroad company's charter above referred to the company did not and could not acquire more than the easement of right of way, and that the circuit judge erred in holding that they acquired the fee to the strip of land. The respondent in his argument says:

"The presiding judge charged, as requested by the defendant, that the grantor actually owned to the center of the railroad track, subject to the easement of the railroad and the highway, and he further instructed them that the title to this land passed under the deed. The judge also specifically charged that the railroad could not acquire a fee in this land.

"The jury, after being so charged, found for the plaintiff, and the defendant cannot complain of the charge of the judge, which was on this point exactly as he requested."

We do not so construe the charge. The charge contained a distinct and unequivocal declaration that the railroad company, in the absence of a contract with the owner, is presumed to have received a grant from the owner for the strip of land, and to have "good right and title thereto * * * as long as the same be used for the purposes of said railroad." He nowhere charged, as we can find, that the title to this strip passed under the deed, or that the railroad could not acquire the fee to the strip of land. His ruling that a grant was presumed, that the railroad company acquired good title thereto, defeasible upon abandonment, is entirely inconsistent with such a statement. The defendants were entitled to have their first request charged, which was as follows:

"Where a deed to land calls for a road as a boundary, such as a public highway or a railroad right of way, such conveyance of land includes the soil to the center of the way, provided the grantor owned to the center when the deed was executed, and provided there are no words of specific description to show contrary intent."

The appellants in their requests to charge embodying their contention, which were not given, and in their exceptions, squarely raise the issue.

[2, 3] This court, in construing a similar provision in the charter of another railroad

company, has distinctly held that the company thereby acquired, not the fee, but an easement of right of way, of the stated dimensions (*Ragsdale v. Ry. Co.*, 60 S. C. 381, 389, 38 S. E. 609, which was reaffirmed in *Railway v. Beaudrot*, 63 S. C. 266, 268, 41 S. E. 299); and in the following cases the proposition seems to have been accepted without a suggestion of controversy; *Hill v. Ry. Co.*, 67 S. C. 548, 46 S. E. 486; *Harman v. Railway Co.*, 72 S. C. 228, 51 S. E. 689; *So. Ry. Co. v. Howell*, 79 S. C. 281, 60 S. E. 677; *So. Ry. Co. v. Gossett*, 79 S. C. 372, 60 S. E. 956; *Lorick v. Ry. Co.*, 87 S. C. 71, 68 S. E. 931; *A. & C. Ry. Co. v. Electric Co.*, 90 S. C. 299, 88 S. E. 635.

The circuit judge was therefore in error in holding that the railroad company had the fee-simple title to the strip claimed by it as a right of way. While he did charge the jury:

"The jury must decide from the evidence what are the bounds to the land called for by the deed. All the circumstances and facts in evidence must be considered by the jury in deciding the boundaries called for by the deed of Mrs. Jane I. Cornwell put in evidence"

—a charge which, as we have seen, would have been entirely appropriate, under *Wheeler v. Wheeler*, 111 S. C. 87, 96 S. E. 714, to the theory of an easement and not a fee, it could not cure the error in holding that a fee had been acquired; for, if that be so, the dividing line would necessarily have its eastern terminus at the western line of the strip. The conclusion that the presumptive grant to the railroad company was of an easement and not of the fee raises a rebuttable presumption that the eastern line of the 13-acre tract was the center of the railroad track, but as the court declares in *Wheeler v. Wheeler*, 111 S. C. 87, 96 S. E. 714:

"That construction is in conformity with the general rule that where a stream is given as a boundary the grant is presumed to extend to the middle of the stream. But, as clearly appears from the decision in that case, the rule is not invariable or inflexible. It may be shown that the parties intended the edge of the swamp rather than the stream as the boundary, and, of course, when that is made to appear by competent evidence, effect will be given to their intention. It may be conceded that parol testimony of a contrary intention is incompetent to vary or control the construction. But, as pointed out in *Felder v. Bonnett*, it may be done by other competent evidence appearing either upon the face of the deed itself, or of the plat made at the time, and proof of the actual location of a different boundary line on the ground, and possession taken and held to the boundary so located. Especially is this so where the boundary given in the deed is ambiguous or of doubtful meaning, as it clearly is in this case; for Pudding swamp as a boundary may be either the edge of the swamp or the run of the stream."

[4-7] This is a law case, and the questions of adverse possession by Dr. Cornwell, the location of the dividing line by co-operation with the trustees, permanent improvements, estoppel, and perhaps others, are questions for the jury and such as this court is powerless to determine.

The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial.

GARY, C. J., and WATTS and FRASER, JJ., concur.

(117 S. C. 545)

ABERNATHY et al. v. WOLFE, Atty. Gen., et al. (No. 10751.)

(Supreme Court of South Carolina. Nov. 9, 1921.)

Elections §—83—Persons who did not pay their taxes when due and payable held not entitled to vote at special election.

Persons who failed to pay their property and poll taxes on or before the 31st day of December, 1920, when they were due and payable, were not entitled to vote at a special election on the question of annexing a portion of one county to another county, held on January 11, 1921, though paying before the election, and, the number so voting being enough to have changed the result, the election was void, Const. art. 2, § 4, prescribing as a prerequisite of the right to vote the payment six months before any election of any poll tax due and payable, and requiring every voter to prove payment of all taxes assessed against him and collectible during the previous year.

Appeal from Common Pleas Circuit Court of Chester County; Ernest Moore, Judge.

Certiorari by W. L. Abernathy and others, directed to Samuel Wolfe, Attorney General, and others, as State Board of Canvassers, to review a decision in the matter of an election held in Chester County upon the question of annexing a portion of Chester County to York County. Judgment for defendants, and plaintiffs appeal. Affirmed.

The decree of Judge Moore reads as follows:

This matter came before me on the 15th day of March, 1921, and was heard in response to a writ of certiorari issued by me on the 3d day of March, 1921, directed to the respondents, above named, who constitute the state board of canvassers, to review the decision of said board in the matter of an election held in Chester county, S. C., on the 11th day of January, 1921, upon the question of annexing a portion of Chester county to York county.

It appears from the record that on the 20th day of December, 1920, the Governor ordered said election to be held at the time above stat-

ed, and in obedience to said order said election was held at said time. While the order of the Governor was dated the 20th day of December, 1920, it was not received by the commissioners of election of Chester county until the 30th day of December, 1920, and the first notice of said election was not published until the 31st day of December, 1920, being only 11 days before the date fixed for the holding of said election.

On the 18th day of January, 1921, the board of canvassers for Chester county met and organized for the purpose of canvassing the returns of managers and counting the votes and declaring the results of said election. At that time Messrs. D. Ferguson and others, who were opposed to the annexation of said territory to York county, duly filed their notice of grounds of protest and contest of said election. The returns of the managers show that 212 votes were cast at said election, of which 148 votes were in favor of annexation and 64 votes against annexation. It appeared from testimony taken before said board of canvassers that of the total 212 votes cast at said election 97 of the voters so voting had failed to pay their property and poll taxes assessed against them and payable on or before the 31st day of December, 1920. It was claimed by the contestants that the 97 votes mentioned were illegal, by reason of the nonpayment of said taxes on or before the 31st day of December, 1920, although many of said voters paid their taxes after said date and before said election. The county board of canvassers, sustaining all the grounds of protest and contest, held said election to be null and void.

From the judgment and decision of the County board of canvassers, the proponents of annexation served notice of appeal to the state board of canvassers upon several grounds, which are not necessary to be stated here. On being heard by the state board of canvassers, that board affirmed the judgment of the county board of canvassers of Chester county and held said election to be void, upon the ground that the votes of the 97 voters were illegal because they had not paid their taxes prior to the 31st day of December, 1920.

While the petitioners, above named, alleged error in the decision of the said board of canvassers upon several grounds, the principal ground argued before me involved the illegality of the 97 votes above mentioned, and I do not feel it necessary to base my decision herein upon any other than the principal ground that was argued before me, namely, the illegality of said 97 votes.

The evidence is undisputed that 97 of the voters in the election in question had failed to pay their poll and property taxes prior to the 31st day of December, 1920. After a careful consideration of the matter, it appears to me that the petitioners herein are concluded by the decision of the Supreme Court in *Clarke v. McCown*, 107 S. C. 209.¹ That case involved the validity of an election held on the question of annexing a part of Berkeley county to the county of Charleston, and the very point in issue here was raised in that case, because it was alleged "that numerous persons (not named) were permitted to vote, whose votes were not legal because they had not paid their poll tax six months before the election." The election

was held on May 9, 1916. In disposing of this question, the court (107 S. C. at page 215, 92 S. E. 481) says:

"Subdivision (a) of section 4, art. 2, of the Constitution prescribes as one of the prerequisites of the right to vote 'the payment six months before any election of any poll tax then due and payable,' and subdivision (e) of the same section requires of every person offering to vote 'proof of the payment of all taxes, including poll tax, assessed against him and collectible during the previous year.' By the plain terms of the Constitution these provisions apply to all persons offering to vote at any election. Therefore it makes no difference whether it is a general or a special election. The purpose of the lawmakers was to stimulate due performance by the citizens of their duty to support the government, and penalize delinquency in that regard, and forestall the evil practice sometimes resorted to by those interested in elections of indirectly purchasing votes by paying the taxes of delinquents immediately before an election to qualify them to vote therein. It was not intended to penalize by disqualifying one who had not become delinquent in the matter of paying his taxes. One who merely takes advantage of a privilege extended to him by the law is not in default. Therefore, although the taxes for the year 1915 were payable at any time between October 15th and December 31st, without penalty, all electors who paid their taxes on or before December 31st were not in default, and were entitled to vote in any election held after that date, if otherwise qualified. But those who failed to pay their taxes on or before December 31st were disqualified from voting in any election held within six months thereafter. The undisputed evidence shows that some 10 or 12 persons were permitted to vote in this election whose poll tax was paid after December 31, 1915. These votes were illegal; and, as there were enough of them to have changed the result, and as the poll could not have been purged of them because it did not appear how they voted, the election was thereby vitiated." (Italics are supplied in above quotation).

The same question appears to have been raised in the case of *Wright v. State Board of Canvassers*, 76 S. C. 574,² and it appears in the opinion of the court, by inference at least, that it is necessary for a prospective voter at an election to offer proof of the payment of his taxes during the year previous to said election. On page 592 of the report (57 S. E. 542), in affirming the judgment of the Circuit Judge, Chief Justice Pope stated:

"We see no fault in the conclusion of the circuit judge holding it mandatory that each voter should, as a prerequisite to voting, produce his registration certificate. Nor is there any fault in the view of the circuit judge in holding that it was mandatory that every voter should, as a prerequisite to voting, offer proof of his having paid his taxes during the previous year. This was not done in this case at the precincts at Laurens and Clinton. No certificate or receipt of the officer authorized to collect such taxes was produced. The only matter referred to is the oath of the voter that he was qualified to vote. This will not answer the demands of the Constitution and statute. And inasmuch as there were classed as legal voters

hundreds who did not produce certificates of registration and proof of payment of taxes of previous year, the election is void." (Italics are supplied).

This question, therefore, as it appears to me, having been expressly decided by our Supreme Court, I do not think the decision was obiter dictum, or that it would be proper for me to undertake to reconsider the matter now, or to overrule the decision of that court, especially when such question involves a construction of the Constitution of the state. It is therefore ordered and adjudged that the decision of the state board of canvassers, holding said election to be void, be, and the same is hereby, affirmed.

Wilson & Wilson, of Rock Hill, and R. H. Welch, of Columbia, for appellants.

R. L. Douglas, of Chester, and J. E. McDonald, of Winnsboro, for respondents.

WATTS, J. For the reasons assigned by his honor, Judge Moore, it is the judgment of this court that the judgment of the circuit court be affirmed.

GARY, C. J., and FRASER and COTH-RAN, JJ., concur.

(117 S. C. 475)

GAINES et al. v. SULLIVAN et al.
(No. 10733.)

(Supreme Court of South Carolina. Oct. 10, 1921.)

1. Deeds \Leftrightarrow 24, 130—Deed held to give remaindermen a fee as a covenant to stand seized to uses.

A deed conveying land to the grantor's daughter during her lifetime, but reserving a life estate to the grantor, and conveying such land on the death of the daughter to such of her children as might be then living, without any words of inheritance, will be construed as a covenant to stand seized to uses, and hence as passing a fee to the takers after the daughter.

2. Deeds \Leftrightarrow 149—Condition against alienation held valid and not sufficient reason shown for disregarding.

Where a mother, in conveying land to a daughter during her lifetime with a life estate reserved to the mother, and after the daughter's death to such of the daughter's children as might then be living, because of the thriftlessness of the daughter's husband, provided in the deed that the land should not be alienated during the daughter's lifetime, the condition was lawful, and must be respected unless there is a necessity for disregarding it, and it is not a sufficient reason for disregarding it that the husband will squander the income from part of the property and allow other property to deteriorate, and that it will be better for the contingent remaindermen to anticipate the enjoyment of their estate.

\Leftrightarrow For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

3. Life estates \Rightarrow 27(2)—Decree for sale of land and reinvestment notwithstanding condition against alienation held to contain improper provisions.

A decree ordering a sale of land conveyed to a woman for life with contingent remainders to her children, notwithstanding a provision in the deed against alienation, and directing a trustee to reinvest the proceeds in property to be taken in trust for the woman and two children, improperly provided that they should pay the taxes, insurance, and repairs, without providing what should be done if they failed to make such payments, as these provisions were not self-executing.

Appeal from Common Pleas, Circuit Court of Greenville County; T. J. Mauldin, Judge.

Suit by Henrietta E. Gaines and others against Mary Virginia Sullivan and others. From a decree for plaintiffs, defendants appeal. Reversed.

The decree ordered a sale of the property involved and payment of the net proceeds to a trustee and directed the trustee to invest \$8,500 thereof in a house and lot to be conveyed to him in trust to permit Mrs. Gaines to use and occupy it free of rent, but charged with repairs, maintenance, insurance, taxes, and assessments during her natural lifetime, and to purchase other houses and lots to be conveyed to him in trust for each of the two daughters of Mrs. Gaines. It also contains provisions as to the title after the death of Mrs. Gaines.

Martin & Blythe, of Greenville, for appellants.

Cothran, Dean & Cothran, of Greenville, for respondents.

FRASER, J. The circuit decree contains this statement:

"John W. Stokes, a lawyer of the Greenville bar, and his wife, Mary K. Stokes, owned a considerable amount of real estate, a part of it was a lot in the city of Greenville, and the remainder farming land in the country. They had three children, daughters, Mrs. Gaines, Mrs. Sullivan, and Mrs. Hunter.

"Beginning as far back as 1877 and extending as late as 1893, Mr. and Mrs. Stokes made sundry several conveyances, deeds of gift, to their three daughters. Those deeds are described in the complaint and need not be again described in this decree, except certain clauses therein which are involved in this controversy and which will be more particularly referred to hereinafter.

"The conveyances to Mrs. Hunter were in fee simple, without any conditions or limitations; they are not here involved. The conveyances by Mary K. Stokes to Mrs. Gaines were three in number and require more particular description."

Each of the deeds forbade the sale of the land during the life of Mrs. Gaines. This action is brought to construe the deeds and

seeks a sale of some of the land, notwithstanding the prohibition.

"The conveyance was to 'Henrietta E. Gaines during her lifetime only and on the condition hereinafter set forth.' It contains the proviso: 'That said tract of land shall be held, used, and exclusively employed by my said daughter for the annual or yearly support of herself and her children jointly during the natural life of my said daughter, the rents, issues, profits, and income to be paid to her individually and personally and to no one else every year and on her own personal receipt for the same. The said tract of land shall not be sold or alienated in any manner or form whatever by my said daughter or any other person during her natural life, nor be liable for her debts or the debts of herself and children or any of them.' It contained also the following provision, and it is the only one of the three deeds that does: 'If the said land should be sold, alienated, or disposed of in the lifetime of my said daughter, or if any attempt should be made by process of law to subject said tract of land or the rents, issues, profits, or income of the same to the payment of the debts of my said daughter and her children or those of either or any of them, then in either event as alternative said tract of land shall revert to my estate and become a part and parcel of my estate.' It also contained the following limitation: 'I give and convey said tract of land on the death of my said daughter to such of her children as may survive her or be living at her death, share and share alike'—with a provision for representation by children of such child as might die in the lifetime of Mrs. Gaines. It contained this reservation: 'I hereby reserve unto myself the use and enjoyment of the rents, issues, and profits of said land and the absolute control and management of said tract of land during my natural life.' This conveyance was dated July 23, 1883."

[1] The appellant claims that the deed provides for only a life estate, first in Mrs. Gaines, and a life estate in her children. The respondent claims that the deed is a covenant to stand seized to uses, and the takers after Mrs. Gaines take a fee.

[2] The appellation "a covenant to stand seized to uses" was in its origin a pure fiction, created to avoid the great hardship that followed inexpert conveyancing in which words of inheritance were ignorantly or negligently omitted. Whatever its origin, it is now well established as a rule of property. Its use in this case is preeminently just. The deed carries a fee to the takers after Mrs. Gaines. It seems that Mr. and Mrs. Stokes determined to divide their property between their children. They intended to part with the whole estate, reserving to themselves a life estate only. Beyond this life estate there was another life estate to the daughter Miss Gaines. Mrs. Gaines was given two plantations in the country and a house and lot in the city. It appears from the record that in their judgment Mrs. Gaines was fixed for life. She had a good

home and an income. That is, Mrs. Gaines was safe for life, provided her "thrifless" husband did not induce her to dispose of the property. That was the danger. In order to guard against that danger, a sale was forbidden in Mrs. Gaine's lifetime. It is conceded that Mrs. Gaines has a "thrifless" husband. This husband is to be guarded against, and the defense of the daughter is to forbid the sale in the daughter's lifetime. The court is now asked to put its judgment against the judgment of the grantor, who owned the property and had the right to give it away absolutely, or with conditions. Mrs. Stokes gave the property with the condition that it should not be sold during a life in being. The condition was lawful and must be respected and upheld, unless there is a necessity. No necessity has been shown. The reasons urged are two, i. e.: (a) The thrifless husband will squander the income from the plantations and allow the city property to deteriorate; (b) it will well serve the contingent remaindermen to anticipate the enjoyment of their estate. Neither of these amounts to a necessity.

[3] In no event can the plan provided for in the decree be approved. Writing into a decree that those who occupy the new bought houses (even if the hazardous scheme of building be not adopted shall pay taxes, insurance, and repairs are not self-executing provisions, and if they do not do so as directed, what then? While legal proceedings are being perfected to enforce the decree, the houses may burn down, uninsured, and the land sold for taxes, and another sale may be necessary to make repairs.

The decree, in that it provides for a sale of the property in anticipation of the time set in the deed, is reversed.

GARY, C. J., and WATTS, J., concur,
COTHRAN, J., disqualified.

WILSON v. WILSON. (No. 10723.)*

(Supreme Court of South Carolina. Oct. 10, 1920.)

1. Appeal and error \S 1022(3)—Decree of court following finding of master affirmed, unless contrary to weight of testimony.

Where master in chancery and trial judge concurred in their findings of fact, decree appealed from must be affirmed, unless the appellant can convince this court that their findings are against the weight of the testimony.

2. Deeds \S 196(2)—No presumption of fraud in conveyance from parent to child.

The mere fact that a parent deeds property to a child raises no presumption of undue influence, overreaching, wrong, or fraud, such as

to shift the burden to the child to show that there was none.

3. Deeds \S 192—Party attacking deed has burden of overcoming presumption of its validity.

A deed properly executed is presumed to be what it purports to be, and one assailing it has the burden of rebutting this presumption.

4. Contracts \S 99(1)—Where fiduciary relation exists between parties to transaction, the burden of showing good faith rests with the superior party.

Where there is a fiduciary relation between parties, and a business transaction occurs between them, and the superior party obtains the advantage or a possible benefit, a presumption arises against the validity of the transaction, and puts the burden of proving good faith on the superior party.

5. Contracts \S 94(1)—Secured by overpowering will of parties will not be upheld.

Where person has a weak understanding, if the proof is of such weakness as incapacitates or dangerously near borders on incapacity, if the nature of the contract warrants the conclusion that it was not the exercise of deliberate judgment, but that the judgment of another has been imposed in the place of his judgment by cunning, artifice, overpersuasion, and undue influence, the contract will not be upheld.

6. Deeds \S 211(4)—Evidence held insufficient to show undue influence.

In an action to set aside a deed evidence held insufficient to show fraud, undue influence, or overpersuasion in securing its execution.

Cotthran, J., dissenting.

Appeal from Common Pleas Circuit Court of Spartanburg County; Ernest Moore, Judge.

Suit by Berry Wilson against R. G. Wilson. From a decree confirming the report of a master in chancery ordering cancellation of a deed, defendant appeals. Reversed.

J. J. McSwain, of Greenville, for appellant.
Bomar & Osborne, of Spartanburg, for respondent.

WATTS, J. This is an appeal from a decree of Judge Moore confirming the report of Master Lanham ordering the cancellation of a deed of conveyance of real estate from plaintiff to defendant, duly recorded. The action was for that purpose, and after issue joined the case was referred to the master, who made his report, recommending the same.

The report of the master should be incorporated in the report of the case. Defendant appeals, and by six exceptions challenges the judge's conclusions and seeks reversal of the same.

[1] The master and circuit judge having concurred in their findings of fact, the cir-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Republished. See 112 S. E. 330.

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cult decree must be affirmed, unless the appellant can convince this court that their findings are against the weight of the testimony.

[2] The laity, in part, and some of the bar, seem to think that when a father conveys to a child there is a presumption of fraud, wrong, or undue influence. Such is not the law. There is no presumption, from the mere fact the parent deeded property to a child, of undue influence, overreaching, wrong, or fraud, that shifts the burden to the child to show there was none. The peculiar circumstances and facts of each case must determine this.

[3, 4] A deed ordinarily, when properly executed, is presumed to be what it purports to be. And the party assailing it is charged with the burden of rebutting this presumption and proving his case. He who avers and charges must ordinarily prove. The burden of proof is on him. Where there is a fiduciary relation between parties, and a business transaction occurs between them, and the superior party obtains the advantage, or a possible benefit, equity will closely scrutinize the transaction and raise a presumption against the validity of the same and throw the burden on him to prove good faith.

[5] Where a person is of weak understanding, if the proof is of such weakness as incapacitates or dangerously near borders on incapacity, if the nature of the contract warrants the conclusion that it was not the exercise of deliberate judgment, but that the judgment of another has been imposed in the place of his judgment, by cunning, artifice, overpersuasion, and undue influence, the contract will not be upheld. In the case at bar it is not one of principal and agent; it is of father and son.

[6] The son did not live with his father; he lived in another county; he did not start the negotiations which ended in the conveyance; the father did. The family knew what was going on in reference to the matter, including the "in-laws." There was no concealment as to what was going on.

There is no doubt but that the plaintiff is old and had physical infirmities, due to age, but we cannot conclude from his evidence, and that of others, that he was mentally incapacitated to such an extent as not to know what he was doing, and that his solemn deed of conveyance should be set aside; that he should be allowed to get out of what some of his family and his neighbors think to be a bad trade on his part.

The facts of the case were not such as were the facts in *Craddock v. Weekley*, 85 S. C. 329, 67 S. E. 308, and *Devlin v. Devlin*, 89 S. C. 268, 71 S. E. 966, but the principles applicable are those announced by Mr. Justice Hydrick in the last case.

The consideration was a valuable one; the deed was properly executed and delivered; no concealment; a neighbor drew the deed; it was properly witnessed. There is no preponderating evidence of fraud, undue influence, or overpersuading, such as to overreach the father and substitute the judgment of the son for that of the father; in executing the deed the father exercised his will and judgment, and should not, under the evidence, circumstances, and facts, be allowed to repudiate his solemn act.

The exceptions are sustained and judgment reversed.

GARY, O. J., and FRASER, J., concur.

COTHRAN, J. (dissenting). I am satisfied that the findings of the master who had all the witnesses before him, concurred in by the circuit judge upon the facts and the law of the case, are not overborne by the testimony for the defendant, but are supported by the weight of the testimony.

(117 S. C. 437)

SLIGH v. SOVEREIGN CAMP, W. O. W.
(No. 10721.)

(Supreme Court of South Carolina. Oct. 10, 1920.)

Insurance ~~665~~ 665(3)—Evidence held not to show insured knew or should have known he had pleurisy when examined.

In an action on a life insurance policy, questions in the application which as to whether insured had consulted a physician within five years and had had pleurisy, were answered "No," testimony while tending to show that he had had pleurisy, held not to show that he knew or should have known it when examined.

Cothran, J., dissenting.

Appeal from Richland County Court; M. S. Whaley, Judge.

Action by Elizabeth L. Sligh against the Sovereign Camp of the Woodmen of the World. Judgment for plaintiff, and defendant appeals. Affirmed.

Melton & Belser, of Columbia, for appellant.

E. J. Best and E. W. Mullins, both of Columbia, for respondent.

FRASER, J. R. E. Sligh took out a policy of insurance with the appellant. The principal questions in this case arise from the answers to two questions: Have you consulted a physician within five years? and Have you had pleurisy? Both questions were answered "No" in the written application. The testimony tends to show that Sligh had a case of pleurisy, but it fails

to show that Sligh knew it, or should have known it, when Sligh was examined for life insurance. The record shows from the testimony of Dr. Butler, who examined Sligh for the appellant, as follows:

"Doctor, something has been said here in respect to the question here whether or not he had been treated by a physician for five years prior to the application here for insurance. Now, please state whether or not you explained that clause to him at the time that you filled it in in your handwriting here. A. I asked him this question, whether he had been treated in the last five years by a physician for any of the following diseases laid down there. He said, 'No.' 'Had you been in bed treated through a long spell of sickness?' He said, 'No.' "

"Q. Did you explain to him what you meant? A. Anything that incapacitated him or affected his eligibility for insurance.

"Q. Did you explain that to him? A. Yes, sir. He said, 'No.'

"Q. State whether or not he denied that a physician had attended him for some trouble before? A. He said 'No' to my questions. That is all I know. My record speaks for itself.

"Q. Yes, sir. You say you explained to him what you meant? A. Yes, sir. Long spell of sickness.

"Q. Such sickness that impaired his eligibility for insurance? A. Yes, sir.

"Q. You so explained to him in answer to that question there? A. Yes, sir.

"Q. Whether he had been treated by a physician in five years? A. Yes, sir. I went by what was told me in forming my opinion.

"Q. Doctor, necessarily you would not have passed him if he had not stood a good physical examination? A. I would not have examined him.

"Q. State whether or not you made a careful examination of him. A. I would not let the examination go in if he was not eligible for it.

"Q. State whether or not he was sound in every respect from that standpoint. A. It seemed so to me.

"Q. Of health? A. It seemed so to me. Active; came in without his coat on; had been working all day.

"Q. At the time you took his application, he was sound in every respect. A. It seemed so to me. I formed a history of the case—what he tells me—whether or not to let him go on.

"Q. State whether or not, Doctor, you read this question here, which enumerates many different things, among others, the word 'pleurisy.' A. Read over all of it.

"Q. State whether the word 'pleurisy' is not included among many other things here. A. That is included.

"Q. In a great list of things? A. Yes, sir.

"Q. You asked him whether or not he had been treated by a physician within five years? A. For any of those diseases wrote down.

"Q. Which would impair his eligibility for insurance? A. Yes; and he said 'No.'

"Q. He didn't deny he had been treated once or twice by a physician? A. Oh, for some minor trouble. He said he never had been in bed.

"Q. But he admitted he had been treated by

a physician for some minor trouble? A. Yes. He consulted Dr. Du Bose for a cold, he said.

"Q. So he didn't deny that any doctor had attended him in the last five years? A. No.

"Q. And he specifically admitted that Dr. Du Bose had attended him? A. Yes.

"Q. Doctor, how long have you been examining for the Woodmen of the World? A. About 14 years.

"Q. Fourteen years."

Cross-examination:

"By Mr. Belser:

"Q. Doctor, you know that pleurisy is a very serious disease? A. Pleurisy is an inflammation of the pleura covering the lungs.

"Q. And one of the diseases that very frequently leads to consumption. A. Sometimes. But I have seen the fluid extracted, and they get over it very quickly.

"Q. And very frequently, and in the majority of the cases, pleurisy is followed by consumption—tuberculosis? A. Not in the majority of cases. It is possible, though, in a good many cases, because in pleurisy there is but one thing involved; that is the serous membrane covering the lungs.

"Q. Is it a serious illness? A. Yes.

"Q. That is, when one has to be punctured and draw off the fluid? A. Yes.

"Q. And if you had treated a man for pleurisy and had to draw off a good deal of fluid, you would consider that he had consulted you. A. He could be relieved entirely.

"Q. You would consider that he consulted you? A. Oh, yes.

"Q. Is it a serious illness? A. Yes, sir.

"Q. This application—of course, you are the camp physician? A. Yes, sir.

"Q. For this camp? A. Yes, sir.

"Q. And you know what your duties are? A. I think I do.

"Q. And of course you carried them out? A. Yes, sir.

"Q. And this says: 'The camp physician will require the applicant to answer the following questions separately.' Of course, you did that, and you explained to him the names of those diseases here, and he answered, when you asked him if he had a chronic cough, consumption, or grip or pleurisy, that he had not had it. That is what is written down here. And you asked him had he consulted or been attended by a physician for any disease or injury during the past five years? A. Injury, disease of extended character, impairing his liability [eligibility] for insurance, and he said 'No.' "

When Dr. Du Bose was on the stand he did not testify that he had told Sligh that he had pleurisy, but did testify:

"I thought Mr. Sligh had gotten over his first attack very fully."

When Sligh went to Dr. Butler, the Company's physician, for examination, he went in his shirt sleeves from his work, and, so far as Dr. Butler could ascertain from his examination, Sligh was a sound man. Sligh had another spell of pleurisy, and died of tubercular meningitis within a year after the policy was issued.

This is a very much stronger case for the respondent than the case of *Wingo v. Insurance Co.*, 112 S. C. 139, 99 S. E. 436; *Id.*, 101 S. E. 653. Sligh told the examining physician all that the record shows that he knew. So far as the record shows, he was a sound man when the policy was issued. If life insurance policies issued as this was, are to be upset after the death of the insured by reason of some fact unknown to the insured, then life insurance policies are liabilities, and not assets.

The judgment is affirmed.

GARY, C. J., and WATTS, J., concur.

COTHRAN, J. (dissenting). The facts appear to be as follows:

On June 20, 1919, the defendant, which I shall refer to for convenience as the Company, issued to R. E. Sligh, member of a local camp, a beneficiary certificate for \$1,000, payable at his death; the amount however to be reduced to \$500 in the event of his death within the first year of his membership. The plaintiff was designated as the beneficiary. The insured died on January 8, 1920, within the first year, of tubercular meningitis, and upon refusal of the Company to pay the insurance this action was brought, resulting in a verdict, July 8, 1920, in favor of the plaintiff for \$500.

The Company's defense was that the insured had, in his application for membership, made false representations relating to two material matters: (1) That he had never had pleurisy; and (2) that he had not been treated by a physician for any disease during the past five years; that his answers to the questions involving these matters were constituted warranties, under the terms of the application, certificate, and rules of the organization; and that accordingly the certificate was void.

The trial judge ruled that the answers were not warranties, but were simply representations, which would not avoid the policy unless these conditions were made to appear by the defendant: (1) That the representations were false; (2) that they were material to the risk; (3) that the Company acted upon them when it issued the certificate; (4) that the insured, at the time he made them, knew that they were false.

The appeal challenges the correctness of this ruling, the defendant particularly contending that the answers were warranties, and not representations simply, and that, if so, it was not incumbent upon the defendant to show that the insured knew that they were false. This presents the vital question in the appeal, it appearing beyond dispute that the insured in April, 1919, had an attack of pleurisy, on account of which he was operated upon by a physician in a Columbia Hospital, and detained there several days under treatment.

It cannot be denied that the Company had the right to impose the conditions referred to; the testimony shows that the seeds of pleurisy in many instances develop into the disease of which the insured died in less than a year. It cannot be denied that the answers were material to the risk. It cannot be denied that the answers were, in point of fact, if not intention, untrue. If the Company had the right to contract with the insured that these answers should be deemed warranties, and not representations, and it did so contract, the question resolves itself into this: Will the court accord to the defendant the right to stand upon a valid contract, or approve the submission of that right to a sympathetic jury upon the issue of the knowledge of the insured that the representations were false; an issue which, viewing the answers as warranties, is entirely irrelevant?

My conviction is that, when parties come before this court relying upon a valid, legal contract, knowingly entered into without fraud or imposition, they should be required to abide by the terms of their convention.

Were these answers, then, warranties or representations? I do not think that the case of *Wingo v. Ins. Co.*, 112 S. C. 139, 99 S. E. 436, cited by counsel for respondent and in the leading opinion, is at all applicable to the facts of this case, for the reason that there were two distinct issues in that case: (1) Was he at the time of the application, as a matter of fact, afflicted with tuberculosis? (2) If so, did he knowingly conceal this fact and represent to the contrary? Upon the first issue the court held that the testimony was conflicting and the issue should have been submitted to the jury. It held also that the second issue should also have been submitted.

In the case at bar, there is no issue as to the fact that in April, 1919, two months only from the date of the application, the insured had an attack of pleurisy; there can be no doubt of that. The second issue becomes unimportant in the case at bar if the answers be deemed warranties.

The question whether or not the insured was a sound man at the time the certificate was issued, the affirmative of which the leading opinion so strongly relies upon, is to my mind entirely foreign to the real issue in the case. Assuming that he was perfectly sound at that time, this fact cannot relieve the disastrous effect of having made two distinct misrepresentations at the time of his application, which, if construed to be warranties, avoid the policy ab initio.

It is impossible for me to reconcile the leading opinion with the decision of this court in the case of *Gambrill v. Ins. Co.*, 83 S. C. 236, 65 S. E. 231, which in one of its aspects presents a stronger case for the plaintiff than the case at bar. There the insured signed an application June 18, 1906, in

which he warranted his answers to be true, and in which he stated that he had not received any medical or surgical treatment during the past five years. It appeared that he had had an illness in December, 1905, and had then been operated upon in a hospital; the operating physician stated that he did not know at that time that the insured had cancer; thought it was a tumor, and did not notify the patient that he had cancer until August, 1906, after the policy was issued; he died in April, 1907. The case was tried by a magistrate, who rendered judgment for the plaintiff. Upon appeal, the circuit court reversed the magistrate's judgment, and upon appeal to this court the judgment of the circuit court was affirmed. This court, in an unanimous judgment, the opinion being written by the present Chief Justice, held:

"The statement which the assured warranted to be true was that he had not had medical or surgical treatment within the past five years, and he knew, or is presumed to know, that this statement was false. The fact that he did not know that he had cancer until August, 1906, did not destroy the effect of the statement which he knew, or is presumed to have known, was false, and which he warranted to be true."

This in reply to the exceptions which contended that, as the insured did not know until August, 1906, that he had cancer, he could not be held to have obtained the policy by a false representation.

Upon an examination of the several papers agreed to be parts of the certificate, and of the certificate itself, I am persuaded that if they do not, by agreement, constitute the answers warranties, and not representations, the English language is without a sufficient vehicle to convey that intention. The application provides:

"This application * * * shall constitute the basis for and form a part of any beneficiary certificate that may be issued."

It also provides:

"I hereby certify, agree and warrant that all the statements, representations and answers in this application * * * are full, complete and true * * * and I agree that any untrue statements or answers made by me in this application * * * intentionally or otherwise * * * my beneficiary certificate shall become void."

The insured signed the application under this declaration:

"I declare and warrant the foregoing answers and statements to be correct."

The certificate itself contained, by reference to indorsement thereon, the following:

"The consideration of this certificate is the application and medical examination on which the sovereign physician based his acceptance and approval of the application of the person within named for membership, and it was issued in consideration of the representations, war-

ranties and agreements made by the said person in his application to become a member, and in his medical examination as accepted and approved by the sovereign physician."

Also the following:

"If any of the statements or declarations in the application for membership, and upon the faith of which the certificate was issued, shall be found in any respect untrue, the certificate shall be null and void."

The insured signed the certificate under this declaration:

"I have read the above certificate * * * and the conditions thereof and hereby agree to and accept the same."

The constitution and by-laws of the order contained the following, which, under the terms of the application and certificate, became a part of the certificate:

"If any of the statements or declarations in the application for membership, and upon the faith of which the certificate was issued, shall be found in any respect untrue, the certificate shall be null and void."

That it was the intention of the Company to constitute the answers warranties, does not admit of doubt; that the contract agreed to by the insured, fully expresses that intention is equally certain; that it was a legal contract no one would question; has the defendant not the legal right, then, to stand upon the contract as it was entered into?

The suggestion, that an adverse ruling upon the plaintiff's demand in this case would convert an insurance policy from an asset into a liability is epigrammatic, but far afield of the point at issue. In many instances the policy has developed into a liability, to the disappointment of the holder, who anticipated an asset. The question at issue is, What was the contract between the parties, and will the court enforce what the parties have solemnly agreed to, regardless of the regretful consequences to either party?

The respective interests of the insurer and the insured depend so vitally upon the issue whether certain statements of the insured shall be taken as warranties or simply as representations, that we are not surprised that hundreds of cases have involved the question. Construed as warranties, the falsity of the statement amounts to an express breach of the contract, regardless of the good faith and honest purposes of the insured, and in some cases it has been held, regardless of the materiality of the statement; construed as representations, the falsity of the statement may render the contract voidable when it is shown to have been material to the risk and knowingly made.

The first attracting point of difference between a representation and a warranty is that a representation is a part of the proceedings which propose a contract, not in-

incorporated into the contract directly or by reference, while a warranty "is a part of the completed contract, either expressly inserted therein, or appearing therein by express reference to statements expressly made a part thereof." 3 Joyce, Ins. (2d. Ed.) § 1882, citing *Well v. Insurance Co.*, 47 La. Ann. 1405, 17 South. 853; *McArthur on Ins.* p. 5; *Ellis on Ins.* 18; *Hammond on Ins.* 82. This distinction furnishes the primary test in solving the problem, and it leads to the tentative conclusion in favor of a warranty; for the statements which otherwise would constitute only the preliminaries to the formal contract are inducted into the certificate, and made a part of it by the clearest form of reference. In the next place, the intention to do so is evidenced as we have seen by the most explicit terms.

It is conceded that statements denominated "warranties" by the most emphatic and specific declarations in the certificate to that effect will be held to be representations, if there should be contradictory provisions showing a purpose to treat them as such, and not as warranties, or explanatory expressions indicating the same purpose. Thus it was held in *Bank v. Insurance Co.*, 95 U. S. 673, 24 L. Ed. 563, that, although in one part of the policy the insured stipulated that his statements should be deemed warranties, in another part the statements referred to were such as should be considered material to the risk, or of facts within the knowledge of the insured, the statements should be considered representations, for the reason that their classification was appropriate to representations, and not warranties. So in *McClain v. Assur. Soc.*, 110 Fed. 80, 49 C. C. A. 31, where the statements were characterized as such as were fraudulent; and in many other cases cited to the notes in 11 L. R. A. (N. S.) 981, the same principle is announced.

It will be observed that there is absolutely nothing in the terms of any of the papers connected with this transaction which lends color to a limitation or contradiction of the provisions so clearly indicating a purpose to make the statements warranties. Bacon defines a warranty thus in section 243 (4th Ed.) of his work on *Life and Accident Insurance*:

"It is a stipulation, inserted in a writing on the face of the policy, on the literal truth or fulfillment of which the validity of the entire contract depends. A stipulation is considered to be on the face of the policy or it may be written in the margin or on another piece of paper or referred to in the policy."

In section 245 the author declares:

"If a contract of life insurance declares that the statements made in the application are warranted to be true, and the policy shall be void if they are untrue, the falsity of such statements will defeat the insurance."

"To justify a recovery on a fraternal benefit certificate the answers to the questions in the

application for the certificate must be true." *National Council v. Wilson*, 147 Ky. 293, 143 S. W. 1000; *Green v. National Annuity*, 90 Kan. 523, 153 Pac. 586.

False statements made warranties in the application preclude recovery. *The Homesteaders v. Briggs* (Tex. Civ. App.) 166 S. W. 95; *Finch v. M. W. A.*, 113 Mich. 646, 71 N. W. 1104; *Alden v. Supreme Tent*, 178 N. Y. 535, 71 N. E. 104. False representation in the application that applicant had never suffered from syphilis defeats the certificate. *Sovereign Camp v. Cooper* (Tex. Civ. App.) 208 S. W. 550. Applicant stated he had consulted one physician (naming him) within seven years for pleurisy, and recovery was complete. Evidence disclosed that he had died of consumption, and had been treated by another doctor for a serious ailment, and that the applicant only disclosed part of the truth. The court held that the statements in the application were warranties, and that they must be strictly and literally true. *Modern Woodmen v. Hall* (Ind. App.) 121 N. E. 835. It was expressly agreed that applicant was in sound health; that he had never been afflicted with tuberculosis, and had not consulted or been attended by a physician within five years. The court held that the form of contract made the statements warranties, and that a breach of warranties constituted a good defense. *Sov. Camp, W. O. W., v. McDonald*, 76 Fla. 599, 80 So. 566. 3 Joyce on Ins. § 1944, defines a warranty thus:

"An express warranty is a particular stipulation inserted on the face of the policy, or clearly embodied therein as a part thereof by proper words of reference, whereby the assured agrees that certain facts are or shall be true, or that certain acts have been or shall be done, and upon the literal truth or exact fulfillment of which stipulation concerning the same the validity of the contract depends."

And in section 1956a:

"It is undoubted that parties may, within legal limitations, stipulate that statements, whether material or immaterial, shall constitute warranties, and when so made they will, if untrue or false, avoid the contract; * * * and an untrue statement concerning a matter of fact that is, or ought to be, within the personal knowledge of an applicant for life insurance, constitutes a breach of warranty, and renders the policy void, where the policy makes the answers and statements contained in the application warranties, and constitutes them a part of the contract."

And in section 1962:

"Where it clearly appears by the express terms of the policy or from the entire contract that a warranty was intended, the materiality of the fact, matter, or circumstance warranted is not a subject of inquiry in aid of the assured; for the latter in such case will be held

strictly to his contract, however immaterial the matter warranted may be, so that a breach of the warranty may be availed of, the policy be avoided, and assurer be thereby discharged from liability, whether the warranty be material to the risk or not, for the warranty being so made a part of the contract makes the matter material and its falsity precludes recovery."

And in section 2003:

"If the policy stipulates that the answers in relation to the health and condition of the assured are the basis of the contract, and that if the same are not absolutely full, true, and correct the contract will be void, or if words of like meaning are used, in such case untruthful or incorrect answers to specific questions avoid the policy, though in relation to immaterial matters. * * * Again, a misrepresentation as to the health or symptoms of a certain disease in answer to specific questions, the statements being made a part of the policy, stipulated to be true and the basis of the contract, binds the assured to correct answers; otherwise the policy will be void, even though the statements be inadvertently or innocently made, and whether designedly untrue or undesignedly so."

In *Metropolitan Co. v. Brubaker*, 78 Kan. 146, 96 Pac. 62, 18 L. R. A. (N. S.) 362, 130 Am. St. Rep. 358, 16 Ann. Cas. 267, it is said:

"An applicant for life insurance, who from motives of his own has sought and obtained a professional interview with a physician regarding the state of his health, cannot truthfully answer the question referred to in the negative merely because the interview concerned some temporary ailment or indisposition, slight in character and not seriously affecting health. The fact of a consultation with a physician does not depend upon the gravity of the subject of the interview. * * *

"Very often men who are not strictly honest seek insurance on their lives, and a life insurance company may properly be allowed to take full precautions against deathbed insurance. It is entirely reasonable that such a company should ask an applicant for insurance if he has consulted a physician. The question is simple and unambiguous. It is not like questions relating to illness, which may call for the opinion and judgment of the applicant upon a debatable matter hard to decide. It involves nothing which the applicant cannot answer categorically out of his own personal knowledge. It relates to a fact which may be recollected, as well as an illness. The question is important, because, if an affirmative answer be given, the company may make an investigation, and ascertain the exact truth regarding the cause for the consultation, and the state of health it revealed, or ought to have revealed. It requires no argument to show that the action of the company may well be influenced by the answer to this question."

In *Cobb v. Covenant Mut. Ben. Ass'n*, 153 Mass. 176, 26 N. E. 230, 10 L. R. A. 686, 25 Am. St. Rep. 619, it is said:

"The sixth question [put to applicant] in form A of the application was, 'Have you personally consulted a physician, been prescribed for or professionally treated within the past ten years?' To this question the insured answered 'No.' * * * The plaintiff contended that such an issue should only be found against her in case the answer was intentionally false. In our view, the insured having made the truth of his statements the basis of his contract, it was sufficient for the defendant to show that this statement was actually untrue. * * *

"While the question whether [the insured] had a fixed disease, and what the disease was, might be an inquiry involved in considerable embarrassment, the question whether he had consulted a physician, or had been professionally treated by one, was simple, and one about which there could be no misunderstanding. Had it been replied to in the affirmative, the answer would have led to other inquiries. Indeed the question which follows [which remained unanswered] is, 'If so, give dates and for what disease.' It is upon the existence of this latter question that the plaintiff founds an argument that it was necessary to show that [the insured] had some distinct disease permanently affecting his general health before it could be said that he answered this question untruthfully. But the scope of the question cannot be thus narrowed. Even if [the insured] had only visited a physician from time to time for temporary disturbances, proceeding from accidental causes, the defendant had a right to know this in order that it might make such further investigation as it deemed necessary. By answering the question in the negative the applicant induced the defendant to refrain from doing this."

The leading opinion concludes: "Sligh told the examining physician all that the record shows that he knew." Did he? If he did not know that he had had an attack of pleurisy, he certainly knew that he had been operated upon by a surgeon in the hospital, and had been confined there several days, and yet he made the statement that he had not been attended by a physician in five years! Nor was it material for the defense that Sligh knew that he had had pleurisy. He warranted that he had not; that warranty was breached. The opinion further states: "He was a sound man when the policy was issued." That may be true, but it is a fact entirely aside from the issue whether or not he had breached his warranty.

If, therefore, the statements, admittedly untrue, were warranties, and not simply representations, it followed that the court was in error in the matters complained of by the defendant, and that the judgment should be reversed.

(117 S. C. 494)

ATLANTA & C. A. L. RY. CO. et al. v. CITY OF EASLEY et al. (No. 10738.)

(Supreme Court of South Carolina. Oct. 10, 1921.)

1. Dedication §20(1)—Railroads §82(2)—Railroad permitting right of way to be used as street estopped from claiming easement.

A railroad, having permitted its right of way to be used by the public as a street, and to be kept in repair as such by city authorities, for over 30 years, and having permitted storehouses and other buildings to be constructed thereon, was estopped from claiming an easement therein precluding assessment of abutting property for street improvements, having thereby abandoned easement and dedicated street to use of public.

2. Eminent domain §318—Railroad acquires mere easement in highway for roadbed.

Under Civ. Code 1912, § 8300, railroad constructing track along a public highway acquires easement merely in that portion necessary for its roadbed.

3. Municipal corporations §434(6)—Railroad property abutting on street not exempt from assessment for street improvements.

Railroad property abutting on street is not exempt from assessment for street improvements under Const. art. 10, § 18, notwithstanding use of such property for railroad purposes.

4. Evidence §5(2)—Judicial notice taken of benefit to railroads from good streets.

In action involving validity of assessment of railroad property for street improvements, the court knows that good roads and good streets are a great factor in human happiness, as well as a great benefit to the territory in which they are, and that good streets facilitate transportation and benefit the business of the railroad.

5. Constitutional law §290(3) — Municipal Corporations §407(1)—Assessment of railroad property by front foot rule without hearing not taking of property without due process of law.

Assessment of railroad property abutting on street for street improvements upon the basis of feet frontage, without giving the railroad company an opportunity to be heard, does not constitute the taking of property without due process of law in violation of the Constitution.

6. Municipal corporations §515(1)—Defect in street improvement ordinance for want of legislative authority cured by subsequent enactment of statute.

Assessment under street improvement ordinance unauthorized at time of enactment, but ratified by Act Feb. 21, 1919 (81 St. at Large, p. 585), held valid, the defect for want of prior legislation being cured by subsequent enactment of statute.

Appeal from Common Pleas Circuit Court of Pickens County; J. W. De Vore, Judge.

Action by the Atlanta & Charlotte Air Line Railway Company and others against the City of Easley, S. C., and others. Decree for plaintiffs, and defendants appeal. Reversed.

Following is the decree of the court below:

This is an action to enjoin the collection of assessments for street improvement in the city of Easley, S. C., levied against the property of the plaintiffs, Atlanta & Charlotte Air Line Railway Company, and its lessee, Southern Railway Company. When the action was filed the Director General of Railroads was in possession and control of said railroads, and was made a party plaintiff. But the said railroads have been turned back to their owners and the Director General has no further interest in this suit. The real contest is between the plaintiffs, Atlanta & Charlotte Air Line Railway Company and Southern Railway Company, which will be for convenience hereinafter called the plaintiffs, and the city of Easley, which will be called the defendant. The validity of the assessments is attacked on several grounds. The first contention of the plaintiffs is that said assessments were levied without authority, were unconstitutional when levied and that the curative or validating act of the Legislature passed thereafter could not and did not render them valid and binding, but that they are null and void, and cannot be enforced. The facts out of which this contention arises are as follows:

The General Assembly, at the session of 1917, passed an act ratifying a constitutional amendment to article 10 of the Constitution of the state, which provided that "The General Assembly may authorize the town of Clinton and the city of Easley to levy an assessment upon abutting property to pay for permanent improvements on streets and sidewalks immediately abutting said property." Act 1917, p. 228. Without any act being passed authorizing such levy, the city of Easley, on December 16, 1917, and thereafter, passed ordinances providing for the levy of said assessments and the collection thereof, and all proceedings relating thereto. The plaintiffs refused to pay the assessments levied against their right of way on the ground that said assessments were unauthorized and illegal and void. By an act of the General Assembly approved February 21, 1919, an attempt was made to validate, ratify, and confirm all acts and proceedings had and taken by the city of Easley in levying assessments on abutting property. Acts 1919, p. 585. By an act of the Legislature approved March 10, 1919, the city of Easley was authorized to levy such assessments as the constitutional amendment provided for. Acts 1919, p. 84. I do not see that the last-named act has anything to do with the questions involved, as it was passed long after the assessments were levied and after the validating act was passed. So that the real question here is: Did the ratifying act have the effect of validating the assessments? I do not think it did.

It was held in the case of Mauldin v. City Council of Greenville, 53 S. C. 285, 31 S. E. 252, 43 L. R. A. 101, 69 Am. St. Rep. 855, that

such local assessments were unconstitutional and void. This was the law at the time the assessments in question were levied, and consequently, when the city of Easley passed its ordinances for the levy and collection of the same, such ordinances were unconstitutional and void. Does the amendment change the situation? It required legislative authority as a condition precedent to levying said assessments. It was not self-executing, but simply provided that the General Assembly may authorize said assessments. Until such authority was given, the city of Easley was without power, authority, or jurisdiction to pass any ordinance on the subject. Such ordinances were mere nullities. The plaintiffs had the right to regard them as absolutely void, and to ratify them as sought by the city of Easley would be such taking of property as would be a lack of due process of law. In no case can the Legislature authorize the violation of the Constitution or validate an unconstitutional act. *State v. Whitesides*, 30 S. C. 579, 9 S. E. 661, 3 L. R. A. 777; *Hodge v. School District*, 80 S. C. 518, 61 S. E. 1009. Curative acts can remedy irregularities in judicial proceedings, but cannot cure void proceedings. *Black, Constitutional Prohibitions*, 208, 209. The Legislature may cure judicial acts which are void through irregularity in procedure. But where the court in which the proceedings were had possessed no jurisdiction, its acts cannot be validated. 12 *Corpus Juris*, 1093. I think the true rule on this subject is stated by the Supreme Court of this state in the case of *Dove v. Kirkland*, 92 S. C. 321, 75 S. E. 503, quoting from *Cooley on Conn. Lim.* as follows:

"A retrospective statute, curing defects in legal proceedings, where they are in their nature irregularities only, and do not extend to matters of jurisdiction, is not void on unconstitutional grounds, unless expressly forbidden. Of this class are the statutes to cure irregularities, in the assessment of property for taxation, and the levy of taxes thereon: irregularities in the votes or other action by municipal corporations, or the like, where a statutory power has failed of due and regular execution, through the carelessness of officers or other cause, irregular proceedings in courts, etc. The rule applicable to cases of this description is substantially the following: If the thing wanting, or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the Legislature might have dispensed with, by prior statute, then it is not beyond the power of the Legislature to dispense with it by subsequent statute. And if the irregularity consist in doing some act, it is equally competent to make the same immaterial by a subsequent law."

I think the foregoing is the correct rule upon the subject rather than the position taken by the defendant that the Legislature can validate any act which it might originally have authorized. This rule is subject to the limitation that there must have been in effect at the time the acts were performed some valid law authorizing the proceedings and conferring jurisdiction to act. In this case it is certain that, at the time the defendant passed its ordinances levying the assessments and attempting to cre-

ate liens on the property of the plaintiffs it was without even the color of jurisdiction or power to act. The plaintiffs and all other persons had the right to treat such proceedings as absolutely void. The Legislature had not authorized these proceedings, and might never do so. The plaintiffs were not bound to assume that an attempt to validate them would ever be made. To give the ratifying act the effect of validating these assessments, no opportunity whatever being furnished the plaintiffs to contest them, would be depriving the plaintiffs of property without due process of law, which is inhibited by the Constitution of the United States and of the state of South Carolina. This would render the validating act itself unconstitutional. So that, even if the rule contended for by the defendant was the correct one, these assessments are invalid. The Legislature could not have originally authorized them without furnishing opportunities to be heard, for this would have been taking property without due process, and therefore the validating act, which attempts to do this, cannot have the effect of rendering these assessments valid. On this branch of the case my conclusion is that the assessments in question are illegal and void, for the two reasons that when they were levied the city of Easley was without even the color of jurisdiction or authority to do so, and to give the ratifying act the effect of validating them would be depriving the plaintiffs of property without due process of law, which can never be done by a curative or validating statute.

The next question for consideration is: What title have the plaintiffs to their right of way through the city of Easley and the extent thereof? In the year 1871 Benjamin Mauldin conveyed to the Atlanta & Richmond Air Line Railway Company, the predecessor in title of the plaintiffs, 100 feet on each side of the track or roadway, measuring from the center, for railroad purposes, in fee simple. This deed was recorded as required by law in the proper office on August 14, 1872, in Book B, p. 38. This right of way was over and through a certain tract of land which was conveyed to the said Benjamin Mauldin by William Couch on August 16, 1866, and the deed for which was recorded in the office of the register of mesne conveyance for Pickens county on January 28, 1867, in Book L-1, p. 39. The same tract of land was conveyed in the form of a fee-simple deed to the said William Couch by Mahala Mansell on October 29, 1859, and the deed for which was duly recorded in the proper office on the 16th day of January, 1860, in Book I-1, p. 224. In the month of May, 1854, Joshua Mansell, the owner of this land, departed this life leaving a last will and testament dated March 6, 1854, which was duly admitted to probate. Mahala Mansell died intestate in the year 1874. On May 25, 1875, Baylis W. Mansell, a son of Joshua Mansell, and the other heirs at law, filed an action in the court of common pleas for Pickens county against James Boswell and others, claiming that the heirs at law of Joshua Mansell were entitled to the 100 acres of land mentioned in the will of Joshua Mansell, and prayed that the title to said land might be cleared and quieted.

After certain proceedings in said case, on

July 5, 1876, Baylis W. Mansell, acting for himself and as attorney for his complainants, of the first part, and R. E. Bowen, H. C. Briggs, and Thos. W. Russell, acting for themselves and for the other defendants, except the defendant Atlanta & Richmond Air Line Railway Company, of the second part, entered into an agreement by the terms of which the title to said land was to be executed under order of the court to the parties of the second part, as agents or trustees of the defendants they represented. These proceedings were never recorded, and seem to have been lost, except an order of the court dated July 15, 1876, which is recorded in the common pleas journal for the year 1876, page 750. The facts as to this case above stated are taken from the recitals in this order, and the deed made thereunder. This deed was made by J. J. Lewis, clerk of the court, to R. E. Bowen, H. C. Briggs, and T. W. Russell, trustees, on the 15th day of January, 1876, and recorded in the office of register of mesne conveyance for Pickens county in volume C-2, p. 372, on the 6th day of March, 1876. The order above referred to confirms said agreement and directs that the clerk make a deed in accordance with the terms thereof. In this order it is stated that the defendant, Atlanta & Richmond Air Line Railway Company, is excepted. The deed provides for the sale of the 100 acres of land willed to Mahala Mansell by Joshua Mansell. Under this order and deed the said trustees cut up said lands into lots and sold the same to different parties. Many of the deeds made by the trustees were introduced as evidence. They show that the lots were laid off fronting the right of way and describing the lots as bounding on the right of way of the railroad company. The railroad was constructed in the years 1872 and 1873 through this land, and has been continuously used ever since. The plaintiffs claim that they own as their right of way 100 feet on each side of the track. The defendant claims that they own their roadbed which they have been in the actual use of. It insists that, under the will of Joshua Mansell, Mahala Mansell took only a life estate, and that therefore the plaintiffs took only an estate for the life of Mahala Mansell in the said 100 feet, but have acquired by adverse possession its actual roadbed and the lands on which the depots stand. Which of these contentions is correct? I have reached the conclusion that the plaintiffs own as their right of way over the land in question 100 feet on each side of the tract or roadbed measuring from the center. I have reached this conclusion for three reasons:

(1) The testimony shows that the plaintiffs and their predecessors have been in open and adverse possession of the main track, side tracks, and depots on said right of way ever since the construction of the road in 1872 and 1873, claiming under color of title, duly recorded, the full 100 feet on each side of the track. It is a well-established principle that adverse possession of a part or parcel of land claimed under color of title extends to the whole boundary described in the color of title. In addition to this the plaintiffs had the general use of the entire parcel which was open and being used by the public, but not in a way which was inconsistent with the right of the railroad

to use the entire strip of land for railroad purposes when it decided to do so.

(2) The will of Joshua Mansell is not very clear as to whether the Mansell children stood as remaindermen thereunder, but, conceding that they did take as remaindermen, and that the widow, Mahala Mansell, took only a life estate in the 100 acres of land described in said will, such remaindermen, after the death of the life tenant, could not disturb the right of way which the railroad company obtained through and under the life tenant. Their only right would be to recover compensation after the death of the life tenant. There are a number of decisions in this state which hold that the word "owner," as used in statutes authorizing condemnation for railroad purposes, does not necessarily mean the owner of the legal title, but refers to parties in possession. This doctrine is fully set out in the case of Cayce Land Co. v. Southern Railway Co., 111 S. C. 115, 96 S. E. 725. The same doctrine has been held to be true where a trustee gives the right to the railroad company to build its line through property held as trustee. See the case of Tutt v. Railway Co., 28 S. C. 388, 5 S. E. 831. This latter case sustains the contention of the railroad company to its right of way through the church property given by the trustees of said property by deed.

(3) After the death of Mahala Mansell the children of Joshua Mansell filed an action in the court and confirmed an agreement by the terms of which the 100 acres of land devised to Mahala Mansell for life was under order of court deeded to trustees to sell said lands and distribute the proceeds. The railroad company was not a party to this agreement, and it was excepted from the order. These trustees cut up the said 100 acres of land into a large number of town lots which bordered on the right of way of 200 feet as it now is, and has been ever since the right of way was acquired. The deeds made to different parties by the trustees in many instances describe the lots as bounded by or fronting on the railroad right of way. I think by this agreement, order of court, and the laying out of the lots bordering on the right of way and the deeds of the trustees, the Mansell children and all persons claiming under them are estopped from claiming that the right of way of the plaintiffs is less than 100 feet on each side of the track. Especially is this true after the lapse of so many years.

It is claimed by the city of Easley that it acquired the 200 feet in question for streets by its long use thereof against the Mansell heirs, except the part actually used by the railroad for its roadbed and depot. The railroad was in possession and claiming this 200 feet three years before the city of Easley existed. It was incorporated March 17, 1874. Acts 1874, p. 706. It has therefore at all times had notice that the plaintiffs claimed this 200 feet under the deed from Benjamin Mauldin, and of the facts hereinbefore recited as to the proceedings taken by the heirs at law of Joshua Mansell, and the acts and deeds of the trustees appointed by the court. Beck v. Railway Co., 105 S. C. p. 819, 89 S. E. 1081. In addition to this, under the decisions of the Supreme Court of this state, neither a town or the public can

acquire by prescription the right to use as a street the right of way of a railroad company. *Blume v. Southern Ry.*, 85 S. C. 440, 67 S. E. 546. A right of way of a railroad, having been acquired for a public purpose, cannot be lost by prescriptive use or adverse possession unless by the erection of a permanent structure, accompanied by notice to the railroad company of an intention to claim adversely to its right. *Atlanta & Charlotte Air Line Ry. Co. v. Limestone & Co.*, 109 S. C. 444, 98 S. E. 188. Taking Joshua Mansell as the common source, my conclusion is that the plaintiffs own as a right of way for railroad purposes 100 feet on each side of the track, measuring from the center thereof through the tract of land described in the deed made by Benjamin Mauldin. If this be true, then the pavements in question are laid down upon the said right of way. The constitutional amendment provides for permanent improvements, and if the railroad company has the right to use for railroad purposes the whole of this 200 feet as established by the foregoing cases, then the improvements could be destroyed. I do not think the amendment contemplates levying assessments against the right of way of a railroad company where such improvements are laid down on the right of way. Nor do I think the right of way such abutting property as the amendment contemplates where there is no legally established street, and a portion of the right of way is paved, and the remaining part thereof charged with assessments as abutting property.

The foregoing are my conclusions as to the right of way which was obtained from Benjamin Mauldin. This covers most of the paved district, but there is a small part of the same where the title to the right of way was acquired in a different way. Joshua Mansell and Mahala Mansell, on August 9, 1848, conveyed by deed duly recorded to John Gilstrap, Benjamin Mauldin, Bradwell Day, W. S. Birge, and Thomas Montgomery $5\frac{1}{4}$ acres of land as trustees of the Methodist Episcopal Church. The conveyance was in trust to build a house of worship on said land for use of the members of the Methodist Episcopal Church, South, according to the rules and discipline which may from time to time be agreed upon and adopted by the ministers and preachers of said church and their General Conference. On March 11, 1878, by deed duly recorded, the trustees of said Methodist Church conveyed to the plaintiff, Atlanta & Charlotte Air Line Railway Company, and its successors and assigns, a strip of 25 feet, beginning at a certain point in the center of the right of way, in width, by 640 feet in length, on the northern side of the railroad track, and 100 feet by 640 feet on the southern side of the railroad track. There is no pavement on the 25 feet, but they are laid on about 40 feet on the southern part of the 100 feet, for which, a part of the assessments in question, charge is made. I think the plaintiffs have good title to these two strips of land. The deed is in fee and the possession of the plaintiffs has been of the same character as their possession of the 200 feet claimed under the deed from Benjamin Mauldin, and most of what I have said in discussing plaintiffs' title to that 200 feet is applicable here. Besides, I do not see how the defendant can question this

title. No one can do so except the Methodist Church, which has never objected. Besides, from the long adverse possession of the plaintiffs and acquiescence of the said church, it will be presumed that the trustees making the deed were authorized to do so by the proper authority.

The idea cannot be entertained that men of high character as trustees of a Christian church would make a deed without authority, especially when the valuable consideration of \$350 is stated in the deed. By this deed, by adverse possession and the statute of limitations I think plaintiffs have acquired title to these two strips of land, and all I have said hereinbefore as to the pavement on the right of way of the plaintiffs for the 200 feet acquired through Benjamin Mauldin is applicable, and need not be repeated. If the plaintiffs had only their roadbed, as contended by the defendant, I do not think these assessments could be sustained. I do not think the constitutional amendment contemplates a mere easement of this kind, and such roadbed would not abut upon the pavement, there being an intervening strip of land of from 15 to 30 feet in width between the roadbed and the pavement. I do not see any merit in the contention of the defendant that there was an old public road 15 or 20 feet wide which extended along the southern side of the strips of land conveyed to the plaintiffs or their predecessors. This could not prevent the said railroad from acquiring the right of way described in their deeds. Two easements over the same property may exist; the owner of each would have to so use it as not to destroy the easement of the other.

The next question I shall consider is: Can assessments of the kind in question be levied on a right of way of a railroad company? On this question the authorities differ. I doubt if the amendment to the Constitution under consideration contemplates levying assessments against such property. But if it does, I am satisfied a railway roadbed or right of way is not subject to such assessments unless benefited thereby. The rule is so stated in 25 Ruling Case Law, p. 117, where the authorities are collected. This benefit must be actual and real, and not conjectural. In the case of *New York R. R. Co. v. Port Chester*, 149 App. Div. 898, 144 N. Y. Supp. 883, affirmed in 210 N. Y. 600, 104 N. E. 1135, the New York court, in considering this question, said: "It is difficult to see how such property can be benefited by the improvement of a village street passing under it. The only benefit that the learned corporation counsel specifically claims will inure to the railroad company from these improvements is an increase in its business following the increase in business and population resulting to the village from the improvement of its streets. This alleged benefit is too conjectural, fanciful, and remote for consideration."

The authorities on this subject are collected in *Ann. Cas.* 1916E, p. 581, and 3 *Ann. Cas.* p. 11. In a note to the last-named case the writer reviews the federal decisions upon this subject, and says they establish these important principles: "That state laws providing for assessing the cost of street improvements upon abutting property, which in practical operation do

confiscate property, are obnoxious to the Fourteenth Amendment to the Constitution of the United States, and for that reason it is the duty of the courts to declare them to be void; that special assessments to pay for local improvements of public streets and highways do, in practical effect, deprive owners of their property without due process of law, unless the property subject to assessment is benefited by the improvement correspondingly to the amount of the assessment; that owners of property have the right to appeal to the courts for judicial protection against the unconstitutional invasion of their rights by municipal governments in enforcing state laws or local regulations for the collection of assessments which are in excess of the benefits to the property assessed, accruing or to accrue by reason of the improvements to be paid for by such assessments." In this state the doctrine that local assessments of this kind benefit abutting property is repudiated. *Mauldin v. City Council of Greenville*, 42 S. C. 293, 20 S. E. 842, 27 L. R. A. 284, 46 Am. St. Rep. 723. I do not think the testimony in this case shows benefits to the plaintiffs' right of way as justifies the levying of these assessments. The plaintiff's testimony is to the effect that there was no benefit, and the testimony of the defendant relates to general and speculative benefits. Besides, it appears from the testimony that the strip of land claimed as a right of way was, up to 1917, one wide space of 200 feet with the railroad tracks in the center thereof. But in the year 1917 the city renamed its streets and denominated that portion of the 200 feet on the south side of the railroad track South Main street, and that portion of the north side of said track North Main street. The assessments in question are levied against the right of way on both sides of the track, which does not touch the pavement on either side of the track, while the business houses and private property abut on the paved area. Such a method of assessment I think is discriminatory and inequitable, and amounts to a taking of property which is contrary to both the state and federal Constitutions, and renders the assessments void.

The only remaining point in the case is the contention of the defendant that the plaintiffs are estopped to question the validity of these assessments. It claims that, when the double tracking of the main line was about to begin through the city of Easley in 1916, the Southern Railway Company applied to the city of Easley for permission to do the work, and to widen South Main street; that plaintiffs did not object to the assessments when notice thereof was given under the ordinances to the depot agent and superintendent. I do not think this position can be sustained. The permission asked was done in the interest of the safety of the public during the construction work, and in no sense involved the question of plaintiff's title. The public was using the right of way as a street, and could use it only in such a way as was not inconsistent with its use by the railroad company. In the next place, when the notices in question were served, the Director General of Railroads of the United States was in possession and control of the railroads, and persons on whom these notices were served

were the agents of the Director General, and not of plaintiffs. In the next place, the assessments being void for want of jurisdiction or authority to levy them, there is no estoppel here. *Ann. Cas. 1915B*, note, p. 753; 33 L. R. A. (N. S.) 584; *O'Brien v. Wheelock*, 184 U. S. 450, 22 Sup. Ct. 354, 46 L. Ed. 636.

I have endeavored to pass upon all the questions arising in this action, and have reached the conclusion that the assessments in question are invalid for the reasons hereinbefore given. It is therefore ordered, adjudged, and decreed that the assessments levied against the property of the plaintiffs described in the complaint are null and void, and that the plaintiffs are not liable for the same.

It is further ordered, adjudged, and decreed that the temporary injunction heretofore granted in this action be made perpetual, and that the defendants, their agents, and servants, be and they are hereby enjoined from collecting or attempting to collect the said assessments by sale of the property heretofore levied upon by them or otherwise.

Let all the record used before me at the hearing be filed with this decree.

J. J. McSwain, A. P. Du Bose, and Haynsworth & Haynsworth, all of Greenville, for appellants.

Carey & Carey, of Pickens, and Cothran, Dean & Cothran, of Greenville, for respondents.

WATTS, J. This is an action seeking to restrain the city of Easley from collecting from railway company certain assessments against abutting property for street improvements. The case was tried by Judge DeVore, who filed a decree in favor of plaintiffs respondents, on January 10, 1920. Appellants appeal, and by exceptions, 20 in number, seek reversal.

The decree of Judge DeVore should be set out in the report of the case. The exceptions challenge the finding of his honor in favor of railroad's contention:

"(1) That the land occupied by North Main street is merely a part of the railroad right of way; that, not being a part of the streets of the city, it does not come within the constitutional amendment authorizing the city council to levy an assessment for its improvement against abutting property. (2) That the right to charge part of the costs of improving a street against abutting property does not apply to the property of a railroad company, consisting of right of way, tracks, station grounds, etc. (3) That an assessment upon the basis of feet frontage and without giving the railway company an opportunity to be heard is a taking of property without due process, and unconstitutional. (4) That, at the time of the passage of the ordinance authorizing the improvement of the streets and the levy of the assessment, no statute had been passed authorizing the city council of Easley to levy such assessments, and that the statute of February 21, 1919, purporting to ratify the action of the city council was inoperative."

As to the finding of his honor that the land occupied by North Main street and South Main street, respectively, is a part of the right of way of the railway company, and that, not being streets, the city council was without power to levy an assessment for their improvement.

[1] The proof clearly shows that, since the city of Easley has been incorporated for a period over 30 years, the streets have been there used by the public at large, worked by the city, and before the railroad was built one of the streets was a public highway; while it is true the right of way of railroad was originally 100 feet, yet these streets have been used by the public for over 30 years, storehouses and other houses have been built, and a use put to the right of way now claimed by the railway, inconsistent with their claim.

[2] The railroad has stood by, never claimed "their pound of flesh" until now, and their easement on these streets, under all the evidence in case unquestionable, has been lost and abandoned by them under the principles laid down by this court under the cases of *Lorick v. Railway Co.*, 87 S. C. 74, 68 S. E. 931; *Southern Railway Co. v. Howell*, 89 S. C. 395, 71 S. E. 972, Ann. Cas. 1913A, 1070; *Railway Co. v. Manufacturing Co.*, 93 S. C. 397, 76 S. E. 1091. The evidence shows that that portion used by the city of Easley and the public at large has been abandoned and lost by estoppel on the part of railroad, and that the easement acquired to these streets by the public at large is superior to the easement of the railroad. That part which was formerly a highway being there first, the railroad never did acquire an easement in it, other than what was necessary for its roadbed. Code Laws 1912, § 3300. The evidence does not warrant any other inference than that the city of Easley and the public at large have acquired by adverse possession for a statutory period and longer that defeats the title of the railroad company to these streets under their original claim of the easement. *Matthews v. Railroad*, 67 S. C. 506, 46 S. E. 335, 65 L. R. A. 286.

The evidence submitted in this case shows that for over 40 years the streets in controversy have been recognized and used in the town and by the public generally, and that the railroad company during all of that time has not questioned such use; has not complained or asserted its rights. During all of that time the public in general have uninterruptedly used these streets for the purpose of travel, continuous, uninterrupted, adverse, notorious, during all that time worked and kept in repair by the proper authorities. During all the time, 40 years, the streets have been used by the public generally, and the railroad has had knowledge of such use and acquiesced therein, has

stood by and allowed storehouses and other buildings erected abutting these streets, and the business of the town has been built up, it is fair to assume, on the assumption that the streets were dedicated to the use of the public. To affirm his honor's decree would be destructive of the property rights of individuals, and destructive of the rights of the public. The claim of railroads to these streets comes too late. *Southern Railway Co. v. Board of Commissioners of Union*, S. C., 246 Fed. 386, 158 O. C. A. 447.

[3] As to the right to charge part of the costs of improving a street, it applies to abutting property of a railroad company used for its track, station, grounds, etc. The amendment to the Constitution, section 18, art. 10, declares the General Assembly may authorize the city of Easley to levy assessment upon abutting property holders to pay for streets immediately abutting such property, etc., provided certain conditions are complied with. The amendment authorized the assessment against abutting property. The railroad property occupied by its tracks and stations does not abut upon both streets. The railroads contend that it does not come within the constitutional amendment, because of the use to which it is put. This position is untenable. The railroad is entitled to no immunity other than any other owner of property abutting the streets. It does not make any difference as to what use the property is put; they are owners and users of the property if it abuts the streets, and there is nothing in the constitutional amendment making the exemption as to them.

The public has a right to a street to get to the stations of the railroad, and it would be unjust and unfair to make other abutting owners of property pay, and exempt the railroad. The railroad is not exempt from this assessment. *Heman Construction Co. v. Wabash Railway Co.*, 206 Mo. 172, 104 S. W. 67, 12 L. R. A. (N. S.) 112, and authorities therein cited; *Northern Pacific Railroad Co. v. Seattle*, 46 Wash. 674, 91 Pac. 244, 12 L. R. A. (N. S.) 121, 123 Am. St. Rep. 955. In *L. and N. R. R. v. Barber Asphalt Co.*, 197 U. S. 430, 435, 25 Sup. Ct. 466, 49 L. Ed. 819, it was held that an assessment for local improvements levied against property used for railroad purposes was valid. The court said:

"That, apart from specific use to which this land is devoted, land in a good sized city generally will get benefit from having the streets about it paved, and that this benefit generally will be more than the cost, are propositions which, as we already have implied, the Legislature is warranted in adopting."

The court further said:

"That the Legislature is warranted in going one step further and saying that on the question of benefit or no benefit the land shall be

considered in its general relations and apart from its particular use."

In *Branson v. Bush*, 251 U. S. 182, 189, 40 Sup. Ct. 113, 116 (64 L. Ed. 215), the court on this question says:

"To this must be added the obvious fact that anything that develops the territory which the railroad serves must necessarily be of benefit to it, and that no agency for such development equals that of good roads."

[4] The railroad here transports passengers, freight, and commodities; the public travel to get to the station, they haul freight from the station; and it is now well known that good roads and good streets are a great factor in human happiness, as well as a great benefit to the territory in which they are, and, unquestionably, if these streets are good, facilities for transportation will be good, and the business of the railroad will be benefited.

[5] As to whether an assessment upon the basis of feet frontage without giving the railroad company an opportunity to be heard is a taking of property without due process of law, and unconstitutional: This must be answered in the negative under the authority of *Tonawanda v. Lyon*, 181 U. S. 389, 21 Sup. Ct. 609, 45 L. Ed. 908; *Wagner v. Baltimore*, 239 U. S. 217, 36 Sup. Ct. 66, 60 L. Ed. 230; *Hancock v. City of Muscogee*, 250 U. S. 454, 39 Sup. Ct. 528, 63 L. Ed. 1081; *Branson v. Bush*, 251 U. S. 182, 40 Sup. Ct. 113, 64 L. Ed. 215.

[6] As to plaintiff's claim that at the time of the passage of the ordinance authorizing the improvement and the levy of assessment, no statute had been passed authorizing the city council of Easley to levy such assessment, and that the statute of February 21, 1919, purporting to ratify the action of the city council, was inoperative: A sufficient answer to this is that, even if at the time the city council passed the ordinance there was no legislative authority for this action, yet this was cured by the Act of Legislature of February 21, 1919, wherein the Legislature ratified and confirmed the action of city council, declaring that—

"Such assessments so levied by said city council of * * * Easley are hereby declared of full force and effect and valid liens against the property assessed, bearing interest, as provided therein, from the date of levy." Acts 1919, p. 585.

The Legislature validated and sanctioned an act which it might have originally authorized. The defect in the ordinance levying the assessment for want of prior legislative sanction was cured. *Duke v. County of Williamsburg*, 21 S. C. 414; *Hodge v. School District*, 80 S. C. 518, 61 S. E. 1009; *Dove v. Kirkland*, 92 S. C. 313, 75 S. E. 503.

The exceptions are sustained, and judgment reversed.

GARY, C. J., and FRASER, J., concur.
COTHRAN, J., disqualified.

(152 Ga. 214)

BONNER v. STATE. (No. 2686.)

(Supreme Court of Georgia. Oct. 15, 1921.
Rehearing Denied Nov. 17, 1921.)

(Syllabus by the Court.)

1. Criminal law §789(2), 805(1), 1064(7)—Definition of reasonable doubt in charge held substantially correct; failure of charge on reasonable doubt to cover burden of proof did not render it defective; total failure to charge on burden of proof should have been made distinct ground of motion for new trial.

The court's definition of reasonable doubt, as given in his charge to the jury, was substantially correct.

2. Criminal law §828 — Defendant's statement held a confession, rendering charge on circumstantial evidence unnecessary in absence of request.

The statement of the accused to the sheriff in regard to the crime charged and the circumstances attending its commission amounted to a confession, and afforded direct evidence of his participation in the crime and of his guilt of the offense charged; and the court did not err, there being no written request to charge upon the subject of circumstantial evidence, in omitting to charge the jury upon that subject.

3. Criminal law §736(2)—Evidence as to whether confession was voluntary held to make question for jury.

Under the evidence as to the circumstances under which the confession of the accused was made, the court did not err in admitting it in evidence and in submitting to the jury, under proper instructions, the question as to whether it was voluntarily made.

4. Sufficiency of evidence.

There was sufficient evidence to authorize the verdict.

Error from Superior Court, Jones County; Jas. B. Park, Judge.

Joe Bonner was convicted of murder, and he brings error. Affirmed.

Paul Maynard and Edward S. Ragsdale, both of Macon, for plaintiff in error.

Doyle Campbell, Sol. Gen., and A. Y. Clement, both of Monticello, and Geo. M. Napier, Atty. Gen., Seward M. Smith, Asst. Atty. Gen., for the State.

BECK, P. J. Joe (Buster) Bonner was tried under an indictment charging him with the offense of the murder of A. S. Jones. Upon the trial he was found guilty; no recom-

mentation of mercy being made. He made a motion for new trial, which was overruled, and he excepted.

[1] 1. The court in part charged the jury as follows:

"The court charges you, when the defendant files a plea of not guilty to this bill of indictment, it puts in issue every material allegation contained therein; and it devolves upon the state to satisfy the minds of the jury, by the evidence in the case, beyond a reasonable doubt, of the defendant's guilt. A reasonable doubt means exactly what it says. A reasonable doubt may grow out of the evidence, or the want of evidence, or be engendered by the defendant's statement. While the law requires the state to demonstrate the guilt of the defendant by the evidence in the case beyond a reasonable doubt before you would be authorized to convict him, the law does not require the state to demonstrate the guilt of the defendant to an absolute or mathematical certainty. A reasonable doubt does not mean a fanciful doubt; it does not mean a conjectural doubt; it does not mean an imaginative doubt; but, as I said to you, it means a doubt founded upon reason."

This charge was excepted to upon the ground that it does not properly define reasonable doubt, and because the court failed to charge that the burden of proof was upon the state of Georgia to prove every material allegation in the indictment. The exceptions to this charge show no ground for the grant of a new trial. The definition of reasonable doubt was substantially correct, and the fact that the judge did not, in this particular part of the charge, state to the jury that the burden was upon the state to prove the material allegations in the indictment does not render this part of the charge defective. This first ground of the amended motion for a new trial is an attack upon the charge of the court there set forth; and if the court failed altogether to charge upon the subject of the burden of proof, that should have been made a distinct ground of the motion, and the failure to charge upon that subject somewhere in the court's instructions to the jury affords no ground of criticism of the excerpt from the charge that is brought under review in the ground of the motion we are now dealing with.

[2] 2. Error is assigned upon the failure of the court to charge the jury on the law of circumstantial evidence, and to instruct them that to warrant a conviction on circumstantial evidence the facts proved must not only be consistent with the hypothesis of guilt, but must exclude every other hypothesis save that of the guilt of the accused. It is contended by counsel for the movant that the evidence required this charge upon circumstantial evidence. This criticism of the court's charge is not meritorious, unless the state's case was based entirely on circumstantial evidence. The plaintiff in error contends that it was

such a case. This contention, however, is not sound if the testimony of the witness Middlebrooks, the sheriff of the county, in regard to a statement made to him by the accused, was for the consideration of the jury, under the court's instructions. The witness referred to testified that in company with other named parties he arrested the accused at the home of one Harrison Jones. Witness had heard that the accused had a pistol in his possession, said to be the same as that which the deceased had; he found the pistol on the accused, and it looked like the one described to witness as the one belonging to the deceased. Witness took the accused to the front porch of the house where he was arrested; and at this time Tucker, one of the parties accompanying witness, hit the accused over the head with a pistol. Witness further testified:

"I asked him [the accused] where he got the gun. He said from Sam Myrick on Monday morning. I asked him if it was not Mr. Jones' gun. He replied, 'If it is, I don't know it.' I then said, 'Buster, you know something about this killing; tell me about it;' and I said, 'Nobody is going to hurt you.' He said, 'If you will take me to where Mr. Jones was killed, I will tell you all about it.' * * * When he made the request I took him over there. * * * We reached his house at 10 o'clock in the morning, about a week after the homicide. When we got there Buster Bonner got out of the car and said, 'Come on, I will show you;' and he showed us how the door was latched. Buster Bonner is Joe Bonner. He told us how he called Mr. Jones; said that Jim Sims called him, saying, 'Sims, Sims;' and that Jones said, 'Knock 'em off;' and that Mr. Jones got up and opened the door, and Jim Sims struck him with the axe; that Jones was standing in the door when Sims struck him again two or three times with the axe and began to search his pockets, and got what money he had and a pistol out of the trunk."

The witness further testified:

"The house is in Jones county. Accused said that Mr. Jones was struck with an axe. I saw his body; he was killed in that room. He lived by himself. He was hit a blow with the eye of the axe."

On cross-examination the witness testified:

"Mr. Tucker has never been a deputy at all. He has worked for me around. He has gone with me lots of times. To the everyday person seeing him associated with the sheriff he would think he was a deputy. The statement made by Bonner was made after he was struck by Tucker. It was a pretty bad blow; it knocked the blood out; it bled some. * * * We made a thorough search the day we arrested Bonner and found a club axe, and a few days later found another axe that was not there the day we arrested Bonner. * * * As to there being a password, Bonner told me that when Sims came up he called to Mr. Jones and said, 'Mr. Jones, this is Sims, Sims;' and that Mr. Jones said, 'Knock 'em off.' Mr. Jones

could not talk, that is, I could not understand what he said. He was paralyzed on one side. Some people in common touch with him claimed that they could understand him. Sims worked on the place with him. I saw the clothes that Bonner had on. Bonner could have struck the first lick from where he was standing. But where he was when Mr. Jones fell he could not have, unless he moved. There were four or five licks passed. There were splotches of blood on top of the house, some on the door and some on the walls. His feet were a foot from the door. I think that it was possible for Bonner to have struck the lick and to have gotten the blood on his clothes in the manner it was on them. I have made the statement that I thought Sims was in it. I have said that it looked like if Bonner used the axe he would have got more blood on his clothes than were on there."

Redirect:

"Bonner stated that Jim Sims got the axe at his (Jim Sims') house. He said Jim Sims went up there in the evening about sundown, and that he borrowed \$4 from Jim Sims. He said Jim Sims told him Mr. Jones had some money, and he wanted to get it that night, and for [Bonner] to meet him back down there, so they would go and kill him and get it."

Considering all that Bonner, according to the testimony of the sheriff, said to the latter, the accused made a confession. It was not a mere incriminatory statement. His confession showed that the crime of murder was committed, and that he was present participating in the commission of the crime. Accepting the testimony of the sheriff as true, the defendant said that Jim Sims told him Mr. Jones had some money and he wanted to get it that night, and for defendant to meet him back down there, so they would go and kill him and get it. And the statement by the accused which we have quoted above shows that he was present at the time when Jones was killed. The language of the defendant in making the confession is not altogether clear, and is evidently that of an illiterate and ignorant man, but it contains the unequivocal statement that Sims had proposed to him that they should go to Jones' house that night, and for the defendant to meet him "back down there, so they would go and kill him and get it" (the money). It can scarcely be contended, in the face of this statement to the effect that defendant went "back down there," and from the place thus designated on to Jones' house that night, and stood there while Sims hit the deceased with an axe, that he was not fully aware of Sims' purpose in going to Jones' house. And if he joined Sims, as he himself admits that he did, and stood by while Jones was killed under those circumstances, whether he struck a

blow himself or not, he was guilty of the crime of murder, and his statement in regard to it is a confession. And, regarded in that light, it affords direct evidence of the commission of the crime, and the case did not rest entirely upon circumstantial evidence; and consequently the court did not err in omitting to charge, in the absence of a request to do so, upon the law of circumstantial evidence.

[3] 3. Another ground of the motion for new trial raises the question as to the admissibility of this evidence, in view of our statute making the evidence of a confession inadmissible where it appears that it was made upon the remotest fear of punishment or the slightest hope of reward. The fact that a person by the name of Tucker, who was not a deputy sheriff, but who was with the sheriff at the time he went to where the accused was, struck the defendant on the head with the butt of a pistol, does not show that the confession was induced by the remotest fear of injury, as is claimed in the brief of counsel. The act of striking the prisoner was, of course, most reprehensible, but it does not appear that it was done in connection with any attempt to make the prisoner confess, or that he was threatened with injury if he did not confess. The prisoner did not then immediately make his confession; the sheriff intervened and prevented Tucker from making a further attack on the prisoner, and then the prisoner and one James and the sheriff went out behind another house, and the sheriff then said to the prisoner: "You know something about this killing; tell me about it. Nobody is going to hurt you." To which the accused replied, "If you will take me to where Mr. Jones was killed, I will tell you all about it;" the location of the crime being a mile and a quarter from the place at which this colloquy took place. The sheriff then carried the prisoner to the place of the crime. The sheriff and a party named Bauchomb went with him in an automobile; when they arrived at the house in which the crime was committed, without further colloquy, the prisoner made the statement which we have set forth above and held to be a confession. Under the circumstances narrated, the court did not err in admitting the evidence of confession and in submitting to the jury the question as to whether it was freely and voluntarily made.

[4] 4. There was sufficient evidence to authorize the verdict.

Judgment affirmed.

All the Justices concur, except ATKINSON, J., absent on account of sickness.

(27 Ga. App. 549)

WILSON v. MARTIN. (No. 12303.)(Court of Appeals of Georgia, Division No. 2.
Nov. 1, 1921.)*(Syllabus by the Court.)*

1. Contracts \S 18—Contractual relation may be inferred from silence on acceptance of inquiry as to willingness to contract.

A communication from one person to another making inquiry as to the latter's willingness to contract may under the circumstances amount to an offer. Where such communication is reasonably susceptible to the construction that it amounts to an offer, and that it was intended as such by the party making it and is accepted as such by the party to whom it is made, when such acceptance is communicated to the party making the communication, and the latter remains silent and does not disclaim that such communication was an offer, such conduct of the parties is sufficient to warrant the inference that the minds of the parties have met and that a contractual relation has been created.

2. Evidence \S 71, 89—Inferred that letter mailed was received.

Where a communication by letter is properly addressed and deposited in the United States mail, and its receipt is not denied by the addressee, the inference is warranted that the communication was received. *Hamilton v. Stewart*, 108 Ga. 472, 476, 84 S. E. 123. Evidence by the addressee to the effect that another person in his employment opened his mail, and that the addressee had never seen or heard of the communication, and that the same cannot be found in his office after careful search, does not conclusively establish as a fact that he did not receive the communication, and does not as a matter of law rebut the inference of its receipt, authorized by its having been posted properly addressed.

3. Certiorari \S 70(8)—Finding of fact by municipal court not disturbed.

Whether or not a contract existed between the parties was a question of fact, and the judge of the municipal court, passing upon the facts without a jury, having determined in favor of the existence of a contract, the judgment of the superior court overruling the certiorari was not error.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action in a municipal court by Thomas Wilson against W. O. Martin. There was a judgment in favor of defendant, and plaintiff sought review in a superior court by certiorari, and from a judgment overruling the certiorari, brings error. Affirmed.

Thomas Wilson, as landlord, through his duly authorized agent, instituted proceedings to dispossess W. O. Martin as a tenant holding over beyond his term, to which proceedings the tenant filed his counter affidavit denying that his term had expired. The

sole issue upon the trial was whether or not the lease contract between the parties which had expired had been renewed. The evidence showed that M. C. Kiser, the agent of the landlord, on June 24, 1920, made the following written communication to the defendant:

"If you wish to renew your lease for another year at a rental of \$100.00 per month, kindly advise us by return mail or not later than the 1st of the month, as we would like to know who wish to remain in the apartment."

To which the defendant on June 28, 1920, replied as follows:

"Replying to yours of the 24th inst., beg to say that we have decided to retain apartment A for another year, although the increase (to \$100.00) per month is much greater than I had expected."

There was also evidence as indicated in paragraph 2 of the syllabus. The judge of the municipal court without a jury rendered a judgment for the defendant, and the plaintiff sued out a certiorari in the superior court, which on the hearing was overruled.

Hewlett & Dennis, of Atlanta, for plaintiff in error.

Troutman & Freeman, of Atlanta, for defendant in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

(27 Ga. App. 546)

HARRELL et al. v. EMANUEL. (No. 12293.)(Court of Appeals of Georgia, Division No. 2.
Nov. 1, 1921.)*(Syllabus by the Court.)*

1. No error.

No error appears, and the verdict is fully supported by the evidence.

(Additional Syllabus by Editorial Staff.)

2. Sheriffs and constables \S 84—Sheriff could sue on forthcoming bond after expiration of office.

The responsibility incident to the acceptance of a forthcoming bond is personal to the sheriff who takes it, and the bond is made payable to him alone and not to his successors in office, and consequently, upon a breach of the bond, the sheriff may institute a suit for use of the plaintiff in execution, notwithstanding that he has gone out of office.

3. Coroners \S 24—Sheriff, after going out of office, could sue on coroner's bond.

Though, as a general rule, bonds required of officials, such as sheriffs, coroners, etc., are considered as made to the office and pass to each incumbent without assignment, a sheriff after going out of office, could bring action on

a coroner's bond by reason of the failure of the coroner to take a forthcoming bond in a suit brought by the sheriff upon a forthcoming bond, wherein an execution was placed in the hands of the coroner; the sheriff being the real plaintiff in execution and therefore the real party interested in the outcome of the suit against the sureties on the coroner's bond for the coroner's neglect of duty, under Civ. Code 1910, § 12, and it was immaterial that he brought the action for the use of another, whose interest did not appear from the pleading.

Error from City Court of Bainbridge; H. B. Spooner, Judge.

Suit by J. H. Emanuel, for the use of Jessie R. Williams, against W. G. Harrell and others. Judgment for plaintiff, and the defendants bring error. Affirmed.

W. V. Custer and J. C. Hale, both of Bainbridge, for plaintiffs in error.

A. E. Thornton, M. E. O'Neal, J. R. Wilson, and H. C. Harrison, all of Bainbridge, for defendant in error.

HILL, J. [1] Emanuel, sheriff, levied a certain mortgage *fi. fa.* in favor of M. C. Williams, issued on the foreclosure of a chattel mortgage in the city court of Bainbridge against Aaron Andrews, on certain personal property described in the levy. Artie Andrews, the wife of Aaron, filed a claim to the property levied upon, giving to the sheriff a forthcoming bond with P. L. Lane and Alexander Thomas as securities. On the trial of the claim case the property was found subject to the mortgage *fi. fa.*, and, not being produced at the time and place of sale, the sheriff brought suit on the forthcoming bond against Artie Andrews and the securities, Lane and Thomas, and obtained a judgment against them. Being the plaintiff in *fi. fa.*, he was not qualified to make a levy of the same, and therefore turned over the *fi. fa.* to Frederick, coroner, for the purpose of having the levy made. The coroner thereupon proceeded to levy the execution and seized sufficient property to pay off the amount of the execution. He left the property so levied upon in the possession of the defendant in execution, without taking any forthcoming bond. The coroner turned the execution, with his entry of levy, over to the sheriff, for the purpose of having the property advertised and sold according to law, but the property was not forthcoming at the time and place of sale, and there was a loss resulting from the failure of the coroner to take a forthcoming bond. In the meantime the sureties on the claim bond made by Artie Andrews, Thomas, and Lane were released as sureties on the forthcoming bond, on the ground that the coroner had left the property levied upon by him in the possession of the defendant without taking

a forthcoming bond. See *Thomas v. Emanuel*, 20 Ga. App. 494, 93 S. E. 114.

Thereupon Emanuel, whose term of office had expired, brought the instant suit, on the coroner's bond, to recover damages resulting from the neglect of the coroner as above stated. By an amendment he added the allegation that the suit was for the use of Jessie R. Williams. It does not appear from the record in this case how Jessie R. Williams is related to the case except by the allegation that the suit by Emanuel was for her use. The original *fi. fa.*, on which the proceedings commenced, was the foreclosure of a mortgage by M. C. Williams and the levy of the *fi. fa.* issued thereon. The coroner had died before the instant suit was brought, and it was brought against Harrell and Welch, as sureties on the coroner's bond. These defendants filed a general demurrer to the petition, on the specific ground that the allegations "were insufficient in law to authorize a recovery in favor of the plaintiff against the defendants." The court overruled the demurrer, and exceptions *pendente lite* were duly preserved and are before this court. The court proceeded to trial and a verdict was tendered for the plaintiff, and the defendant's motion for a new trial was overruled, to which judgment defendants excepted.

[2, 3] The plaintiffs in error insist, in support of their demurrer to the petition, that the plaintiff in the court below, Emanuel, having ceased to be sheriff, was not authorized as an individual to bring the suit on the coroner's bond, and that the suit should have been brought by the sheriff in office; this contention being based upon the principle that bonds required of officials, such as sheriffs, coroners, etc., are considered as made to the office, and pass to each incumbent without assignment. This has been held to be the law in *Stephens v. Crawford*, 1 Ga. 574, 44 Am. Dec. 680; *Howard v. Crawford*, 15 Ga. 433; *Beckwith v. Rector*, etc., 60 Ga. 575. And this is a general rule. Bonds of coroners in this state are made payable to the "ordinaries and their successors in office," and a copy of the bond in the present case shows that the law had been complied with in this respect. It therefore follows, from the decisions above cited, that unless there was some exception in the present case which brings it outside of this general rule, the proper plaintiff to bring this suit for the real party at interest would be the ordinary, the obligee in the bond, who was in office at the time the suit was filed.

Under the provisions of section 12 of the Civil Code of 1910, suits may also be brought by any person aggrieved through the misconduct of an officer on his official bond in his own name as the real plaintiff. In the instant case the allegations in the petition show that Emanuel may be regarded at least

as something more than a mere nominal party. While sheriff, he made the levy of the mortgage *fi. fa.* and took the forthcoming bond of the claimant as against that levy, and, when the property was not forthcoming, as obligee in the forthcoming bond the sheriff sued thereon and obtained a judgment in his favor and had a *fi. fa.* issued thereon; this being the *fi. fa.* placed in the hands of the coroner for levy, the sheriff being a party and therefore disqualified. The responsibility incident to the acceptance of a forthcoming bond is personal to the officer who takes it; and hence the bond is made payable to him alone, and not also to his successors in office. Consequently, upon a breach of the bond, the obligee therein, for whose individual protection it was given, may institute suit on the instrument for the use of the plaintiff in execution; and this is so notwithstanding the fact that the plaintiff has, prior to the bringing of the action, gone out of office. *O'Neill Mfg. Co. v. Harris*, 120 Ga. 467, 47 S. E. 934.

The record in this case shows that the sheriff, who took the forthcoming bond following the levy of the execution in favor of Williams, upon the breach of that bond brought suit upon it, not in the name of Williams, but in his own name as obligee in the bond, and obtained a judgment thereon, followed by an execution which was placed in the hands of the coroner. This made the sheriff the real plaintiff in execution, and therefore the real party interested in the outcome of the suit against the sureties on the coroner's bond for the coroner's neglect of duty. For the reasons stated, it would seem to follow that he had a legal right to bring the suit on the coroner's bond, as being the person aggrieved by the coroner's neglect, either in his own name individually or for the use of any one that he might designate as the usee, and in this case, by amendment, he brought the suit for the use of Jessie R. Williams. Why he did so does not appear from the record, but this is immaterial as affecting his right to bring the suit, and we therefore think that the demurrer was very properly overruled by the learned trial judge.

The amended motion for a new trial contains numerous grounds of error in rulings on evidence, refusals to charge, and exceptions to instructions. Examination of each in connection with the record fails to disclose any material error, and the verdict is amply supported.

Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(27 Ga. App. 549)

NEW SOUTH RUBBER CO. v. MUSE.
(No. 12297.)

(Court of Appeals of Georgia, Division No. 2.
Nov. 1, 1921.)

(Syllabus by the Court.)

1. Sales \S 437(1)—Under defendant's pleadings admission of evidence and giving of instructions as to express warranty held error.

Where a defendant, by plea and answer to a suit on open account for goods sold, merely denied the indebtedness and set up that some of the articles furnished were worthless, and thus relied only upon a general implied warranty, without pleading any express warranty as to durability and quality, evidence as to such a special guaranty by plaintiff's selling agent was improperly admitted, and it was error for the court to charge thereon. *Snowden v. Waterman*, 100 Ga. 588(5), 591, 28 S. E. 121; *Pound v. Williams*, 119 Ga. 904, 908, 47 S. E. 218.

2. Evidence \S 91 — Pleading \S 374 — Trial \S 257—Burden on plaintiff except where defendant by plea or admission admits *prima facie* case; charge on shifting of burden not required unless timely requested when *prima facie* case not admitted.

Except in cases where the defendant by his plea admits a *prima facie* case as alleged in the petition, so that the plaintiff without more could recover the amount sued for, or where the defendant in open court makes such an admission and thereby assumes the burden of proof, the burden in all cases brought *ex contractu* lies upon the plaintiff, and it is incumbent upon him to establish all of the unadmitted material allegations as laid in the petition. Since the plea in the instant case does not admit a *prima facie* case, such as the plaintiff without more could recover on in the amount sued for, the general burden remained upon the plaintiff; and, in the absence of a timely request, it was not incumbent upon the court to charge upon the shifting of the burden under the development of the evidence. *Western & Atlantic Ry. Co. v. Brown*, 102 Ga. 13, 29 S. E. 130; *Brunswick R. Co. v. Wiggins*, 113 Ga. 842, 845, 39 S. E. 551, 61 L. R. A. 513; *Askew v. Amos*, 147 Ga. 613, 95 S. E. 5; *Lazenby v. Citizens' Bank*, 20 Ga. App. 53, 55(2), 92 S. E. 391.

Error from City Court of Carrollton; Leon Hood, Judge.

Action by the New South Rubber Company against O. P. Muse. Judgment for defendant, and plaintiff brings error. Reversed.

Boykin & Boykin, of Carrollton, for plaintiff in error.

JENKINS, P. J. Judgment reversed.
STEPHENS and HILL, JJ., concur.

(27 Ga. App. 537)

STANSALL v. COLUMBIAN NAT. LIFE INS. CO.**COLUMBIAN NAT. LIFE INS. CO. v. STANSALL.**

(Nos. 12282, 12283.)

(Court of Appeals of Georgia, Division No. 2
Nov. 1, 1921.)*(Syllabus by the Court.)*

1. Courts ⇐91(1) — Decision of Supreme Court binding on Court of Appeals; error to direct verdict where Supreme Court in similar case had held question for jury.

Not only would this court be bound by the rulings of the Supreme Court on a principle of law as applicable to a certain state of facts under the doctrine of "stare decisis," but by express provision of the Constitution of this state the decisions of that court are made binding upon this court as precedents. In a suit by the same plaintiff on another policy of life insurance covering the same risk, where the issue as to fraud was the same, and the evidence on that issue was for the most part identical, and in its effect substantially the same, it was held by the Supreme Court that, "under the evidence introduced, it was for the jury to say whether the representations thus made were material to the risk." *Connecticut Mutual Life Insurance Co. v. Mulkey*, 142 Ga. 358, 82 S. E. 1054. It was therefore error in the instant case for the trial judge to direct a verdict for the defendant, but the issue of fraud should have been submitted to the jury.

2. Appeal and error ⇐1097(1), 1195(1,3) — Striking of allegations not error where law as to the defense determined previously adverse to defendant; law of the case includes every applicable proposition of law; law of the case binding on appellate and trial courts; rulings held law of the case though judgment might have been sustained on narrower ground.

Under the doctrine known as the "law of the case," the court did not err in striking certain portions of the original plea and certain amendments thereto, since, according to the rulings made by this court in *Columbian National Life Insurance Co. v. Mulkey*, 13 Ga. App. 508, 70 S. E. 482, and 19 Ga. App. 247, 91 S. E. 344, the law as to such a defense, so far as this case is concerned, has been fixed and determined by express rulings adverse to defendant; and by them not only the lower court, but this court, as well, is bound.

3. Appeal and error ⇐1056(1) — In action on insurance policy, exclusion of medical examiner's report held harmless.

The exclusion of the medical examiner's report, if error at all, was, under the facts of this case, harmless.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Janie Stansall against the Columbian National Life Insurance Company.

Judgment for defendant, and plaintiff brings error, and defendant files a cross-bill of exceptions. Reversed on the main bill of exceptions, and affirmed on the cross-bill.

The suit as originally brought in 1913 by Mrs. Mulkey, now Mrs. Stansall, against the defendant insurance company on a policy dated March 4, 1911, showed on the face of the petition itself that a portion of the premium was covered by two promissory notes which had never been paid, and that the notes provided by their terms that the policy would become null and void upon their nonpayment at maturity. The petition, despite such provision in the premium notes, claimed liability under the policy on two theories, one of which was that the stipulation as contained merely in the note could not cause the policy "to lapse," and, second, that the company by its duly authorized agents had moreover waived any such ground of defense by its acts and conduct subsequent to the maturity of the note which was due. A demurrer to the petition was filed, to the effect that it failed to set forth a cause of action, and upon the overruling of the demurrer the case was brought to this court, and the court held as follows:

"The failure to pay a promissory note, taken in payment of an insurance policy (although it is stipulated in the note that the nonpayment of the same at maturity will avoid the policy), will not forfeit the policy, where there is no condition in the policy itself providing for its forfeiture for the nonpayment of notes." "When the condition as to forfeiture for nonpayment on maturity of a note given for the premium is contained only in the note, the mere fact that the note is not paid at maturity does not of itself avoid the policy. Such a provision is a condition subsequent, of which the company must avail itself by clear and unequivocal acts." The decision in *Arnold v. Empire Insurance Co.*, 3 Ga. App. 685, 60 S. E. 470, is controlling. There is no conflict between the decision in that case and the decision of the Supreme Court in *Stephenson v. Empire Life Insurance Co.*, 139 Ga. 82 (76 S. E. 592). In the *Stephenson* Case the provision relating to forfeiture for nonpayment of premium notes was contained in the policy itself; in the *Arnold* Case it was in the premium note only; and in the instant case the condition was contained, not in the policy contract, but only in the note, and is therefore within the ruling in the *Arnold* Case. *Joyce on Insurance*, § 1211; *May on Insurance*, § 345e." *Columbian Nat. Ins. Co. v. Mulkey*, 13 Ga. App. 508, 70 S. E. 482.

Following this ruling, in form and substance as above set forth, was a brief statement of the pleadings. By the original plea, and by amendments filed November 1, 1913, and December 15, 1914, it was alleged both that the policy sued on was ad initio void, and that it "became null and void" by reason of the nonpayment of the premium note; and

by the original plea, and by an amendment filed December 3, 1914, the policy was alleged to be void because obtained by fraudulent representations on the part of the insured. After the above decision by this court a verdict was directed for the plaintiff. The case was again brought to this court, and the question as to the necessity of the return of the premium by the company as a prerequisite to its defense was certified to the Supreme Court, and after a decision upon the question by the court (*Columbian National Life Insurance Co. v. Mulkey*, 146 Ga. 267, 91 S. E. 106), a judgment was rendered by this court (*Columbian National Life Insurance Co. v. Mulkey*, 19 Ga. App. 247, 91 S. E. 344) reversing the judgment of the court below, the second and third divisions of the syllabus being as follows:

"Where suit is brought on an insurance policy which contains a stipulation to the effect that the policy will be void if procured by fraud on the part of the insured, a defense by the insurer that the policy is avoided on account of willful and material misrepresentation, made by the insured in his application for the policy, is not an attempt to rescind the contract, but an attempt to have it declared void *ab initio*. In such a case it is not necessary for the insurer, before pleading that the policy was voided by such misrepresentations, to return the premiums paid or the notes given therefor. The provisions of section 4305 of the Civil Code of 1910 are not applicable to such an action, but the law governing it is found in sections 2479, 2480, 2481. In other words, the insurer has a right to retain the premiums already received on the policy, and to avoid the policy because of the fraud practiced upon the insurer by the insured, and to plead such fraud as a defense to the suit. *Columbian National Life Insurance Co. v. Mulkey*, 146 Ga. 267, 91 S. E. 106.

"Under the ruling of this court when this case was formerly before us (*Columbian National Life Insurance Co. v. Mulkey*, 13 Ga. App. 508, 79 S. E. 482), it was not error for the trial court to strike paragraphs 3, 5, 6, and 7 of the original answer, or to strike the whole of the amendment allowed and filed November 1, 1913, or to strike the whole of the amendment allowed and filed December 15, 1914. This court in its previous decision of the case, however, did not pass upon the question ruled upon in the preceding paragraph of this decision; and, under the decision of the Supreme Court in this case (*supra*), the trial judge erred in striking the paragraphs of the original answer, with the exception of those just mentioned, and in striking the amendment allowed and filed December 3, 1914, and in refusing to allow the defendant to sustain by proof the allegations therein made."

Subsequently, the Supreme Court passed upon another phase of the litigation. *Columbian National Life Insurance Co. v. Mulkey*, 150 Ga. 45, 102 S. E. 346. On the last trial of the case in the court below, the defendant sought to amend its plea by again setting up as a ground for defense the pro-

vision in the unpaid premium note already referred to, and sought to show that this provision was legal and binding as a part of the insurance contract, so as to forfeit the policy upon its nonpayment at maturity. On motion of plaintiff's counsel, the original pleas, save the defense setting up fraud, together with the amended pleas, were stricken; after which upon the trial of the case, a verdict was directed in favor of the defendant on the issue of fraud. Plaintiff now brings her exceptions to the action of the court in directing a verdict for the defendant, and in excluding from the testimony the medical examiner's report to the company; and the defendant files its cross-bill, excepting to the order of the court in striking the amended defenses referred to.

It appears that the insured in the policy sued on had taken out another policy in the Connecticut Mutual Life Insurance Company, and that the litigation under that policy has been determined. It appears that the issue and the evidence in the instant case and in that case pertaining to the issue of fraud on account of the alleged false and fraudulent material representations by the insured, were substantially the same, including the documentary evidence, although in the application for the Connecticut Mutual Policy the applicant stated that he used no beer and no alcoholic stimulants, while the application for the policy in the instant case does not go to that full extent, but states that he drank beer, one or two bottles a week, and alcoholic stimulants once or twice a month. The documentary evidence as to the proof of death, occurring about 6 months subsequent to the issuing of the policy, and as to the verdict of the coroner's inquest that the insured had died of acute alcoholism, was the same in both cases; likewise the extracts from the testimony of the insured taken from his examination in bankruptcy in September, 1911. Pursuant to a stipulation between counsel in the trial of the instant case, the defendant read the depositions of one witness taken in the other case, and read the stenographic report of the evidence delivered on that trial by seven additional witnesses. Pursuant to this stipulation the plaintiff read in evidence the testimony of nine of her witnesses as delivered in the trial of the other case; also the evidence of one of the defendant's witnesses in the other case. Dr. J. H. Conway was a witness for the defendant on both trials, and his evidence was substantially the same on both. The evidence of the respective medical directors of the defendant companies was similar in the two cases. J. M. Davis testified for the plaintiff to like effect in both cases. Except as above indicated, there was only one witness for the defendant and only one witness for the plaintiff who did not testify in the other trial, but their evidence does not materially

alter the state of the case as proved; the evidence for the plaintiff in the instant case is almost the same, and is fully as strong, as in the former case; and the evidence for the defendant is almost identical, and substantially the same in effect, as offered in the trial of the previous case. Upon a question subsequently certified by this court to the Supreme Court in another case that court held:

"A contract of life insurance, as expressed in the policy issued by a company to an individual, may be supplemented by a subsequent contract between the parties, expressed in a promissory note given by the insured to the insurer for a premium on the policy and providing for a termination of all rights under the policy for nonpayment of the note, although the policy contain no such provision." *State Life Insurance Co. v. Tyler*, 147 Ga. 287(1), 93 S. E. 415.

Horton Bros. and Anderson, Rountree & Crenshaw, all of Atlanta, for plaintiff in error.

Colquitt & Conyers, of Atlanta, for defendant in error.

JENKINS, P. J. (after stating the facts as above). [1] The ruling in the first head-note, when taken in connection with the above statement of facts, does not seem to require further elaboration. Something additional may properly be said in regard to the rulings in the second and third head-notes.

[2] It is the contention of learned counsel for the insurance company that neither of the rulings made by this court in *Columbian National Life Insurance Co. v. Mulkey*, 13 Ga. App. 508, 79 S. E. 482, and 19 Ga. App. 247, 91 S. E. 344, can properly be taken as the law of this case, so as to exclude the defense made by virtue of the stipulation contained in the premium notes, for the reason that the ruling on the demurrer as made in 13 Ga. App. 508, 79 S. E. 482, "went no further than the judgment of the trial court, which was that a declaration setting up all the waivers and facts heretofore enumerated could withstand a general demurrer to the petition." In other words, the contention is, as we understand it, that, since the petition might have been held to be good by virtue of the saving allegations therein contained with reference to a waiver by the company of its defense growing out of the stipulation contained in the premium notes, neither the trial court nor this court can be taken to have gone further in its ruling than to hold that the petition as brought was good in law; and consequently that this, as the only ruling, is all that has become settled as "the law of the case," to the exclusion of what might have been given by this court merely as reasons for its decision. If the proposition should be accepted as sound that

this court in ruling upon questions of law, is limited in its power to fix and determine the law of the case by the scope and necessary legal effect of the judgment rendered in the trial court, then the contention as now made might be correct, since it has been held that a judgment by a trial judge on a demurrer does not conclude a party upon any question not necessarily involved in such a demurrer. *McElmurray v. Blodgett*, 120 Ga. 9 (3), 47 S. E. 531; *Ga. Northern Ry. Co. v. Hutchins*, 119 Ga. 504 (1, 2), 510, 46 S. E. 659; *Atlanta Post Co. v. McHenry*, 106 S. E. 324. But, while we agree with counsel that a decision or ruling by this court such as shall constitute the "law of the case" does not consist in the line of reasoning or arguments set forth in the opinion, we do think that it includes each and every applicable proposition of law actually applied to the facts or pleadings involved (*Heldt v. Minor*, 113 Cal. 385, 45 Pac. 700, 701); and that a rule when thus announced, in so far as it relates to the case in which it was rendered, is binding alike upon the trial court and the court rendering it, in all subsequent proceedings therein. As we understand it, not only the judgment rendered by the appellate court, but all applicable rules of law actually applied in the decision, become the law of the case. *Continental Life Insurance Co. v. Houser*, 111 Ind. 266, 268, 12 N. E. 479. While it is true that a judgment by an appellate court does not become the law of the case upon any proposition not expressly or impliedly applied by it in the decision, yet where a proposition of law is plainly stated and applied to its decision, the rule thus applied becomes the law of that particular case in all subsequent proceedings therein, and that to such an extent that the appellate court itself is powerless to depart therefrom. Thus, the proposition of law as stated by this court, and applied to this case in 13 Ga. App. 508, 79 S. E. 482, not only binds the trial court, but this court as well. It was there held that—

"The failure to pay a promissory note, taken in payment of an insurance policy (although it is stipulated in the note that the nonpayment of the same at maturity will avoid the policy), will not forfeit the policy, where there is no condition in the policy itself providing for its forfeiture for the nonpayment of notes."

The petition had admitted the nonpayment of the premium notes containing such a stipulation. The demurrer raised the question of law. In passing thereon the court specifically planted its decision on its statement of the legal rule, and the rule as thus stated and applied became the law of the case. Under the ruling as made, the question as to whether, under the allegations of the petition, the company had by the conduct of its agents waived such a ground of defense, became moot, as it were, since that question became merged into and was comprehended

by the more far-reaching and controlling proposition actually applied. A right which did not exist need not and could not be waived. The court in its subsequent decision in 19 Ga. App. 247, 91 S. E. 344, itself treated this question of law as adjudicated. The action of the trial judge in striking the original and amended portions of the plea, which pertain to this matter of defense, was following not only the original ruling, but the subsequent one as well, the latter of which was itself based upon this doctrine known as "the law of the case." It appears that when the case was here last these pleas had not, as was then supposed, been actually stricken; but the subsequent action in striking them is in accord with both of the decisions of this court. So far as the ruling in 19 Ga. App. 247, 91 S. E. 344, which relates not to the demurrer to the petition, but to the pleas as amended, is concerned, counsel seek to draw a distinction, such as might prevent the application of the latter case under the doctrine of the law of the case. The point is that, up to the time of the holding in 19 Ga. App. 247, 91 S. E. 344, the plea had sought to set up that the policy was void ab initio, whereas the recent amendment offered at the time of the last trial sought to show that the policy lapsed or became forfeited upon the nonpayment of the premium notes.

As already intimated, this contention is not urged with reference to the decision in 13 Ga. App. 508, 79 S. E. 482, since that decision was upon the overruling of the defendant's demurrer to the petition, and both the petition and the decision clearly had reference to a lapse or forfeiture. But even as to the point made with reference to the later decision, it would seem that the original plea, and certainly the plea filed December 15, 1914, sought to set up as a defense the lapse or forfeiture of the policy by reason of the nonpayment of the premium note on its maturity. In the original plea and answer it is set up, not only that the policy was void ab initio by reason of the nonpayment of the premium note, but "became, was, and is null and void by reason of the failure to pay the first premium thereon," and that "by the failure of the said William M. Mulkey to pay the notes, both the notes and the policy became null and void and of no force and effect whatsoever." In the amendment to the previous plea, filed December 15, 1914, it is stated that, by reason of the provision in the premium notes, the policy of insurance "lapsed and became null and void by the failure to pay the second of said notes at its maturity," and that, after receiving notice of such nonpayment, it took action upon said notes "by

canceling and entering canceled said notes, and by lapsing and entering as lapsed said policy." This latter amendment, as well as the paragraphs in the earlier pleas containing the averments quoted, was specifically referred to in the opinion in 19 Ga. App. 247 (3), 248, 91 S. E. 344.

[3] The only other question involved relates to the exclusion of the special report to the defendant of the physician who examined the insured; which report appears to have been printed and written on the same pages as part II of the application, and which was signed by the medical examiner, but not by the applicant. This physician testified orally for the plaintiff in the trial; and the court, in excluding the report as independent evidence of itself, ruled that it was admissible "as a memorandum which the witness used." Plaintiff contends that it was admissible because it "is a part of the application written and printed on the same sheet, and it is likewise a part of the contract of insurance," that "this report was before the company when the application for insurance was considered, and it thus acquired direct knowledge and notice of every statement in the application," and that the knowledge of the medical examiner "will be imputed to the company." Since an examination of the report discloses nothing whatever to indicate any knowledge on the part of the examiner as to any fact conflicting with the statements made by the insured, and since it fails to disclose any statements from which any such knowledge might be deduced, the exclusion of such report was necessarily harmless to the defendant, as showing either actual or imputed knowledge by the company relating to the previous use of alcoholic stimulants by the insured. Thus, since the report could not have any probative value upon the sole issue to be determined, its exclusion could not in any event have been harmful to the defendant; and it therefore becomes unnecessary to determine whether or not it in fact constituted a part of the contract of insurance and for that reason was admissible. Moreover, it appears that the examiner as a witness for the plaintiff, testified to substantially everything treated in that report, and, while so testifying, was permitted, under the ruling of the court, to use the report as a memorandum to refresh his recollection: and by the ruling of the court the report was declared admissible for such purpose.

Judgment reversed on main bill of exceptions; affirmed on cross-bill.

STEPHENS and HILL, JJ., concur.

(27 Ga. App. 531)

HARRELL v. SOUTER. (No. 12155.)(Court of Appeals of Georgia, Division No. 2.
Nov. 1, 1921.)*(Syllabus by the Court.)*

4. Landlord and tenant \S 120(2)—Term of tenant at will does not terminate for two months after notice.

The term of a tenant at will does not expire at the instance of the landlord until after the expiration of two months after notice from his landlord to terminate the tenancy. Civil Code 1910, § 3709.

2. Landlord and tenant \S 291(11)—Tenant's counter affidavit held to make issue as to giving of notice requiring proof by plaintiff.

Where the landlord seeks by summary process to dispossess his tenant upon the ground that the latter was a tenant at will, holding over after the expiration of his term, and where the tenant in his counter affidavit arresting the proceedings alleges that his term has not expired, there is presented an issue as to whether the requisite two months' notice to vacate has been given to the tenant by the landlord; and where the evidence is silent upon this issue, the plaintiff cannot prevail. It follows, therefore, that a verdict for the defendant cannot be set aside upon the ground that it was contrary to law, and without evidence to support it.

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Suit by Georgia Harrell against Thomas Souter. Judgment for defendant, and plaintiff brings error. Affirmed.

W. F. Way, of Moultrie, for plaintiff in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

(Ga. App. 523)

CITIZENS' TRUST CO. v. BUTLER et al. (No. 11143.)(Court of Appeals of Georgia, Division No. 2.
Nov. 1, 1921.)

Error from City Court of Savannah; Davis Freeman, Judge.

Action by the Citizens' Trust Company against C. J. Butler and others. Judgment for defendants, and plaintiff brings error. Reversed in conformity to decision of Supreme Court on certiorari (108 S. E. 468).

For former opinion of the Court of Appeals, see 103 S. E. 852.

Anderson, Cann, Cann & Walsh, of Savannah, for plaintiff in error.

Geo. H. Richter, of Savannah, for defendants in error.

STEPHENS, J. This court having held that the trial court did not err in granting a non-suit (103 S. E. 852), and the Supreme Court on certiorari having reversed this judgment ([Sup.] 108 S. E. 468), the judgment of affirmance originally rendered by this court must be vacated and the judgment of the trial court reversed.

Judgment reversed.

JENKINS, P. J., and HILL, J., concur.

(131 Va. 479)

FIRST STATE BANK OF MONROE v. CONNOLEY.

(Supreme Court of Appeals of Virginia. Nov. 17, 1921.)

1. Bailment \S 12—Person, given draft to take to another, who cashed it himself, held liable for loss of money irrespective of due care.

Where plaintiff asked defendant to take a draft to a bank in L. and bring back the money, without compensation, but, upon learning that defendant was not coming back from L. until in the night, told him to give it to H. and tell H. to send the draft by some responsible person, and H. told him to give the draft to M., but, upon learning that M. was not going to L., defendant took the draft to L. himself and cashed it, he exceeded his authority, and violated his duty as bailee, and was liable for the loss of the money, irrespective of any want of due care on his part.

2. Bailment \S 12—Gratuitous bailee subject to same obligations as others except as to degree of care required.

Except as to the degree of diligence and care required of him, the general obligation of a gratuitous bailee is the same as if he had assumed the trust upon the promise or with the expectation of reward.

3. Appeal and error \S 1175(5)—Judgment entered for plaintiff on reversal of judgment for defendant in accordance with uncontroverted facts.

On reversal of a judgment for defendant, where the facts seem to be fully before the court and are uncontroverted, and entitle plaintiff to final judgment for the amount sued for, the appellate court will enter judgment accordingly.

Error to Circuit Court, Amherst County.

Action by the First State Bank of Monroe against Charles Connoley. Judgment for defendant, and plaintiff brings error. Reversed, and judgment entered for plaintiff.

This is an action of trespass on the case in assumpsit brought by the plaintiff in error bank, as plaintiff in the court below, against the defendant in error Connoley, as defendant in the court below, to recover the sum of \$1,000, the amount of a draft belonging to the bank intrusted to and received by Connoley under certain instructions

which did not authorize him to cash the draft, but which Connoley, in excess or in disregard of his instructions and authority, took to the bank on which it was drawn, cashed into money, and subsequently lost the money out of his pocket; the result being the loss to the bank of the amount of the draft which is sued for.

There was a trial by jury and a verdict and judgment accordingly in favor of the defendant.

There is no conflict in the evidence as to the material facts in the case, and they are as follows:

The defendant, Connoley, happened to be in the plaintiff's bank at Monroe on a certain day, and was asked to take a draft in an envelope to the First National Bank of Lynchburg, in Lynchburg, which was about seven miles from Monroe, and bring back the money which was called for by the draft, being the sum of \$1,000. Connoley informed the bank that he did not expect to come back until in the night. He then started to leave the bank, and was called back and asked to take the draft to a Mr. Hicks at Monroe, and to tell Mr. Hicks to send the draft by some responsible person. The evidence, however, is express that the bank gave Connoley no authority whatever to himself take the draft to Lynchburg after Connoley stated that he did not expect to come back until in the night. Connoley took the envelope with the draft in it to Mr. Hicks, who said he was busy, and asked Connoley why Connoley did not take it. Connoley replied that he was not coming back till in the night. Hicks then told Connoley to take the draft over to the depot and give it to a Mr. McIvor to take to Lynchburg. Connoley took the draft to McIvor, but found that McIvor was not going to Lynchburg. Thereupon Connoley took the draft on to Lynchburg himself, went to the bank, got the money, done up into a package, and put it in his inside coat pocket. It was about 2 p. m. when Connoley cashed the draft. He had nothing in particular to do that afternoon, so he bought a pint of whisky in Lynchburg (just where or from whom he declined to tell), went to a picture show and other public places mentioned in his testimony, and left Lynchburg for Monroe that night about 10 o'clock, in a jitney, with four others. As he got in the jitney Connoley felt in his pocket and was confident he had the money at that time. Connoley was on the back seat of the automobile coming back to Monroe, with two of the other passengers on that seat. When they got to a watering trough, just outside of Lynchburg, the engine began to heat, and Connoley got out and put some water in the radiator. He did not miss the money until he got in his room at Monroe. He then went out and told a person, who was a witness in the case,

that he had lost the money, got this person to take him back to the watering trough, where they both looked for but could not find the money. They afterwards looked in the jitney for the money, but failed to find it there. The next morning Connoley went to the bank, and told the cashier that he had lost the money. The pint bottle of whisky was only half full when one of the witnesses saw it when the stop was made to put water in the radiator as aforesaid. Connoley had been drinking while in Lynchburg and on his return to Monroe, but, as several witnesses testified, was at no time drunk. The money was never found. Connoley was not promised any compensation for his services in connection with the matter and received none; his action being wholly gratuitous and for the sole benefit of the bank.

The instructions given by the court assumed that the defendant, Connoley, had the implied authority to take the draft to Lynchburg, etc., and were to the effect that if the jury believed that the defendant was a gratuitous bailee for the sole benefit of the bank, the law required of him only a slight degree of care, and made him answerable only for gross negligence.

And the court refused to give the following instruction asked for by the plaintiff, namely:

"(2) The court instructs the jury that if you believe from the evidence that the defendant had no authority from the plaintiff's cashier to take the draft in question to Lynchburg and collect same himself, and that he did so in violation of his instructions, and thereby exceeded or disregarded his instructions given him at the time he received said draft, and that by reason of his exceeding or disregarding his instructions plaintiff's money became lost, the defendant is liable in the action, irrespective of any question of negligence on his part."

The action of the court in refusing to give the last-named instruction is one of the assignments of error.

B. B. Campbell, of Lynchburg, for plaintiff in error.

Whitehead & Shroder, of Amherst, for defendant in error.

SIMS, J., after making the foregoing statement delivered the following opinion of the court:

[1] In the view we take of the case, the sole question presented by the assignments of error which we need to decide is the following:

1. Is the defendant, Connoley, liable to the plaintiff bank for the money which was lost by him while he was acting in disregard of his instructions from the bank in accordance with which he accepted the undertaking confided to him.

This question must be answered in the affirmative.

The defendant, Connoley, was undoubtedly-

ly in the inception of the transaction which was the basis of this action, a gratuitous bailee or mandatory, acting for the sole benefit of the bank, the bailor; and if the defendant had not exceeded or disregarded his instructions the law of the case would have been in accordance with the instructions which were given by the trial court. For all of the authorities lay it down that a gratuitous bailee can be held liable for gross negligence only. 5 Cyc. 186; Carrington v. Ficklin's Ex'rs, 73 Va. (32 Grat.) 677; and numerous other Virginia cases and other authorities. What is gross negligence in a given case is a matter not always easy to determine, as it will depend upon all the circumstances of the particular case. However, that question does not arise in the case before us, for the reason that the uncontroverted evidence plainly shows that the defendant disregarded and exceeded his instructions in accordance with which he had accepted the undertaking confided to him, when he took the draft to Lynchburg and cashed it. When he took that action he did so outside of the authority conferred upon him as bailee. That authority extended no further than his taking the draft in the first instance to Hicks, and subsequently, under Hicks' direction, to McIvor. He had no authority from any one to take the draft any further. He should have left the draft with McIvor or have brought it back to and have left it with Hicks, according to his instructions from the bank. When he went further, and took the draft on to Lynchburg, he assumed an authority which had not been conferred upon him, and, in truth, acted, in so doing, not as bailee, but as a wrongdoer, and became personally responsible to the owner for the loss occasioned by such conduct, irrespective of any want of due care on his part. See note to 4 A. L. R. 1225 et seq. and authorities cited.

As said in the note supra (4 A. L. R. 1225):

"If a gratuitous bailee undertakes to deal with the subject of the bailment in a manner not warranted by his instructions, expressed or implied, * * * and the property is lost, he is liable therefor, irrespective of any want of due care on his part, unless his act is ratified by the bailor with full knowledge of the circumstances"—citing a number of authorities, among which is a Supreme Court decision, in the case of Walker v. Smith, 4 Dall. 389, 1 L. Ed. 878, 879.

In that case the defendant was a gratuitous bailee of certain goods, which the plaintiffs by letter requested him to hold at the disposal of one B., but not to deliver them to B. without being paid for the amount of the goods, or having such security given therefor as was satisfactory to the defendant, bailee. The defendant received the goods, but delivered them to B. without receiving payment or exacting any security.

Held: The defendant was liable for the value of the goods.

[2] As said of a bailee, who receives a deposit gratuitously, in Jenkins v. Bacon, 111 Mass. 373, 15 Am. Rep. 33:

"Except as to the degree of diligence and care required of him, his general obligation is the same as if he had assumed the trust upon the promise or with the expectation of reward"—citing numerous authorities.

So too, if a bailee for hire makes an unauthorized use of the subject of the bailment, he is liable for any resulting loss or damage irrespective of whether he is or is not negligent. Spencer v. Pilcher, 35 Va. (8 Leigh) 565; Harvey v. Epps, 53 Va. (12 Grat.) 153.

The uncontroverted evidence in the case before us is express that the bank gave the defendant no authority to take the draft to Lynchburg after his statement that he would not return until in the night; nor was there any evidence whatsoever before the jury to support a finding that the defendant had the implied authority to do so.

[3] We feel constrained, therefore, to set aside the verdict and judgment under review, because of the refusal of the trial court to give instruction No. 2, quoted above, asked for by the plaintiff; and, as the facts of the case seem to be fully before us and are uncontroverted, and are such that we feel compelled to say that the plaintiff is entitled to final judgment against the defendant for the sum of \$1,000, the amount sued for, we will enter judgment accordingly for that sum, with interest from the date of the entry of the order, and for the costs of the plaintiff in this court and in the court below.

Reversed and final judgment.

(131 Va. 564)

NORFOLK & W. RY. CO. et al. v. ARRINGTON.

(Supreme Court of Appeals of Virginia. Sept. 22, 1921.)

1. Railroads §5½. New, vol. 6A Key-No. Series — Companies not liable for injuries caused during federal control.

The companies owning the railroads are not liable for injuries caused by the operation thereof under the control of the Director General of Railroads.

2. Appeal and error §1173(1) — Erroneous judgment against railroad company does not require reversal as against Director General.

The fact that a judgment for the death of an employee rendered against both the railroad company and the Director General of Railroads was erroneous as against the company does not affect the liability of the Director General, under Code 1919, § 6365.

3. Witnesses ¶281 — Cross-question should not impute to witness a statement not made by him.

Counsel in cross-examining an adverse witness should not ask a question imputing to the witness a statement which he had not made.

4. Appeal and error ¶1048(5) — Permitting improper question immediately corrected held harmless.

Error in overruling an objection to a question asked defendant's engineer, which imputed to him a statement made by the fireman and not by the engineer, was not prejudicial to defendant, where the witness denied making such statement and the court immediately corrected its ruling and sustained the objection.

5. Railroads ¶390—Last clear chance held applicable to killing of licensee.

In an action for the death of licensee working on a railroad grade for an independent contractor, where there was ample evidence that the fireman saw deceased on the track with his back to the train and notified the engineer, but that the engineer took no measures to warn deceased or stop the train until he could see deceased after the engine had rounded a curve and just before it struck deceased, the doctrine of last clear chance was applicable.

Error to Circuit Court, Montgomery County.

Action by Cora Arrington, administratrix of the estate of G. C. Arrington, deceased, against the Norfolk & Western Railway Company and Walker D. Hines, Director General of Railroads. Judgment for the plaintiff against both defendants, and they bring error. Reversed and remanded as to the Railway Company, and affirmed as to the Director General.

Jordan, Roop & Sowder, of Christianburg, F. M. Rivinus, of Philadelphia, Pa., and H. J. Phlegar, of Christianburg, for plaintiffs in error.

Harless & Calhoun, of Christianburg, for defendant in error.

PRENTIS, J. G. C. Arrington was killed by a train of the Norfolk & Western Railway Company, in August, 1918, while the system was being operated by the Director General of Railroads. His administratrix sued both the company and the Director General of Railroads, and recovered against both. Both defendants complain of the judgment, and three of the errors assigned are relied upon in this court.

1. The first assignment is that the court erred in overruling the motion of the Norfolk & Western Railway Company to dismiss the action against it, relying upon General Orders Nos. 50 and 50A, United States Railway Administration.

[1] The question thus raised has been much discussed in the state and federal courts

recently. It is unnecessary for us to treat it at any length, because by a recent decision of the Supreme Court of the United States, handed down June 1, 1921, the question must be regarded as definitely settled. *Missouri Pac. R. Co. v. Ault*, 256 U. S. —, 41 Sup. Ct. 593, 85 L. Ed. —.

It is there said, with reference to this identical point:

"The company is clearly not answerable in the present action if the ordinary principles of common-law liability are to be applied. The Railroad Administration established by the President in December, 1917, did not exercise its control through supervision of the owner-companies, but by means of a Director General through 'one control, one administration, one power for the accomplishment of the one purpose, the complete possession by governmental authority to replace for the period provided the private ownership theretofore existing.' *Northern Pac. Ry. Co. v. North Dakota*, 250 U. S. 135, 148, 63 L. Ed. 897, 902, P. U. R. 1919D, 706, 39 Sup. Ct. 502. This authority was confirmed by the Federal Control Act of March 21, 1918, c. 25, 40 Stat. at L. 451, and the ensuing proclamation of March 29, 1918, 40 Stat. at L. 1763. By the establishment of the Railroad Administration and subsequent orders of the Director General, the carrier companies were completely separated from the control and management of their systems. Managing officials were 'required to sever their relations with the particular companies and to become exclusive representatives of the United States Railroad Administration.' U. S. R. R. Adm. Bulletin, No. 4, pp. 113, 114, 313. The railway employees were under its direction and were in no way controlled by their former employers. See Bulletin No. 4, p. 168, § 5, page 198 et seq., page 330 et seq. It is obvious, therefore, that no liability arising out of the operation of these systems was imposed by the common law upon the owner companies, as their interest in and control over the systems were completely suspended."

The opinion handed down by Mr. Justice Brandeis proceeds with convincing reasoning to show the soundness of the conclusion that the motion of the Missouri Pacific Railway Company in that case to dismiss the action against it should have been sustained.

The very great weight of authority in the inferior federal courts as well as in the state courts supports this view, and the question is no longer open.

[2] The motion of the Norfolk & Western Railway Company should have been sustained, because the injury to the plaintiff's intestate occurred while the system was being operated by the Director General, and the court committed error in overruling it. This conclusion, however, does not affect the liability of the Director General of Railroads (Code 1919, § 6365), and we will proceed to consider the other assignments of error.

2. On cross-examination of the engineman, Douthat, counsel for the plaintiff asked the following question:

"Q. Then you did not blow it until you got to the straight track, although you acknowledge the man was oblivious to his danger and standing on the west-bound track?"

To this question the attorneys for the defendants objected, the objection was overruled, and exception duly taken, but immediately thereafter the court ruled that the question was improper, and sustained the objection thereto.

[3, 4] As the engineer had not acknowledged that the deceased was oblivious to his danger, the question was manifestly improper. There was, however, evidence in the case from the fireman and others that the deceased appeared to be oblivious to his danger for an appreciable time before he was struck. It is, however, not fair, even upon cross-examination, for attorneys to assume that a witness has made a statement which he has not made, and such a practice should be firmly restrained by the trial courts. Inasmuch as in this case the court immediately reversed its ruling, we find nothing in the occurrence which would justify a reversal of this case. The jury had heard the evidence of the witness, and knew that he had not acknowledged that the deceased was oblivious of his danger; indeed, the answer to this objectionable question by the witness himself was that he had no such knowledge, and then the prompt reversal of the ruling by the trial judge emphasized to the jury the fact that the witness had not so testified. It is thus perfectly clear that the error so quickly and completely corrected was not prejudicial; indeed, the incident in its close was altogether beneficial to the defendants, for the fact that the engineer claimed that he had no such knowledge was made obvious.

3. The other assignment of error here relied upon is that the court erred in overruling the motion for a new trial upon the ground that the verdict was contrary to the law and the evidence. The determination of this question depends upon whether under the evidence the defendant could be held liable under the doctrine of the last clear chance, or discovered peril.

[5] There were numerous instructions given at the instance of the litigants. It is conceded in the briefs that the jury were fully and properly instructed, and of the eight instructions given at the instance of the defendant, six recognized that doctrine as applicable to the evidence in this case. Under the evidence, this question was fairly referable to the jury, and of this there can be no doubt whatever. The unquestioned facts are that the deceased was a licensee, being a servant of an independent contractor who was engaged in grading work on the railway line. He was a foreman, having

charge of a large number of hands. The line was double-tracked at that point, and after attending to some of his duties on the south of the east-bound track he recrossed that track and nearly crossed the west-bound track, but stood on the end of one of the ties. A train going east passed about that time, and he was struck by a train going west on the west-bound track while thus standing. The defendants had knowledge of the fact that the grading work was proceeding, and had issued an order that the trains were to go slowly at that point. The fireman on the train which struck the deceased first observed him when 431 feet away, thereafter noted his change of position, saw that he was looking west with his back toward the approaching west-bound train, and perceived that he was apparently oblivious of his danger. The fireman promptly notified the engineman, who, according to his own testimony, then looked out of the window on his side in order to satisfy himself as to the facts. As the engineman was on the outside of the curve on which the train was then running, he did not see the deceased. Then as the train rounded the curve he could see for a distance of 214 feet on a straight track, but, inasmuch as the length of the engine was ahead, it was within 164 feet at the time he might with due care have seen the deceased and realized his peril. The engineman testifies, however, that he was within 50 feet of the deceased when he first saw, or could have seen, him, and that he did everything that could have been done to save him by endeavoring to slacken the speed of the train and by sounding danger signals. There is, however, abundant testimony to the effect that the speed of the train was not slackened until just at the time of the casualty, and that no warning whistle was sounded until immediately before the deceased was struck. The admitted facts that the trainmen had notice to operate the trains at that point with caution, that before the occurrence of the casualty the fireman appreciated the danger and notified the engineman of the fact, and that according to the testimony of many witnesses, notwithstanding the discovered peril of the deceased, the train was not brought under control, and that no warning signal was given until it was too late, make a case in which the issue of fact must be submitted to a jury. The instructions, which are unobjectionable, show that this was the view of the defendants at the time the case was tried. If the jury had ignored all of the physical facts and the testimony of all of the other witnesses except that of the engineman, they might have found in favor of the defendant; but they also had the right to discredit his testimony and to accept the weight of the evidence to the effect that under the doctrine of

discovered peril the plaintiff was entitled to recover notwithstanding the contributory negligence of the deceased.

Among the recent cases in this state which apply the doctrine are *Wilson's Adm'r v. Va. Portland R. Co.*, 122 Va. 160, 94 S. E. 347; *Roaring Fork R. Co. v. Ledford*, 126 Va. 97, 101 S. E. 141, 871; *Gunter's Adm'r v. Southern Ry. Co.*, 126 Va. 535, 101 S. E. 885; *Gordon's Adm'r v. Director General*, 128 Va. 426, 104 S. E. 796.

Reversed as to Norfolk & Western Railway Company; affirmed as to Director General of Railroads.

BURKS, J., absent.

(121 Va. 514)

GARBER v. SAUFLEY et al.

(Supreme Court of Appeals of Virginia. Nov. 17, 1921.)

1. Wills \S 524(8), 614(8)—Legatee held to take only life estate with remainder to descendants.

A will, "I give to E. the balance of my property, * * * her lifetime, and if she should die without leaving an heir, then I want all that I have given her divided into three parts," etc., held to give E. a life estate in the residue, with remainder to her descendants living at the time of her death, whether occurring before or after the death of the testator.

2. Wills \S 104 — Limitation over held not void for uncertainty.

A will giving to a daughter a life estate in the residue, "and if she should die without leaving an heir, then I want all that I have given her divided into three equal parts, and put on interest for the benefit of my grandchildren, to be given to them after they reach the age of 21. If R.'s children should not live to that age, I want their shares to be given to L.'s," etc., held not void for uncertainty as to the limitation over.

Appeal from Circuit Court, Augusta County.

Suit by Sandy S. Saufley, executor of Ada B. C. Hollar, deceased, against E. Orvetta Garber and others. From a decree, the named defendant appeals. Amended and affirmed.

Rudolph Bumgardner, of Staunton, for appellant.

J. A. Alexander, of Staunton, for appellees.

SAUNDERS, J. This appeal presents for construction the fifth clause of the will of Mrs. A. B. C. Hollar.

This lady was twice married. By her first husband, Saufley, she had three children, Ressie W., the wife of one Neff, who has two children; Sandy S. Saufley, who has four children; and Lena L., the wife of one McAllister, who is childless. By her second husband, one Hollar, the testatrix had a

child, E. Orvetta, who married Charles P. Garber, and by him has two children.

The testatrix appointed her son, Sandy S. Saufley, executor of her estate, and asked that he be allowed to qualify without security.

The executor found some difficulty in construing paragraph 5 of testatrix's will, and brought a suit in the circuit court of Augusta county, asking the "aid and assistance" of the court in this respect. The paragraph to be construed is the following:

"Fifth. I give to E. Orvetta Garber the balance of my property, all real estate and personal property that I may own at the time of my death I want Orvetta to have, her lifetime, and if she should die without leaving an heir, then I want all that I have given her divided into three equal parts, and put on interest for the benefit of my grandchildren, to be given to them as they reach the age of twenty-one. If Ressie's children should not live to reach that age, I want their shares given to Lena's, and Sandy's children when they reach that age, if they have any children."

It is stated in the will that it was written by the testatrix.

E. Orvetta Garber answered the bill of the executor, Saufley, asserting that according to the true construction of the will, *supra*, she took "a fee-simple estate in the realty, and an absolute estate in the personalty remaining after the payment of the funeral expenses, and the three legacies of \$5.00 each, given to the three daughters."

The trial court construed the will as follows:

"Orvetta takes a life estate. Remainder to her children, if she has any surviving her. If she dies without leaving children surviving her, then the estate is to be divided into three parts for the benefit of the children of Mrs. Neff, Sandy Saufley, a son, and Lena McAllister, a daughter. If none of Mrs. Neff's children reach the age of 21, their third goes to Lena's, and Sandy's children. If Lena leaves no children, that third goes to the other grandchildren."

A decree embodying the foregoing interpretation of the will in question was entered by the circuit court. From this decree an appeal was taken by E. Orvetta Garber, bringing the controversy before this court for determination.

The following errors are assigned by the appellant.

"First. Because the trial court did not hold that the limitation over to the grandchildren was void for uncertainty, and, if not, fails by reason of the fulfillment of the condition annexed to the previous estate.

"Second. Because the court did not hold that E. Orvetta Garber took a fee-simple estate in the land, and an absolute estate in the personalty; or limiting her to a life estate, did not hold that her children took a vested estate in remainder at her death."

(109 S.E.)

[1] The phrasing of the will is inartificial and in some degree redundant, but on the whole the testamentary scheme of Mrs. Hollar is fairly apparent from the language employed. The contention of the appellant that she takes a fee simple in the real estate, and an absolute estate in the personality, rests upon a highly artificial, if not distorted, construction of the first sentence of item 5. This sentence would give Orvetta a fee if a period was placed after the word "property," and the remainder of the sentence as well as the succeeding provisions of the paragraph were eliminated. But this action would do violence to the obvious intent of the testatrix. Plainly she intends to give Orvetta a life estate in the residuum. Not only do the words used with reference to Orvetta indicate such intention, but that indication is strengthened by the precise arrangements made for the testatrix's grandchildren. These provisions are entirely intelligible, and easy of execution. If the testatrix had intended to give Orvetta a fee, the fifth item could have been reduced to the opening sentence, as follows: "I give to E. Orvetta Garber the balance of my property, all real estate and personal property that I may own at the time of my death I want Orvetta to have;" or in even shorter terms: "I give to E. Orvetta Garber the balance of my property." The language, "I give to E. Orvetta Garber the balance of my property," etc., "her lifetime, and if she should die without leaving an heir," by plain implication confers upon the heirs of Orvetta Garber, i. e., the descendants living at the time of her death, the life estate devised to the mother. Such descendants are the tenants in remainder of the life estate of the ancestor. See *Wine v. Markwood*, 31 Grat. (72 Va.) 48. In this case one Sampson Pelter, a son of the testator, was devised a life estate. In the same connection the testator used this language: "Should my son, Sampson, die without issue, I direct," etc. Construing this language, the court held that by necessary implication it was intended by the testator that "the issue of Sampson Pelter living at his death" should take the remainder.

A further contention of the appellant, E. Orvetta Garber, is that the reference to death, contained in the will of the testatrix, namely, "if she (i. e., Orvetta) should die without leaving an heir," is to the death of Orvetta before the death of the testatrix. In that connection *Peyton v. Perkinson*, 98 Va. 215, 35 S. E. 450, and cases following same, are cited. It is true that in the case *ubi supra* the court construed the words, "If any of my children should depart this life leaving a child or children, such child or children are to be entitled to," etc., to refer to the death of the devisees prior to the death of the testator. But the court in construing this language, which was a part of an elaborate and entire instrument, reached

the conclusion that the testator intended by said language, which occurred in the twelfth item of his will, "only to cover the period between the execution of his will and his own death," in view of the fact that the testator had been at too great pains in other portions of his will "to use appropriate words for creating an absolute estate in the items or clauses" * * * in which he makes provision for his children, if by the twelfth item he intended to cut down the estate conferred upon them, respectively, from an absolute or fee simple estate to a life estate, should they die at any time [italics supplied], leaving a child or children surviving them." Hence the conclusion that the testator intended by the twelfth item "to cover only the period between the execution of his will and his own death."

In the instant case the estate conferred upon Orvetta Garber is a life estate, not a fee. Moreover, the provisions of the two instruments are entirely dissimilar. It has been often said that precedents involving the construction of wills are of but little aid in the interpretation of a specific testament. Even in respect of individual words and phrases, there is no strict uniformity of construction. Under the compelling force of the context, a word may be given one meaning in one will, and a different meaning in another. We are satisfied that the will in the instant case refers to the death of the devisee, Orvetta Garber, at any time, and not to her death prior to the death of the testatrix. We are aided to reach this conclusion by the provisions made for the children of Ressie Neff and Sandy Saufley, and the possible children of Lena McAllister, which repel the theory that the testatrix intended by the words, "if she should die without leaving an heir," to cover only the period between the execution of her will and her own death. Having provided for Orvetta Garber during her lifetime, and for her descendants living at her death, the testatrix contemplated and provided for the contingency that her daughter Orvetta might die without issue. In that event the will provides that the corpus of the estate should be "divided into three equal parts, and put on interest for the benefit of my grandchildren, to be given to them as they reach the age of twenty-one. If Ressie's children should not live to reach that age, I want their shares given to Lena's and Sandy's children when they reach that age, if they have any children."

[2] Appellant attacks this provision for testatrix's grandchildren in vigorous fashion, alleging that this limitation over fails either for uncertainty, or the discharge of the condition. In the view of the appellant this condition was discharged when the testatrix died leaving Orvetta and the latter's children living. But we have already considered and rejected the contention that in the instant case the words "if she should die with-

out leaving an heir" refer to the death of Orvetta prior to the death of the testatrix. In support of the contention that Orvetta takes a fee on the ground that the limitation over is void for uncertainty, appellant cites *Early v. Arnold*, 119 Va. 500, 89 S. E. 900. In that case the devise was as follows:

"I want my son, William Stewart Kinnaman, to have my entire interest in the estate of my father, James T. Early. If Stewart should die without heirs, I want it to go to whoever has been his best friend."

Plainly, this limitation over "to whoever has been the best friend," of W. Stewart Kinnaman, was void for uncertainty, and Kinnaman took a fee simple in the real estate, and an absolute estate in the personal property passing by his mother's will.

But this decision is not pertinent to, much less decisive of, the instant case. There is no uncertainty in the provisions of Mrs. Hollar's will relating to her grandchildren. The will clearly provides that in the event Orvetta dies without issue, the estate is to be divided into three parts, and put at interest to be given to the grandchildren as they respectively reach the age of 21. It is altogether possible that at Orvetta Garber's death, should she die without issue, all of the indicated beneficiaries may be of age and capable to take. The trial court in the main correctly construed the provisions of the will relating to the grandchildren when it said:

"If she (i. e., Orvetta) dies without leaving children surviving her, then the estate is to be divided into three parts for the benefit of the children of Mrs. Neff, a daughter, Sandy Saufey, a son, and Lena McAllister, another daughter. If none of Mrs. Neff's children reach the age of 21, their third goes to Lena and Sandy's children. If Lena leaves no children, that third goes to the other grandchildren."

But in one respect the decree of the circuit court is erroneous. It interprets the word "heir" in the sentence, "if Orvetta should die without leaving an heir," to mean child. Evidently the word "heir" in this connection has a broader significance, and means "descendant."

The decree complained of will be amended in this respect, substituting the word "descendants" for the word "children," and as amended will be affirmed.

Affirmed.

(131 Va. 486)

FITZGERALD v. CAMPBELL

(Supreme Court of Appeals of Virginia. Nov. 17, 1921.)

1. Judgment \Leftrightarrow 631—Payment to sheriff held not "satisfaction" of judgment so as to bar suit against joint tort-feasor.

Where plaintiff instituted two suits against joint tort-feasor in commission of identical

wrong, and the court, without knowledge or consent of the plaintiff, ordered execution to issue under judgment obtained in first action tried, pursuant to Code 1919, § 6500, and plaintiff refused to accept the money from the sheriff and directed that it might be returned to the parties who paid it, there was no payment or "satisfaction" of the judgment within the meaning of section 6264 so as to bar plaintiff's action in the other case.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Satisfaction—Satisfy.]

2. Judgment \Leftrightarrow 630—Judgment for plaintiff against joint tort-feasor no bar to action against other joint tort-feasor.

Under Code 1919, § 6264, judgment against several joint tort-feasors does not bar the prosecution of an action by plaintiff against other joint wrongdoers, and he may await the trial and result of the latter action before deciding whether or not he will prosecute the first judgment by suing out execution thereon.

3. Execution \Leftrightarrow 60—Clerk at common law had no right to issue without direction.

At common law clerk of court has no right to issue any execution without the direction of the plaintiff or his attorney.

Error to Circuit Court, Augusta County.

Action by J. W. Fitzgerald against James Campbell. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

This is an action of trespass brought by plaintiff in error, as plaintiff in the court below, against the defendant in error, as defendant in the court below, seeking to recover damages for an assault and battery committed upon the plaintiff by the defendant as alleged in the declaration.

The defense interposed by the defendant in the court below by special plea was that at the same time at which this action was instituted the plaintiff also brought another action against one C. P. McClure and five others, as joint tort-feasors with the said defendant, Campbell, in the commission of the identical wrong, to wit, the said assault and battery, alleged in the declaration in the instant case; that the plaintiff elected to try the action against McClure and others first, and on December 2, 1920, recovered a judgment against McClure and others in the said action against them at the term of court then being held; that no direction was given to the clerk by the plaintiff or his attorney when or after such judgment was recovered not to issue execution thereon, nor did the plaintiff or his attorney at any time request the clerk to issue execution on such judgment; that pursuant, however, to an established custom of the court, the court below, acting under section 6500 of the Code, on December 16, 1920, more than 15 days from the beginning of the current term, entered the following order, to wit: "Ordered that execution may issue on all judgments and de-

crees rendered during the present term of the court after ten days from this date"—that execution on said judgment was accordingly issued by the clerk of the court below, bearing date December 21, 1920, and went into the hands of the sheriff to be executed, and afterwards, and before the instant case was called for trial, the amount of the execution was paid to the sheriff by the several execution debtors; that the court did not adjourn for the term until some time in the following January; that at the time this payment was so made neither the sheriff nor the execution debtors had any actual knowledge of the fact that the plaintiff did not desire that payment should be so made and received. And such payment was, by such special plea, pleaded and relied on as payment in full and in discharge of the said execution and judgment and as satisfaction thus received by the plaintiff for the damages occasioned him by the alleged wrong committed upon him, and in bar of any recovery against the defendant in the instant action.

It was and is a fact, however, that neither the plaintiff nor his counsel intended to accept any payment from the said judgment debtors or any of them, or that execution should issue on the judgment, before the instant case had been tried and determined; nor did the plaintiff or his counsel know that the execution had issued until it was paid as aforesaid. Further, the plaintiff thereupon refused to accept said payment, and the money was left in the hands of the sheriff, with the direction from counsel for plaintiff that it might be returned to the parties who paid it.

The foregoing are conceded to be the facts in the case.

There being no controversy as to the facts, by pleadings which were somewhat irregular, but as to which all objections before us have been waived, the case was submitted to the court below for decision upon the point of law involved. Whereupon the court, in substance, decided that the payment to the sheriff was to one authorized to receive it, and was therefore, in contemplation of law, a payment and satisfaction of the judgment, within the meaning of section 6264 of the Code, and hence that upon the special plea and upon the facts aforesaid the law was for the defendant, and entered judgment accordingly, dismissing the plaintiff's action, with costs, however, to the plaintiff as the statute provides; and the plaintiff brings error.

Hugh A. White, of Staunton, and Chas. A. Hammer, of Harrisonburg, for plaintiff in error.

Curry & Curry and Timberlake & Nelson, all of Staunton, for defendant in error.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

[1] The case turns upon the decision of the following question, namely:

(1) Was the execution issued by the clerk without the direction of the plaintiff, under the general order of court, such an execution that the payment of it to the sheriff by the execution debtors, without the express or implied actual consent of the plaintiff, can be considered as, in contemplation of law, a payment or satisfaction of the judgment within the meaning of section 6264 of the Code, so as to bar the plaintiff's action in the instant case?

This question must be answered in the negative.

Section 6264 of the Code, so far as material, is as follows:

"A judgment against one of several joint wrongdoers shall not bar the prosecution of an action against any or all the others, but the injured party may bring separate actions against the wrongdoers and proceed to judgment in each, * * * and no bar shall arise as to any of them by reason of a judgment against another, or others, until the judgment has been satisfied. If there be separate judgments against different defendants for a joint wrong, the plaintiff shall elect which of them he will prosecute, but the payment or satisfaction of any one of such judgments shall be a discharge of all, except as to the costs."

Prior to this statute the rule on the subject in Virginia was the same as that in England, being that a judgment against one of several joint wrongdoers, whether satisfied or not, was a bar to any action against the others. *Petticolas v. City of Richmond*, 95 Va. 456, 28 S. E. 566, 64 Am. St. Rep. 811. The revisors' note to section 6264 of the Code contains this statement:

"This section is new, and overturns *Petticolas v. City of Richmond*. * * * It is said, however, that the great weight of authority in the United States is otherwise (*Burks' Pl. & Pr.* p. 10), and the new section makes this view statutory in Virginia, the revisors being of opinion that the bar should not fall until there has been a satisfaction of the wrong done."

The rule in the United States in accordance with the great weight of authority and that now made statutory in Virginia, as stated by the revisors of the Code, as aforesaid, is thus enunciated in 1 *Cooley on Torts* (3d Ed.) p. 232:

"The rule laid down by that eminent jurist [Chief Justice Kent of New York], and which has been since generally followed in this country, is that the party injured may bring separate suits against the wrongdoers, and proceed to judgment in each, and that no bar arises as to any of them until satisfaction is received. * * * But he [the plaintiff] can claim or enforce only one satisfaction for the same injury; he must elect against which of the several he will proceed to execution for the satisfaction of his damages. * * * And such

election, followed by actual satisfaction of that particular judgment, will preclude the plaintiff from proceeding against either of the other defendants upon the judgments recovered against them, except for the costs of the respective cases, which he may enforce the collection of by execution."

See to same effect note 11 Am. St. Rep. 906.

[2] We are of opinion that under this rule, and by the very terms of the statute above quoted, the plaintiff had the right to elect whether he would or would not prosecute the judgment he obtained against the wrongdoers other than Campbell, and therefore had the right to await the trial and the result of the instant case before deciding whether he would prosecute the judgment aforesaid, by suing out execution thereon. And whatever may be the effect of the action of a clerk in issuing executions in other cases, under a general order of court such as that involved in the instant case, prior to the adjournment of the court for the term (as to which we are not called upon in this case to decide, and therefore express no opinion), we hold that such an order of court cannot be held to have the effect of authorizing the clerk to exercise the said right of election for the plaintiff, which would be the result if the execution issued by the clerk under the circumstances of the instant case could be held to be such an execution that the payment of it to the sheriff by the execution debtors, without the consent of the plaintiff, was in contemplation of law the payment or satisfaction of the judgment within the meaning of section 6264 of the Code.

[3] At common law the clerk has no right to issue any execution without the direction of the plaintiff or his attorney. Herman on Executions, pp. 64, 66, 79; 23 O. J. p. 364; 17 Cyc. 986.

As said in Herman on Executions, *supra*, p. 66:

"In the absence of statutory provisions to the contrary, a clerk has no right to issue executions without the direction of the plaintiff or his attorney. * * * The property in the judgment is in the plaintiff therein, and he alone or those acting for him, have the exclusive right to order execution. * * *"

In 23 C. J. p. 364, this is said:

"In the absence of statutory regulation the clerk has no authority to issue an execution without the direction of the judgment creditor or his attorney. * * * A party is not bound by a proceeding under an execution issued without his authority or that of his attorney, even though it is the custom of the clerk to issue executions without such authority."

Section 6480 of the Code does authorize the clerk after the adjournment of the term of court at which a judgment is rendered to issue execution thereon without any direction so to do, by providing that—

"It shall be the duty of the clerk * * * to issue a writ of fieri facias as soon as practicable after the adjournment of the term of the court * * * and place the same in the hands of the proper officer of such court to be executed * * * unless he [the clerk] be otherwise directed by writing by the beneficiary of such judgment, his agent or attorney."

The learned judge of the court below gave to section 6500 of the Code, under which the general order of court involved in the case before us was entered, and to such general order itself, the same meaning as that of section 6480. The language of section 6500 and of the general order of court aforesaid is very different from that of section 6480. Section 6500, so far as material, is as follows:

"Any court after the fifteenth day of its term, may make a general order *allowing executions to issue* on judgments and decrees after ten days from their date, although the term at which they are rendered be not ended." (Italics supplied.)

And the general order of court aforesaid provided:

"That executions *may issue* on all judgments and decrees rendered during the present term of the court after ten days from their date." (Italics supplied.)

Hence, without deciding what would have been the effect of the action of the clerk if it had been under section 6480 aforesaid, we have no hesitancy in holding that the action of the clerk in the instant case, without the direction of the plaintiff or his attorney, cannot be regarded as authorized by the plaintiff, or by law, so as to give to it the effect of an exercise of the plaintiff's right of election aforesaid. Without some affirmative action on the part of the plaintiff, such as suing out the execution, or receiving the money collected by the sheriff under it, or the like, actually accepting or in some way binding the plaintiff to accept such money, "in satisfaction of the wrong done" (to quote the language aforesaid of the revisors of the Code), the plaintiff cannot be said to have ever exercised his right of election given him by the statute (section 6264 of the Code) as aforesaid. Until such right of election was actually exercised by the plaintiff in some way, it remained unaffected by whatsoever else may have occurred.

In Iowa a defendant has the statutory right to pay to the clerk of the court in which it is rendered the amount of any judgment against him in discharge of the judgment. In the case of McDonald v. Nugen, 118 Iowa, 512, 92 N. W. 675, 96 Am. St. Rep. 407, the plaintiff sued separately and recovered a judgment against one joint tortfeasor, which was paid to the clerk of the court by the other tortfeasor, without authority

in fact from the plaintiff to such clerk to accept payment for him, nor did the plaintiff in fact accept such payment. The authority of the clerk to receive payment was purely statutory. The joint tort-feasor who paid such judgment pleaded such payment in bar of the plaintiff's action against him. The court in the opinion, after referring to the majority rule above mentioned as prevailing in that state, said this:

"This brings us to the question of what is the legal satisfaction contemplated by the rule above noticed. The authorities generally hold that the plaintiff may prosecute separate actions against joint wrongdoers to final judgments, if in the meantime he has not received satisfaction for the injury from any source (Cooley on Torts, 138), and that he may elect which judgment he will enforce for his satisfaction. Putney v. O'Brien, 53 Iowa, 117, 4 N. W. 891; Cooley on Torts, 138. Following these rules to their final analysis, it is evident that the satisfaction which the law says shall bar further recovery must be such as shall be voluntarily accepted by the plaintiff. Otherwise one joint wrongdoer, or all of them acting in concert through the one, or the clerk, might in fact exercise the election which the law says the plaintiff has the right to make, and thus defeat the very object of the rule giving the plaintiff the right to maintain separate actions, and to prosecute them to final judgments [citing Blann v. Crocheron, 20 Ala. 320, in which the judgment debtor paid the amount of the judgment to the clerk].

"It is well said in the last case cited: 'Were the law otherwise, it would enable joint trespassers who were sued separately to hasten the trial of the one lesser guilty among them, and, by satisfying in the clerk's office the damages against him, to free themselves from all responsibility for their own greater guilt. In fact, it would change the rule which gives the right of election in such actions to the plaintiff, and bestow it upon the defendant. To determine the plaintiff's right to elect, he must act.' * * *

"The satisfaction must be such as is acceptable to the plaintiff as the final determination of his right of action against all of the * * * wrongdoers, and it must of necessity be a satisfaction to which he has agreed, either expressly or impliedly. * * * In other words, he cannot be deprived of his right of election against the wrongdoers, except on account of some act of his own."

And the court held that the payment to the clerk, which was not in fact authorized by the plaintiff, or in fact accepted by the latter, was not such a satisfaction of the judgment as would constitute the accord and

satisfaction which is essential to bar proceedings against the other wrongdoer.

See to same effect, where there was payment into court and satisfaction of judgment entered of record by the clerk, Power v. Baker (C. C.) 27 Fed. 396.

The court in McDonald v. Nugen deals with the effect of the payment to the clerk under the purely statutory authority therefor, and in that connection says:

"It is true that the payment * * * to the clerk of the court in which it is rendered is authorized, and that such payment will be a satisfaction thereof, so far as the judgment debtor is concerned; but there is a wide difference between the satisfaction of a judgment of record, which operates to bar further proceedings against the judgment debtor, and the accord and satisfaction which will bar proceedings against his joint wrongdoer. In the first case the defendant has done no more than the law requires him to do, though it may have been done without the solicitation of the plaintiff; nor was such consent on the part of the plaintiff necessary to the protection of the defendant. In the latter case the satisfaction must be such as is acceptable to the plaintiff. * * *

It is urged in argument for the defendant that the payment of the execution by the execution debtors was not voluntary in the case before us, but enforced by the sheriff under the authority conferred upon him by law as incident to the having the execution lawfully in his hands. If that were conceded to be true, still it would be immaterial in so far as the question we have under consideration is concerned. The payment thus enforced could not be considered as enforced at the instance of the plaintiff by any voluntary act of his, but only as the involuntary result of the operation of the general order of the court entered under the statute on the subject of the issue of executions. For the reasons aforesaid, we are of opinion that it was not the intention nor the effect of such statute, in any view of it, to deprive the plaintiff of his right of voluntary election aforesaid in the case of a judgment in tort against one or more, but not all, of the wrongdoers.

The case must therefore be reversed; and we will enter an order remanding the case to the court below, with direction to dismiss the special plea of the defendant filed therein and to proceed with the further trial of the case, in a manner not inconsistent with the views expressed in this opinion.

Reversed and remanded.

(131 Va. 571)

SMITH v. STATE HIGHWAY COMMISSION OF VIRGINIA et al.

(Supreme Court of Appeals of Virginia. Nov. 21, 1921.)

1. Master and servant ⇐364—State Highway Commission is not "employer" within Compensation Act.

The State Highway Commission of Virginia is not the employer of those working under it within Workmen's Compensation Act, §§ 2a, 8, providing that employers shall include the state, any municipal corporation within the state, or any political division thereof.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employer.]

2. Master and servant ⇐364—State liable for compensation as employer of Highway Commission's employee.

Within Workmen's Compensation Act, § 2a, defining employers, the state is the employer of those working for the State Highway Commission.

3. States ⇐130—Appropriation necessary for payment of workmen's compensation by state.

Since the Legislature, though it has provided by the Workmen's Compensation Act for compensation for injuries to state employees, has made no provision for the payment of claims for such injuries, and Code 1919, § 2582, provides that no judgment or decree, unless otherwise provided, shall be paid without special appropriation, the Industrial Commission cannot direct the payment of compensation for the death of the state employee working under the Highway Commission from any fund, but the payment must be provided for by special appropriation by the Legislature.

Certified from Industrial Commission.

Claim by Grace Lillard Smith before the Industrial Commission against the State Highway Commission of Virginia and the Commonwealth of Virginia to recover compensation for the death of claimant's husband employed by the Highway Commission. On questions of law certified by the Industrial Commission. Claimant held entitled to compensation from the Commonwealth, but not from the State Highway Commission.

PER CURIAM. This case is before us upon the following certificate:

"The Industrial Commission of Virginia, pursuant to the provisions of section 61 of the Workmen's Compensation Act (Acts 1918, p. 637) beg leave to certify to this honorable court for its decision and determination a question of law arising in the above-entitled proceedings, now pending before said Industrial Commission of Virginia.

"The claimant, Grace Lillard Smith, in her own right and in behalf of her infant child, had filed her application for hearing before the Industrial Commission of Virginia, setting up

the claim of herself and infant child as dependents of her husband, William Oscar Smith, a quarry foreman in the direct employment of the State Highway Commission of Virginia, who died as result of an injury which arose out of and in the course of his employment with the said State Highway Commission, on the 30th day of June, 1920.

"In said application claimant asks that the compensation be paid as provided by the statute, either by the State Highway Commission of Virginia or the Commonwealth of Virginia, as liability under the statute may be determined.

"The State Highway Commission of Virginia now comes by counsel, and moves the Industrial Commission of Virginia to dismiss the above-entitled proceedings as to the said State Highway Commission and make the commonwealth of Virginia party defendant, stating that if any claim at all can be asserted in the above-entitled proceedings it must be asserted against the commonwealth of Virginia, section 2 (a) Workmen's Compensation Act of Virginia (Acts 1918, p. 637), whereupon the commonwealth of Virginia, by consent of the Attorney General of Virginia, was made a party defendant to the above-entitled proceedings.

"The question of law which is here respectfully certified to this honorable court for its decision and determination is:

"Was the State Highway Commission the employer of William Oscar Smith, at the time of his death, and therefore the proper party defendant, and is it, as such, liable to pay compensation to the claimants in the act provided? or,

"Was the commonwealth of Virginia the employer at said time and, as such, liable to pay said compensation; if so, in what manner and against what funds should the Industrial Commission of Virginia direct an award for the payment of compensation to the claimants in the above-entitled proceedings?"

[1] 1. Taking up the two questions thus submitted to us in their order, we answer that the State Highway Commission was not the employer of William Oscar Smith within the contemplation of the Workmen's Compensation Act, because the commission does not fall within the definition of an employer contained in section 2 thereof. The act provides (section 2a) that—

"'Employers' shall include the state and any municipal corporation within the state or any political division thereof, and any individual, firm, association or corporation, or the receiver or trustee of the same, or the legal representative of a deceased employer, using the service of another for pay."

A counterpart of this provision is found in section 8 of the act as follows:

"Neither the state, nor any municipal corporation within the state, nor any political subdivision thereof, nor any employee of the state or of any such corporation or subdivision shall have the right to reject the provisions of this act relative to payment and acceptance of com-

pensation; and the provisions of sections 5, 6, 16, 17 and 18 shall not apply to them."

It is clear that the State Highway Commission is neither a municipal corporation nor a political division thereof, nor is it an individual, firm, association, or corporation, receiver or trustee of the same, or the legal representative of a deceased employer.

Not falling within the terms of the definition to be found in the act, we have no hesitancy in saying that the State Highway Commission cannot be regarded as the employer of the deceased.

[2] 2. (a) We think it is equally clear, however, that the deceased was an employee of the state, that if there be nothing in the facts of the case concerning the circumstances of the accident which would defeat the right of his estate to compensation for his death, the state is liable for the compensation allowed.

The definition above quoted brings the state within the operation of the act, and the act, and the organization and duties of the State Highway Commission make those employed by it employees of the state. It is manifest, for example, that if an employee of the State Corporation Commission, or of the Industrial Commission of Virginia, should be injured by accidental means, he would be entitled to the benefit of the provisions of the act, but the proceeding could not be against either commission, and would have to be brought against the state.

[3] (b) As to the manner in which and the funds from which the compensation awarded by the Industrial Commission in such a case should be paid, no order can be made directing the payment, but the same must be provided for by special appropriation to be made by the Legislature.

While it is true that the Compensation Act contemplates employees of the state, and expressly provides that they shall have the benefit of the same, no provision has yet been made for the payment of claims against the state, and section 2582 of the Code provides that no judgment or decree, unless otherwise provided, shall be paid without a special appropriation by law. Neither the court nor the Industrial Commission can require the Legislature to make an appropriation for cases of this character, but it is not to be doubted for a moment that such appropriation will be made in every case in which an order against it is made by the commission. The state will not provide that its employees shall have the right to claim compensation under the Workmen's Act, and then decline to give them any means whereby they may collect the compensation allowed them thereunder.

We have been referred to the case of Woodcock v. Board of Education, decided by the Supreme Court of Utah January 13,

1920, and reported in 55 Utah, 458, 187 Pac. 181, 10 A. L. R. 181. In that case a school-teacher had presented her claim for injuries sustained in her usual duties, and the Industrial Commission made an award in her favor against the board of education of Salt Lake City. The board resisted the payment of the award on the ground that there were no funds in their hands applicable to such allowances, and the court held that the judgment should be paid from the funds provided for the support and maintenance of schools. The case has no application here, because the Utah statute expressly made each school district an "employer," and as such liable for the compensation.

(131 Va. 447)

BEAR'S ADM'X v. BEAR.

(Supreme Court of Appeals of Virginia. Nov. 17, 1921.)

1. Appeal and error \Leftarrow 1170(3)—Permitting at trial inclusion of defense previously asserted held not prejudicial.

Where defendant stated the grounds of his defense under plea of nil debet as infancy, and that the note was without consideration and not intended to be collected, but the latter grounds were apparently overlooked, plaintiff, under Code 1919, § 6104, was not prejudiced by the court's action in permitting defendant at the trial to amend his statement of defense by adding those grounds thereto.

2. Evidence \Leftarrow 437 — Infant can show there was no intention that note was to be paid.

The rule excluding parol evidence to contradict a written instrument does not prevent an infant from testifying that a note given by him, claimed by plaintiff to have been for necessities, was not intended to be paid, since the infant is liable only for the reasonable value of necessities furnished, not on the contract therefor.

3. Pleading \Leftarrow 339—Conduct of judge held not refusal of leave to withdraw plea of infancy.

Where defendant stated on cross-examination that he did not rely on his plea of infancy, it was not error for the trial court, after informing him he could withdraw such plea if he chose, to permit him to leave the stand and confer with his counsel, and, on the counsel's announcement in the defendant's presence that the plea should stand, to refuse to consider it withdrawn.

4. Trial \Leftarrow 194(12)—Instructing that sending infant to academy was not necessary invades province of jury.

In an action on a note given by an infant for money advanced by a brother to send him to a boarding academy, an instruction that sending him to the academy was not a necessary, if public schools which he could attend while at home were available, was an erroneous invasion of the province of the jury.

5. Infants ⇨102 — Whether things of class which might be necessities were such held for the jury.

In an action for money advanced to an infant, claimed to have been for necessities, the court must determine whether the purpose was within the class of things which might be claimed as necessities, and whether there was any evidence to sustain a finding that they were such, but if it determines those questions in the affirmative, whether the things were actually necessary under the circumstances is for the jury.

6. Infants ⇨50 — Advancement as gift by brother for schooling is not a necessary.

Where a mother intended to advance her son money to attend a boarding school, but a brother proposed to make the gift himself, and did so, such advancement was not a necessary.

7. Evidence ⇨276—Admission against interest by decedent is receivable against administratrix.

In an action by the administratrix of a decedent's estate, admissions by plaintiff's intestate against his interest are receivable in evidence for defendant.

8. Infants ⇨98—Evidence that neither parent requested advancement to send infant to academy admissible on issue as to whether it was a necessary.

In an action for money advanced by a brother to an infant, to send him to a boarding academy, evidence that neither of the infant's parents requested such advancement is admissible on the infant's behalf on the issue whether such advancement was a necessary.

Error to Circuit Court, Rockingham County.

Action of debt by J. D. Bear's administratrix against Eugene F. Bear. Judgment for defendant, and plaintiff brings error. Reversed and remanded for new trial.

Edward C. Martz, of Harrisonburg, for plaintiff in error.

E. D. Ott, of Harrisonburg, for defendant in error.

BURKS, J. This is an action of debt upon a note for \$265, executed by the defendant Eugene F. Bear to the plaintiff's intestate for board and tuition of the defendant one session at Randolph Macon Academy at Front Royal. The defendant pleaded nil debet, and when called upon by the plaintiff to state the grounds of his defense under this plea, he stated infancy, and "that the note was without consideration and was not intended to be collected." There was a trial by jury, and a verdict for the defendant, which the trial court refused to set aside, and the case is here on a writ of error awarded to the plaintiff.

[1] According to the record the above grounds of defense were stated, and the issues made up in September, 1917. Proceedings, however, were stayed because the de-

fendant was in the military service of the United States, and the trial was not had until July, 1920. At the trial the defense that "the note was without consideration and was not intended to be collected" seems to have been overlooked, and the parties went to trial apparently solely on the statement that the defendant was an infant when the note was given. The mother of the defendant and of the plaintiff's intestate was the first witness offered for the defendant, and pending her cross-examination, defendant's counsel asked leave "to amend his statement of defense so as to say the note sued on was without consideration," which motion was granted over the objection of the plaintiff, "and later, during the redirect examination of said witness, the court stated to counsel for defendant that he might add to the ground of defense that the note was without consideration the further words, 'and was not intended to be collected'; the defendant having previously, both before the commencement of the trial and during the trial, offered as a ground of defense the statement that the note was not intended to be collected, and the court * * * having excluded the same as an independent defense," but subsequently permitted it. The ruling of the trial court permitting the amendment was duly excepted to by the plaintiff, but the bill of exception does not show the ground of exception, nor that any motion was made to defer the trial or grant a continuance. The record fails to disclose any error prejudicial to the plaintiff. See Code, § 6104.

[2] The further objection is made that to permit the defendant to show that the note was not to be paid is "in the teeth of the defendant's written promise to pay," and hence forbidden by the parol evidence rule. If this rule applied to the contracts of infants, the defense of infancy would be of little avail to infants dealing with the crafty. Even in contracts for necessities, the infant is not bound on the express contract, but on the implied contract to pay what they are reasonably worth. On this subject the fullest investigation is allowed, and, although it is said that an action may be brought on the contract, evidence is receivable as to the actual value of the goods furnished. 14 R. C. L. 254, § 33; 18 Am. St. Rep. 643. He is not bound by an express contract to pay for necessities for any more than their actual value, nor is he bound by a statement in the contract that the consideration thereof was necessities, when such was not the fact.

The defendant was 18 years of age when the note was executed and 26 at the trial. He was examined as a witness in his own behalf, and on cross-examination he stated that he was not relying on the defense of infancy, and knew nothing about the plea

being filed. He was then asked the following questions: (1) "You personally would not have filed any such plea?" and (2) "Do you want to withdraw the plea of infancy in this case?" Answers to these questions were excluded on motion of his counsel, and the plaintiff excepted. The bills of exception show that the answer to question 1 was "that he would not have filed such plea," and to question 2 was "that he wanted to withdraw the plea of infancy." The trial judge seems to have been satisfied that the witness did not understand the meaning and effect of withdrawing the defense of infancy; that he meant to insist that the amount advanced was a gift and not a loan, and that payment was never to be enforced, but did not understand that the withdrawal of the defense of infancy would cut him off from making this defense. Hence the following colloquy between the court and the witness:

"The Court: Your counsel has put in this case a plea that this transaction is not binding and should not be enforced because you were under age when it was given. Do you want to put that plea out of the case and abandon it?"
 "Witness: I do not thoroughly understand this.

"The Court: Do you stand by the action of your counsel as to your case here and to manage it for you?"

"A. Yes, sir.

"The Court: He is authorized to act for you and put in any defense that he thinks proper?"

"Witness: Yes, sir."

The trial court was of opinion that the defendant had the right to withdraw his defense of infancy, if he so desired, but that this right should be exercised understandingly and in the regular way, and not by cross-examination, when the witness could not consult his counsel and have the subject fully explained to him, and hence determined to give him this opportunity. This phase of the case is presented in the record as follows:

"The Court: The jury may disregard that statement of the witness, that he did not rely on the plea of infancy. As a matter of fact that plea has been filed here, but if he wants to withdraw it and instructs the court to withdraw it from the case, the court will allow it to be stricken out. Until he does that the court will not.

"X. Do you want to withdraw the plea of infancy in this case?"

"The Court (to the defendant): You may retire with your counsel and see whether you want to continue your case or to abandon it, after you have conferred with him.

"Memo.: The defendant leaves the witness stand, and, in company with his counsel, mother, and brother, Warfield, retired to the judge's room, and in a few minutes returned into court.

"The Court: Is the plea to go out or to stay in, Mr. Ott?"

"Mr. Ott: The plea stays in.

"The Court: Yes, sir."

(Mr. Ott was counsel for the plaintiff.)

The witness was then told to stand aside. The foregoing action of the trial court is excepted to on the ground that the plea of infancy is personal to the defendant, and that the court had refused to permit the defendant to withdraw his defense of infancy, although he desired to do so.

[3] The court fully recognized the right of the defendant to withdraw the defense of infancy, and to control the action of his counsel in this respect, but simply gave him the opportunity to confer with his counsel on the subject so as to act advisedly, and after such conference his counsel, in open court and in his presence, announced that the "plea stays in," and the trial proceeded on this issue.

There was no error in this action of the trial court.

One of the pivotal points in the case was whether the board and tuition which the plaintiff's intestate had furnished the defendant were necessities, and whether the defendant was already sufficiently supplied. Much evidence on this subject was introduced by the defendant, and there was ample room for different conclusions to be drawn therefrom by reasonable men. Under these circumstances the court gave to the jury, on the motion of the defendant, and over the objection of the plaintiff, the following instruction:

"The court instructs the jury that, generally speaking, a minor is not liable on his contracts. This rule is subject to the exception that he is personally liable for a debt created for necessities, but that while the expense of a common school education would be recognized in most cases as a necessary expense, yet the sending of a boy to a distant academy, or boarding school, when there was a good public school and high school convenient to his home, could not be so regarded under the evidence in this case; and, therefore, if the jury believe from the evidence that the note in suit was given for money laid out or expended by John D. Bear in sending the defendant to the Randolph Macon Academy, a boarding school * * * at Front Royal, the Elkton graded and high school being convenient to his home, they cannot consider such expenditure by John D. Bear as one made for necessities, and they must find for the defendant."

[4, 5] This instruction is plainly wrong. It expresses the opinion of the court on the weight of the evidence, and took away from the jury the consideration and determination of an important question of fact upon which different conclusions might have been reached by reasonable men upon the evidence introduced. *Norfolk & W. R. Co. v. Poole*, 100 Va. 148, 40 S. E. 627; *Burk's Pl. & Pr.* (2d Ed.) §§ 256, 264, and cases cited. We have italicized the objectionable part of the instruction. The law on this subject is well expressed in a note in 18 Am. St. Rep. at page 652 as follows:

"The province of the court and of the jury in solving the question of necessities involves a proposition of considerable nicety, and one which is not always as clearly and definitely stated as it might be. The rule, having regard particularly to the latest cases, seems to be this: It is for the court to determine, as a matter of law, in the first place, whether the things supplied may fall within the general classes of necessities, and, if so, whether there is sufficient evidence to warrant the jury in finding that they were necessary. If either of these preliminary inquiries be decided in the negative, it is the duty of the court to nonsuit the plaintiff who seeks to recover from the infant. If they be decided in the affirmative, it is then for the jury to determine whether, under all the circumstances, the things furnished were actually necessary to the position and condition of the infant, as well as their reasonable value, and whether the infant was already sufficiently supplied."

The statement of the note is abundantly supported by authority, both English and American, and also commends itself to our judgment as a correct statement of the law. Under the instruction given, the jury was left no discretion in the matter, but were obliged to find a verdict for the defendant.

[6, 7] The trial court committed no error in refusing the instructions tendered by the plaintiff. It would not be of future value to quote them in full, but they will be referred to by number for guidance of counsel and the court upon another trial, if one should be had. Instruction No. 1 is broader than is warranted by the statute (Code, § 6209). Instruction No. 2 leaves out of consideration the question of "necessaries," which was an essential element of the defendant's liability on the note. Instruction No. 3 is not a correct statement of the law. If the payment by the plaintiff's intestate was to be a gift by him to the defendant, then it was not necessary for his mother to make the gift. If she was able and willing to make the gift, and simply yielded to the proposal of the plaintiff's intestate to make the gift, then the advancement by him was not a necessary. Instruction No. 4 is not a correct statement of the law. If the jury believed the statements attributed to the plaintiff's intestate, they were admissions against his pecuniary interest and receivable as such.

[8] There was no error in permitting the defendant to show that neither his father nor mother requested the plaintiff's intestate to send the defendant to Randolph Macon Academy.

For the error in defendant's instruction hereinbefore discussed, the judgment of the trial court will be reversed, the verdict of the jury set aside, and the case remanded for a new trial, not in conflict with the views hereinbefore expressed.

Reversed.

(131 Va. 820)

STANDARD OIL CO. v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Nov. 17, 1921.)

1. Highways \Leftarrow 158—Municipalities may maintain necessary actions to abate obstructions and other nuisances.

The general rule is that municipalities have power to maintain such actions at law or in equity as may be appropriate to prevent and abate nuisances obstructing highways or rendering them useless.

2. Criminal law \Leftarrow 13—Statute defining offense sufficient if it supplies standard of guilt when fairly construed with reference to common law.

A penal statute, to be valid, must by its language, fairly construed and with reference to common-law definitions, if the act denounced as a crime was punishable at common law, supply the standard by which the guilt of the accused person is to be determined, and if it does not thus supply such standard, it is invalid for vagueness and uncertainty, but if it does it is valid.

3. Highways \Leftarrow 153—Obstructions or encroachments are public nuisances.

Obstructions or encroachments on a highway or anything which interferes unreasonably or unnecessarily with the use of the highway by the public, or which makes the highway more dangerous for travelers thereon, constitute a public nuisance per se, even when they do not actually operate as an obstruction to travel.

4. Highways \Leftarrow 153—Statute authorizing legislation by boards of supervisors regarding use of roads and bridges held valid.

Code 1919, § 2013, authorizing boards of supervisors to enact special legislation to protect roads and bridges from encroachment or obstruction or from any improper or exceptionally injurious use, is valid under Const. 1902, § 65.

5. Highways \Leftarrow 166—Statute and resolution of board of supervisors as to injurious use held to supply sufficient standards to establish violation.

Code 1919, § 2013, authorizing boards of supervisors to enact legislation to protect highways from any improper or exceptionally injurious use, and a resolution thereunder prohibiting the operation on the highways of any engine, threshing machine, logging or lumber wagons, heavy machinery, wagons, or tanks, automobile trucks, and all heavily laden wagons or trucks, at any time when the roads are so wet as to be materially damaged by such hauling or use, affords sufficiently definite standards by which the guilt or innocence of the person charged with a violation may be determined.

6. Highways \Leftarrow 186—Resolution of board of supervisors as to use of vehicles materially damaging roads when wet construed.

A resolution of a board of supervisors under Code 1919, § 2013, forbidding the operation on the highways of certain heavy vehicles and

all heavily laden wagons or trucks when the roads are so wet as to be "materially damaged" thereby, only prohibits an improper and exceptionally injurious use of the highway under the circumstances indicated.

7. Criminal law — 829(18)—Refusal of instruction as to elements of offense held properly denied in view of other instructions.

In a prosecution for operating a heavily loaded truck so as to materially damage the highway in violation of a resolution of the board of supervisors, the refusal of instructions that the mere use of the roads while they were wet or muddy was not sufficient to convict, but that the jury must believe beyond a reasonable doubt that they were in such condition that they would be materially damaged, and that, if other reasonable persons used the road at the same time with similar wagons or trucks, defendant had a right to assume that its use was proper, was harmless, where other instructions fully protected every right of defendant to be acquitted if there was any reasonable doubt of its guilt.

8. Highways — 186—Guilty of using heavy vehicles so as to materially damage highway not dependent on whether other persons were using highway.

Under a resolution of the board of supervisors prohibiting the operation on the highways of heavy vehicles and heavily laden wagons or trucks when the roads were wet so as to be materially damaged thereby, the guilt or innocence of one charged with a violation did not depend upon whether reasonable persons were using the roads with similar wagons or trucks, and he was bound at his peril to determine for himself whether he would use the road.

Error to Circuit Court, Rockbridge County.

The Standard Oil Company was convicted of an offense, and it brings error. Affirmed.

Hugh A. White, of Lexington, and Eppa Hunton, Jr., of Richmond, for plaintiff in error.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazile, Second Asst. Atty. Gen., for the Commonwealth.

PRENTIS, J. By an act approved March 13, 1912 (Acts 1912, p. 503), Code 1919, § 2013, it is provided that—

"The boards of supervisors of the several counties of the commonwealth shall have power to enact such special and local legislation in their respective counties, not in conflict with the Constitution and the general laws of the commonwealth, as they may deem expedient to protect the public roads, ways and bridges of the such county from encroachment or obstruction, or from any improper or exceptionally injurious use thereof."

By authority of that statute the board of supervisors of Rockbridge county adopted a resolution declaring that—

"It shall be unlawful for any person, firm, or corporation to operate or cause to be operated over the highways of Rockbridge county any engine, threshing machine, logging or lumber wagons, heavy machinery, wagons or tanks, automobile trucks and all heavily laden wagons or trucks, at any time at which the said roads are wet to a sufficient extent to be materially damaged by such hauling or use: Provided, however, that this enactment shall not be construed to prevent the hauling of farm produce."

The Standard Oil Company was charged with a violation of this resolution, in that it operated a heavily loaded truck over a certain road while it was so wet as to cause the highway to be materially damaged by such hauling or use. After a conviction before a justice of the peace, an appeal was taken to the circuit court of Rockbridge county, and upon a jury trial the accused was again convicted, and subjected to a fine of \$50, of which it is here complaining.

The point chiefly relied on was in the trial court first raised upon the demurrer of the defendant and its motion to dismiss the warrant, upon the ground that the resolution of the board of supervisors upon which the prosecution was based was unconstitutional and void for uncertainty in its description and definition of the alleged crime. This contention is based upon the general rule that an ordinance of a regulatory nature must be clear, certain, and definite, so that the average man may, with due care, after reading the same, understand whether he will incur a penalty for his action or not, and, if not of this character, it is void for uncertainty.

Many cases may be cited to support this rule, and we do not question its validity where it is properly applicable. It may be also conceded that there are instances in which it has been applied by the courts to statutes bearing some resemblance to that here involved. It is, however, also easy to cite cases in which other courts have refused to apply it to statutes equally indefinite as that here criticized.

It has long been held that to obstruct or unlawfully injure a public highway is a nuisance—a serious encroachment upon the public right.

In 3 Salk. 183, we find this precedent in Egerly's Case:

"Information against a common carrier, setting forth that no waggon ought to carry more than 2,000 weight, and that the defendant used a waggon with four wheels, and cum inusitato numero equorum, in which he carried 3,000 or 4,000 weight at one time, by which he spoiled the highway leading from Oxford to London (viz.) at Lobb lane, in the parish of Hosely. This was adjudged good, though it was laid generally at Lobb lane, without shewing how many perches in length, because the nuisance was alleged, for all the way leading from Oxford to London, and Lobb lane was mentioned only for the venue; and though there was no

particular measure expressed how much of the way was spoiled, it shall be intended all Lobb lane was spoiled. Likewise, though it said that he went inusitato numero equorum without setting forth what number, yet the information is good, because it was the excessive weight which he carried that made the nuisance."

In *Congreve v. Smith*, 18 N. Y. 79, it is said, incidentally, that the general doctrine is that the public are entitled to the use of a highway in the condition in which they placed it, and whoever without sufficient authority materially obstructs it is guilty of a nuisance.

[1] The general rule is that municipalities have the power to maintain such actions at law or in equity as may be appropriate to prevent and abate nuisances obstructive of highways, or rendering them useless. *Stearns County v. St. Cloud, M. & A. R. Co.*, 38 Minn. 425, 32 N. W. 91; *Hooksett v. Amoskeag Mfg. Co.*, 44 N. H. 105; *Troy v. Cheshire R. Co.*, 23 N. H. 83, 55 Am. Dec. 177; *Springfield v. Connecticut River R. Co.*, 4 Cush. (Mass.) 63; *Easton & A. R. Co. v. Greenwich Tp.*, 25 N. J. Eq. 565; *Rio Grande R. Co. v. Brownsville*, 45 Tex. 88; *Philadelphia v. Thirteenth & Fifteenth Sts.* Pass. R. Co., 8 Phila. (Pa.) 648; 39 L. R. A. 650, note.

These cases, relating to statutes which were attacked upon the ground that they were vague and indefinite, are pertinent:

In *State v. Ayers*, 49 Ore. 61, 88 Pac. 653, 10 L. R. A. (N. S.) 992, 124 Am. St. Rep. 1036, it is held that naming the offense is not necessary to warrant its punishment, where it is described by statute sufficiently to justify a resort to the common law for its definition, although no common-law offenses are recognized in that particular state. There, under a statute which provided for the punishment of any act which grossly disturbs the public peace or health, or which openly outrages the public decency and is injurious to the public morals, it is held that the court was competent to determine what acts come within the description. The particular offense charged in that case was the habitual sale of pools on horse races, at a track where many persons were assembled to witness the races, and this was construed to be an act which grossly disturbed the public peace and openly outraged public decency, within the meaning of the statute referred to, and the accused was convicted.

Katzman v. Commonwealth, 140 Ky. 124, 130 S. W. 990, 30 L. R. A. (N. S.) 519, 140 Am. St. Rep. 359, holds that a statute forbidding druggists to sell poisons at retail, except under certain conditions, one of which is that they shall satisfy themselves that they are to be used for legitimate purposes, is not invalid for not defining the meaning of the words "retail" and "legitimate purposes." Whether or not a druggist, in selling opium without a prescription, used reasonable care to satisfy himself that it was obtained for a legitimate purpose, as required by statute, was held to

be a question for the jury. In that case, in reply to the same argument which is made here, we find this:

"In the argument in support of the objection mentioned, it is said that the Legislature should have defined the meaning of the words 'retail' and 'legitimate purposes,' so that a druggist might know what quantity would constitute a sale by retail, and what would or would not be considered a sale for legitimate purposes; and so, that there could not be two opinions as to what these words mean when different courts or juries came to pass upon questions involving a violation of the statute. It may be admitted that although the meaning of the words 'retail' and 'legitimate purposes,' as used in the statute, are reasonably well understood, it is nevertheless possible that there might be difference of opinion as to whether in a given state of case the sale of a drug was by retail or for a legitimate purpose, and it is possible that in administering this statute it may occasionally happen that a druggist will be accused who claims not to know what constitutes a sale by retail or what is a legitimate use of opium; and it is also possible that different trial courts and juries may not always be harmonious in the conclusions reached upon this point. But the fact that there may be occasional doubt or want of agreement on this question cannot be allowed to invalidate the statute. If this rule obtained, many penal statutes that have stood unquestioned for years and have been often enforced would be held invalid. There are numerous statutes in existence, creating and describing offenses the enforcement of which often brings into prominent notice a question concerning the meaning of words in the law about which different persons might reach a different conclusion. In the trial of many criminal cases there are of necessity submitted to the jury issues involving the meaning of certain words upon which depends the guilt or innocence of the accused; and with the court or jury as the case may be, is left the decision whether or not the law under which the prosecution is pending has been violated. It would, of course, be extremely desirable if every penal statute could be made so plain as not to leave any doubt as to its meaning, and so intelligible as that every person could by reading it at once decide what he might with safety do under it. But this ideal condition is not attainable. It would not be at all practicable to define in every statute the meaning of controlling words in it, that there may be difference of opinion concerning, when it is attempted to apply them to a given state of facts. To do this would extend to unreasonable length almost every statute that creates and describes an offense, and would also complicate and confuse the administration of the criminal law, as the definitions would often be as uncertain as the thing defined. Every penal statute should be given a reasonable construction, one that will effectuate the legislative intent in its enactment; and if it describes the offense in language that can be understood by persons of ordinary intelligence, it will not be declared invalid on the ground of uncertainty. * * *

A little common sense, as well as legal learning, must be used in the practical administration of the law; and it is not essential that

a statute shall be so elaborate in its details as to attempt to meet every possible state of fact that may arise under it."

In *Stewart v. State*, 4 Okl. Cr. 564, 109 Pac. 243, 32 L. R. A. (N. S.) 505, it is held that a statute, which provided that "every person who wilfully and wrongfully commits any act * * * which grossly disturbs the public peace or health, * * * although no punishment is expressly prescribed therefor by this Code, is guilty of a misdemeanor," is not void for uncertainty; and that whooping and yelling and uttering loud and vociferous language are acts prohibited thereby, if they grossly disturb the public peace; and it is said that the Legislature, in creating an offense, may define it by a particular description of the act or acts constituting it, or it may define it as any act which produces, or is reasonably calculated to produce, a certain defined or described result. There being no common-law crimes in Oklahoma, it is held that where the Legislature creates without defining an offense which was a crime under the common law, the common-law definition of the crime will be adopted.

Several recent cases in the Supreme Court of the United States illustrate and follow the same liberal rule of construction.

In *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 108, 29 Sup. Ct. 226, 53 L. Ed. 429, this is said with reference to the Texas statute relating to monopolies and combinations in restraint of trade:

"It is further insisted that the acts in question are so vague, indefinite and uncertain as to deprive them of their constitutionality, in that they punish by forfeiture of the right to do business, and the imposition of penalties, under provisions of an act which do not advise a citizen or corporation, prosecuted under them, of the nature and character of the acts constituting a violation of the law. These objections are found in the words of the act of 1899, denouncing contracts and arrangements 'reasonably calculated' to fix and regulate the price of commodities, etc. And in the act of 1903 acts are prohibited which 'tend' to accomplish the prohibited results. It is insisted that these laws are so indefinite that no one can tell what acts are embraced within their provisions. In support of this contention it is argued that laws of this nature ought to be so explicit that all persons subject to their penalties may know what they can do, and what it is their duty to avoid. And reference is made to decisions which have held that criminal statutes should be so definite as to enable those included in its terms to know in advance whether the act is criminal or not. [Citing cases.] * * * But the Texas statutes in question do not give the broad power to a court or jury to determine the criminal character of the act in accordance with their belief as to whether it is reasonable or unreasonable, as do the statutes condemned in the cases cited."

The statutes are held to be valid as sufficiently definite and certain in their definition of the crime denounced.

Nash v. United States, 229 U. S. 373, 33 Sup. Ct. 780, 57 L. Ed. 1232, was a prosecution for a criminal violation of the Sherman Anti-Trust Act, and it was held that there is no such vagueness in the Anti-Trust act of July 2, 1890 (26 Stat. at L. 209, c. 647, U. S. Comp. Stat. 1901, p. 3200 [U. S. Comp. St. §§ 8820-8823, 8827-8830]), as to render it inoperative on its criminal side, because only such contracts and combinations are within the act as, by reason of intent, or of the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition, or unduly obstructing the course of trade.

In *Fox v. Washington*, 236 U. S. 273, 35 Sup. Ct. 383, 59 L. Ed. 574, it is held that a statute of the state of Washington (Code, § 2564) which makes criminal the editing of printed matter tending to encourage and advocate disrespect for law, does not violate the United States Constitution, Fourteenth Amendment, as being an unjustifiable restriction of liberty, and too indefinite for a criminal statute, where the highest state court, by implication at least, reads the statute as confined to encouraging an actual breach of the law, and in the case at bar has merely construed it as embracing an article encouraging and inciting a persistence in what would be a breach of the state laws against indecent exposure.

In *Miller v. Strahl*, 239 U. S. 426, 36 Sup. Ct. 147, 60 L. Ed. 364, it is held that there is no uncertainty in the requirement of the Nebraska law (Rev. Stat. 1913, § 3104) that innkeepers, in case of fire, shall give notice of the same to all guests and inmates at once, and shall do all in their power to save such guests and inmates, as to render the statute invalid under the Fourteenth Amendment of the United States Constitution as wanting in due process of law, and this is said:

"The argument is that the requirement 'to do all in one's power' fails to inform a man of ordinary intelligence what he must or must not do under given circumstances.

"Rules of conduct must necessarily be expressed in general terms and depend for their application upon circumstances, and circumstances vary. It may be true, as counsel says, that 'men are differently constituted,' some being 'abject cowards, and few only are real heroes'; that the brains of some people work 'rapidly and normally in the face of danger while other people lose all control over their actions.' It is manifest that rules could not be prescribed to meet these varying qualities. Yet all must be brought to judgment. And what better test could be devised than the doing of 'all in one's power' as determined by the circumstances."

And it is said that the case falls within the rule stated in *Nash v. United States*, supra.

In *Omaechevarria v. Idaho*, 246 U. S. 346, 38 Sup. Ct. 323, 62 L. Ed. 763, under a statute making criminal the grazing of sheep on the federal public domain upon ranges previously occupied by cattle, or usually occupied by cattle raisers, it was held that the provisions are not so indefinite as to render the statute repugnant to the constitutional guaranty of due process of law, although it fails to provide for the ascertainment of the boundaries of a range, or for determining what length of time is necessary to constitute a prior occupation, a usual one within the meaning of the statute, especially since it is provided by section 6314 that in any crime or public offense there must exist a union or joint operation of act and intent, or criminal negligence.

The recent case of *United States v. Cohen Grocery Co.*, 255 U. S. 81, 41 Sup. Ct. 300, 65 L. Ed. —, is relied upon by the plaintiff in error here as sustaining a contrary view; but the opinion in that case expressly refers to the previous cases just cited herein, and their authority is conceded. The *Cohen Case* held *Lever Act* of August 10, 1917, § 4 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 3115½ff), as re-enacted by the act of October 22, 1919, § 2 (41 Stat. 298), which undertook to punish criminally any person who willfully makes "any unjust or unreasonable rate or charge in handling or dealing in or with any necessities," violative of the Fifth and Sixth Amendments of the United States Constitution, which require an ascertainable standard of guilt fixed by Congress rather than by courts and juries, and secure to accused persons the right to be informed of the nature and cause of accusations against them. A careful reading of the opinion demonstrates that the court had no intention of impairing the weight of its previous decisions upon this subject.

[2] The true test, as we understand it, may be thus expressed: The statute, to be valid, must by its language, fairly construed and with reference to common-law definitions (if the act denounced as a crime was punishable at common law), supply the standard by which the guilt of the accused person is to be determined. If the statute does not thus supply such standard, it is invalid for vagueness and uncertainty, but if it does, it is valid. Mr. Chief Justice White said, with reference to the section of the *Lever Act* considered in the case of *United States v. Cohen*, supra:

"The sole remaining inquiry, therefore, is the certainty or uncertainty of the text in question, that is, whether the words, 'That it is hereby made unlawful for any person willfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessities,' constituted a fixing by Congress of an ascertainable standard of guilt, and are adequate to inform persons accused of violation thereof of the nature and cause of the

accusation against them. That they are not, we are of opinion so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below in its opinion to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury. And that this is not a mere abstraction finds abundant demonstration in the cases now before us, since in the briefs in these cases the conflicting results which have arisen from the painstaking attempts of enlightened judges in seeking to carry out the statute in cases brought before them are vividly portrayed."

[3] Applying this test to the statute and resolution here involved, we are of opinion that they are valid. That obstructions or encroachments upon a highway per se constitute a public nuisance, even when they do not actually operate as an obstruction to travel, is well settled, and it follows that the same is true of anything which interferes unreasonably or unnecessarily with its use by the public, or which makes the highway more dangerous for travelers thereon. 13 R. C. L. 186; *Commonwealth v. Stodder*, 2 Cush. (Mass.) 562, 48 Am. Dec. 679.

[4] That the act here involved, authorizing boards of supervisors to enact special legislation deemed expedient to protect the highways from encroachment or obstruction, or from any improper or exceptionally injurious use thereof, is valid, cannot be doubted. It is authorized by the Constitution, section 65, and the statute based thereon was reviewed by this court in *Polglaise's Case*, 114 Va. 850, 76 S. E. 897. In the course of the opinion in that case it is said:

"Upon reason and authority, the matter of regulating the amount of loads to be hauled over the public highways is generally recognized as properly within the discretion of the authorities charged by law with the care and maintenance of the public highways; and it is likewise settled that when any such regulation, within the scope of the authority of the lawmaking power, has been passed, the prima facie presumption is that the regulation is reasonable and proper, and in order to warrant the court in coming to a different conclusion there must be evidence introduced showing that in the particular case the discretion granted to the legislative body has been abused, and the rights of individuals taken from them."

Other recent and instructive cases from other jurisdictions relating to the general

power of public authorities to restrict the use of highways and to exclude certain classes of vehicles therefrom are: State v. Mayo, 106 Me. 62, 75 Atl. 295, 26 L. R. A. (N. S.) 502, 20 Ann. Cas. 512; Fifth Ave. Coach Co. v. New York, 194 N. Y. 19, 86 N. E. 824, 21 L. R. A. (N. S.) 744, 16 Ann. Cas. 695; Commonwealth v. Kingsbury, 199 Mass. 542, 85 N. E. 848, L. R. A. 1915E, 264, 127 Am. St. Rep. 513; Commonwealth v. Nolan, 169 Ky. 34, 224 S. W. 506, 11 A. L. R. 203.

[5] We must look to the statute and the resolution based thereon then to ascertain whether they afford the standard by which the guilt or the innocence of the person charged with the offense is to be determined. We find therefrom that certain specified heavy vehicles, and all heavily laden wagons or trucks, are forbidden the use of the roads under certain conditions. There is certainly nothing indefinite about the resolution in so far as it designated the prohibited vehicles. The question presented to the court or jury in a given case is whether or not the accused person has operated such a vehicle. This is a question of fact to be determined from the evidence like any other fact, not resting in the varying discretion or opinion of the jury, but depending upon the evidence. In order to convict, the vehicle must be of the character described and prohibited.

[6] Then, the time and circumstance under which such use is prohibited is clearly indicated; that is, to justify conviction, it must be shown that the road was wet to a sufficient extent to make such use at that time exceptionally injurious to the highway, and hence improper. Thus the statute and resolution clearly point out the other essential fact which must be established by evidence before there can be a conviction thereunder. The words "materially damaged," used in the resolution of the board, are in instruction 5 construed properly by the court to be equivalent to the words used in the statute, so that in order to convict it must be shown by the evidence that there was an improper and exceptionally injurious use of the highway under the circumstances indicated.

So that we have in the statute itself and in the resolution the standards by which the guilt or the innocence of accused persons is to be determined. Thus construed, they are not as indefinite as are those ordinances which provide penalties for disorderly conduct. While it is said that disorderly conduct has a common-law meaning, this meaning is so indefinite as to require the submission of the evidence to the jury in order to determine the facts. So in homicide the question is not whether the accused person thought he knew whether he was committing the crime of involuntary manslaughter or of murder in the first or second de-

gree. If he commits a homicide, he must take his chances with the jury. The jury determines the degree of his guilt, although he may feel very sure that they are mistaken. So here, the accused person who uses the prohibited vehicle upon a clay road which is wet must determine at his peril whether it is so wet as to make his use of it then exceptionally injurious to the highway, and thereafter he must accept the judgment of the jury as to whether he is innocent or guilty of the offense charged. There is nothing unusual in all this, and the language of the resolution, thus construed, sufficiently fixes the standard. The jury are not left free to exercise their own untrammelled judgment, but must determine the issue presented to them from the evidence. Like any other case, if the evidence fails, the accused is acquitted. The criminality of the act here denounced does not depend upon whether a jury may think it reasonable or unreasonable. The statute describes the misdemeanor with reasonable definiteness and certainty, though in a given case it may be difficult to show the guilt of the accused beyond a reasonable doubt, because from the evidence there may be fair differences as to whether the essential facts necessary to constitute the crime have been proved. There is no fair doubt, however, as to the misdemeanor which is prohibited.

It follows from what we have said that we think the judgment of the trial court overruling the demurrer and motion to dismiss is without error.

[7] The defendant in error complains of the failure of the court to give instructions 2 and 4.

Instruction 2 reads thus:

"The jury is further instructed that the mere use of the roads while they are wet or muddy is not sufficient, but you must further believe that the roads were in such condition that beyond a reasonable doubt they would be materially damaged as mentioned in instruction No. 1."

It is sufficient to say as to this that the three instructions given by the court fully protected every right of the defendant to be acquitted if there was any reasonable doubt of its guilt, and it was unnecessary to repeat that doctrine in the instruction which was refused. The error, if any, was harmless.

[8] Instruction 4 was to the effect that if the jury believed from the evidence that other reasonable persons subject to the law involved used the roads at the time the defendant was charged with using them, and with wagons or trucks of similar kind and weight as used by the defendant, then the defendant had the right to assume that its use was proper and would not be guilty. This instruction was properly refused, because the jury had been sufficiently instructed

ed already in the other three instructions which were given, and for the additional reason that it is not true that under such circumstances the defendant's guilt or innocence depends upon what other reasonable persons do. He must at his peril determine for himself whether or not he will use the road when it is wet with his heavy or heavily loaded vehicle, and the jury must in each case determine whether or not such use was improper and exceptionally injurious in violation of the resolution; and the fact that other reasonable persons may have also violated the law at the same time does not entitle the accused to an acquittal.

The evidence introduced by the commonwealth is sufficient to support the verdict, and the trial court committed no error in refusing to set it aside.

Affirmed.

(89 W. Va. 321)

GLASSCOCK et al. v. SOUTH MORGANTOWN TRACTION CO. et al. (No. 4312.)

(Supreme Court of Appeals of West Virginia. Oct. 25, 1921.)

(Syllabus by the Court.)

1. Receivers ¶162—Railway company's creditor whose claim was secured along with others held not entitled to preference for furnishing labor and materials.

The claim of a creditor of a railway company, secured along with its other general debts, by a deed assigning all of its property to trustees to secure ratable payment of all of its debts, and not otherwise expressly secured, is not entitled to priority or preference over such other debts in the distribution of a fund arising from sale of such property, even though such claim may have arisen out of the furnishing of labor and materials for necessary use in the operation of the company's railway, in the absence of establishment of a diversion and payment of net earnings of the company to such other creditors or the holder of some other lien on such property.

2. Receivers ¶154(1)—Railway company's prior operation debt is not part of receivership expenses.

A debt so incurred by a railway company, before the appointment of a receiver in a suit brought to wind up its business, is not a part of the expenses of the receivership.

3. Appeal and error ¶266(1)—Chancery commissioner's findings not excepted to below cannot be assailed on appeal.

A finding of a commissioner in chancery, set forth in his report and not excepted to in the court below, cannot be assailed in the appellate court by an assignment of error, unless the report is erroneous on its face as to it.

Appeal from Circuit Court, Monongalia County.

Suit by William E. Glasscock and others, trustees, against the South Morgantown

Traction Company and others, for ascertainment of liens, administration of trust, and appointment of receiver for the defendant. Exceptions to the commissioner's report sustained, and a decree of preference awarded in favor of the city of Morgantown, and plaintiffs appeal. Reversed in part, and affirmed as modified.

Cox & Baker, of Morgantown, for appellants.

T. D. Stewart and C. B. Dille, both of Morgantown, for appellee.

POFFENBARGER, J. This appeal involves only a question of priority of liens, the appellants denying the right of preference accorded the city of Morgantown by the decree complained of. They contend that the city must take its place among the general creditors of the South Morgantown Traction Company, whose debts are all secured on a pro rata basis and without preference, by a deed of general assignment for their benefit. Before the assignment, there was but one admitted lien on any of the company's property, and that was a vendor's lien for \$1,000 on a certain piece of real estate. The entire indebtedness amounted to \$176,848.57. By the decree complained of, the debt of \$2,495.43 due the city of Morgantown, and secured by the assignment, was given priority over the other creditors secured by it, on the theory of right in those furnishing labor and materials to a railroad company, to a preference over secured creditors, in the distribution of a fund arising from the sale of the corpus of its property, not from its net earnings.

The assignment was made March 29, 1919. This suit for ascertainment of liens, administration of the trust, and appointment of a receiver was commenced in October, 1919.

Incurrence of the preferred debt antedates both transactions, but it was not secured by an express lien of any kind. It arose under a contract between the city and the traction company, dated September 24, 1918, and substantially performed in December, 1918. Under it, the city did certain street grading and paving the traction company was obligated to do by a provision of its franchise, in consideration of the agreement of the latter to pay the cost thereof, immediately upon the completion of the work.

In his report, the commissioner to whom the cause was referred denied the preference claimed by the city, but the court sustaining an exception to the report, based upon disallowance thereof, awarded it by the decree, as has been stated. By the decree entered July 19, 1920, modifying the report and confirming it as modified, sale of the traction company's property by the trustees was ordered, and it was subsequently sold for \$40,100.

[1] From November 3, 1919, until sold, the

(199 S.E.)

property was managed and operated by a receiver who, under authority duly conferred, borrowed \$2,500 on a receiver's certificate, for operating expenses. Under his administration, the income was insufficient to pay the taxes, necessary current expenses, and the receiver's certificate. Conceding nonexistence of any net earnings, either in hand or diverted, upon which the debt due the city could be a lien, its counsel insist, nevertheless, that it is entitled to preference over the other general creditors secured by the deed of assignment, in the distribution of the fund created by sale of the property of the company.

The authorities invoked for this right of preference do not sustain it. There is no pretension that either *Fosdick v. Schall*, 99 U. S. 235, 25 L. Ed. 339, or *Hale v. Frost*, 99 U. S. 389, 25 L. Ed. 419, in which the doctrine of preference in respect of net earnings was originally asserted, goes beyond such earnings; and, manifestly, neither of them does. It is insisted, however, that the decision in *Southern Railway Co. v. Carnegie Steel Co.*, 176 U. S. 257, 20 Sup. Ct. 347, 44 L. Ed. 458, extends the principle to the corpus of the property of the corporation as against mortgage creditors; but this position is wholly inconsistent with the conclusion announced in the case. The trial court had ascertained that net earnings of the railway, upon which the steel company was entitled to a preferential lien, had been diverted and paid to the mortgage creditors, and its decree had, in effect, required restoration of the amount so diverted and paid, to satisfy the claim of the steel company. This decree was affirmed by the appellate court. Not a word found in the opinion purports to extend the preferential right of a laborer or materialman beyond the net earnings; nor has any other decision purporting to do so been cited or found. Most assuredly *Virginia & Alabama Coal Co. v. Central R. & B. Co.*, 170 U. S. 355, 18 Sup. Ct. 657, 42 L. Ed. 1068, does not, for the terms of the opinion very carefully and explicitly limit it. Moreover, the discretionary power of a court of equity to allow such a preference is uniformly held to be limited, and it is not allowed except in clear cases. *Kneeland v. American Loan Co.*, 136 U. S. 89, 10 Sup. Ct. 950, 34 L. Ed. 379; *Union Trust Co. v. Ill. Mid. R. Co.*, 117 U. S. 434, 6 Sup. Ct. 809, 29 L. Ed. 963; *Addison v. Lewis*, 75 Va. 701; *Huldekoper v. Locomotive Works*, 99 U. S. 258, 25 L. Ed. 344; *Burnham v. Bowen*, 111 U. S. 776, 4 Sup. Ct. 675, 28 L. Ed. 596; *Wood v. Guarantee Trust Co.*, 128 U. S. 416, 9 Sup. Ct. 131, 32 L. Ed. 472.

Though there is no specific objection to award of the balance in the hands of the receiver, \$1,390.25, to the holder of an unpaid receiver's certificate for \$2,500, it is proper to observe that no valid objection could be urged against it, if issuance of the certificate

was duly authorized, as presumptively it was, no complaint of the appointment of the receiver, or the order authorizing him to borrow money, having been made. *Union Trust Co. v. Ill. Mid. Ry. Co.*, 117 U. S. 434, 6 Sup. Ct. 809, 29 L. Ed. 963.

[2] The city's debt does not represent an expense of operation under the receivership, because it accrued long before the receiver was appointed. Its representation of an expense necessarily incurred by the debtor itself does not legally nor equitably differentiate it from other debts which, presumptively, were necessarily incurred. Nor is it material that immediate payment for the work was to be made on completion thereof. Time of payment does not affect the question of priority.

[3] Allowance of a mechanic's lien in favor of *Joseph H. Stevens*, for \$186.75 was not excepted to in the court below, and, as no error in the allowance thereof appears on the face of the report, no complaint of it can be originally interposed here. *Bank of Union v. Nickell*, 57 W. Va. 57, 49 S. E. 1003; *Long v. Willis*, 50 W. Va. 341, 40 S. E. 340.

In so far as the decrees complained of sustain the exception of the city of Morgantown to the report of the commissioner, accord preference and priority of the debt due said city, over the claims of other creditors secured by the deed of assignment, exclusively accord to said city the fourth place in the distribution of the assets of the traction company, and postpone to its claim those of such other creditors, they will be reversed, and then so modified as to make the debt of said city and such other creditors stand fourth in such distribution and share therein pro rata, and, as so modified, they will be affirmed, with an award of costs in this court to the appellants.

MILLER, J., absent.

(89 W. Va. 314)

BRYAN v. FAIRFAX FOREST MIN. & MFG. CO. et al. (No. 4233.)

(Supreme Court of Appeals of West Virginia. Oct. 25, 1921.)

(Syllabus by the Court.)

1. Equity ⇐24—May extend time of performing contract, where other party delays performance.

It is within the power of a court of equity to extend the time for the performance of a contract, where either party unduly obstructs or delays the other in its performance.

2. Equity ⇐24—Party seeking extension for other party's obstruction or delay must show diligence and sufficient cause.

To authorize such extension, the party so obstructed or delayed must have been diligent in performing the contract within the time stipulated therein for its performance, and

must also show sufficient cause for the extension sought by him.

3. Equity ¶24—Party seeking extension has burden of showing cause therefor.

Upon him who asserts the right to such an extension rests the burden of showing cause therefor.

4. Equity ¶24—Where there were two agreed extensions, party seeking further extension for other party's obstruction or delay should show ample and satisfactory proof.

Where the contract whose extension is sought was to be performed within five years from its date, but, not being so performed within that time, the party not at fault voluntarily granted two years additional time for its performance, and subsequently by a written agreement granted another like period upon a cash consideration, or a total time limit of nine years, the proof should be ample and satisfactory, in order to warrant still further indulgence.

5. Equity ¶24—Idle rumors of delayed party's financial inability, in absence of proof thereof, held insufficient in suit for extension of time.

Mere idle rumors of the financial inability of the party delayed to pay, and his tardiness in payment of wages earned by his employees, are not substantial cause for such extension, in the absence of proof of his dereliction in that respect.

6. Equity ¶24—Circulation of rumors by party's agent as to other party's inability to pay employees held insufficient to warrant extension of time for performing contract.

The circulation of such rumors by an agent of a corporation, when not engaged in the course of his employment as custodian of its property, and without its authorization, knowledge, or consent, and which, when informed of such circulation, directs him to desist therefrom, and he does desist, is not sufficient to warrant the extension.

7. Corporations ¶182—Acts of agent in charge of corporation's property do not affect right of owners of its stock.

The acts and conduct of a corporation's agent, a custodian of its property, whose duty it is to protect the property from trespassers and to collect rents from its tenants, do not affect the right of the owners of the corporation's capital stock, as its agent is not their agent, and his acts are not theirs, unless they authorized or ratified such acts and conduct on his part.

Appeal from Circuit Court, Grant County.

Bill by Jonathan Bryan against the Fairfax Forest Mining & Manufacturing Company and others, for enforcement of liens created by decrees in a former suit. From a decree for plaintiff, defendant William C. Bond appeals. Decree affirmed, and cause remanded.

Q. O. Strieby, of Elkins, for appellant.

L. J. Forman, of Petersburg, and Charles McH. Howard and John B. Deming, both of Baltimore, Md., for appellees.

LYNCH, J. The bill and amended bill, though called petitions, had for their object enforcement of liens created by decrees in a former suit in favor of plaintiff's intestate and some of the defendants against the real estate of Fairfax Forest Mining & Manufacturing Company, a corporation, consisting of 2,309 acres. The decree entered in this cause after the report of the commissioner, to whom it was referred, was filed and confirmed, established and co-ordinated the former decrees as such liens, adjudicated the rights claimed by Davis Coal & Coke Company under coal-mining leases covering parts of the land, and the claim of Theodore G. Lurman for commissions for services rendered by him in procuring the leasehold contracts, and directed a sale of the land to satisfy the liens thus ascertained and determined, but denied William C. Bond, the purchaser of the timber on the land, a further extension of the right to remove it beyond the five-year period provided in the original contract, dated April 17, 1911, and two extensions of the time limit, one oral, the other written, the last postponing the date to April 17, 1920. The written extension agreement bears date, November 27, 1917. The whole contract period, therefore, was nine years, or from April 17, 1911, to April 17, 1920.

[4] The timber contract was a cash transaction and Bond entered upon the tract, installed all the equipment by him deemed necessary or sufficient to manufacture the timber into lumber and market the product, and to exercise the rights and privileges accorded to him by the contract, but did not succeed in the accomplishment of the purpose of the grant within the original five-year period, or the period covered by the oral and written extension agreements, the latter expiring ten days before the institution of this suit, April 27, 1920. In his answer, also called a petition, to the bill, Bond claims the right to a further enlargement of the time to complete the timber removal and lumber operations on the land and assigns as reasons for this enlarged opportunity the interference by J. E. Grimes, agent of defendant, Fairfax Forest Mining & Manufacturing Company, alleging that, but for such interference, he would have succeeded in completing the contract within the time so prescribed.

The so-called interference consisted in the use by Grimes on various occasions in the presence of Bond's employees of language reflecting upon the financial ability and in-

tegrity of Bond, and his disposition to delay payment of his contract obligations, until such payment was compelled by legal proceedings, the ultimate effect of which derogatory remarks and aspersions was to create, and he contends did create, doubt in the minds of the employees as to the receipt of their wages when due; also by way of other alleged acts and conduct of Grimes creative of dissatisfaction among the employees relative to the collection of rents from such of them as occupied some of the houses on the land. These rents, however, Grimes apparently had authority to collect and did collect, pursuant to such authority, before the date of the last extension agreement, as other agreements are silent as to the right of Bond to the use of the houses, the contract of November 27, 1917, having for the first time conferred upon him the right to use the houses rent free, except the one occupied by Grimes; and although he continued to exact and collect rents thereafter due and payable, he did so without knowledge of the contract terms, and when advised by Howard of the terms he ceased to require and collect rents from the occupants. He may have been, and perhaps was, indiscreet in dealing with the occupants, as he seems to have been somewhat irascible and petulant, and apparently there was enmity or lack of cordiality between him and Bond.

[5, 6] Because of such remarks and the creation of such doubt, and the acts and conduct relative to rents, Bond's contention is that he lost the services of men employed by him, and for that reason was unable to cut and manufacture the timber into lumber when and as so required, but could do so within three or four months, if the time was extended that long, and Grimes compelled to cease interference with his working force.

Grimes defines his relation to the Fairfax Forest Mining & Manufacturing Company as "custodian of the property, with authority to rent and collect rents and to protect the property." He did negotiate the sale of the timber to Bond, subject, however, to the company's approval, and received, but did not collect, Bond's check, delivered to him as payment for the lumber contract. He took it to the bank on which it was drawn, requested the cashier to certify it, and, when certified, transmitted it to William Bowly Wilson, a resident of Baltimore, and then president and owner of a large part of the capital stock of Fairfax Forest Mining & Manufacturing Company, but now deceased; Charles McH. Howard having succeeded him in that capacity since his death.

There was doubt whether, because of his delay in the timber operation on the land, whatever the cause may have been, Bond would be able to secure the extension of the time of performance, finally granted, and

Grimes so informed Pace and "a gentleman" with him, who contemplated an agreement to cut the timber and stock the mill, but did not secure the agreement, perhaps, but not certainly, because of such doubt, Grimes at that time believed the extension improbable, although without his knowledge, negotiations therefor were then pending, perhaps consummated.

Grimes does not deny, but admits making the remarks, proved by other witnesses, and as charged in Bond's answer, but what he said, he contends, was a matter of common knowledge in the community; and as to the generality of the rumor several of Bond's employees corroborated him, and they heard it mentioned and discussed, when assembled at the railroad station and elsewhere, when Grimes may or may not have been present, or, if he was, they were not aware of his presence, as they were not acquainted with him at that time.

[2, 3] But conceding, as we must concede, as the proof sufficiently shows that Grimes, both before and since the last extension, did discuss Bond's dereliction in the payment of wages earned by his men, and that a few of them did cease to labor for him on account of the impression thus created, still no proof shows failure on the part of any of them to receive wages earned by them, when due and payable, though some did quit the employment, in part because of the derogatory remarks heard by them, and for other reasons.

An active business man, as Bond has shown himself to be, is to be judged by his acts, rather than by idle reports of his want of financial integrity, and it is hardly conceivable that his lumber operations were delayed because of such reports. Other reasons must have been responsible for the delay. He had nine years to manufacture the timber, and he had cause to suspect that he could not obtain further indulgence in that behalf, and even if now, as noted, he deems three or four months ample time to complete the contract, the lower court evidently concluded that he was not entitled to that relief.

[7] But Grimes was not the agent of the lien creditors. Whatever authority he had, he did not derive it from them, and although the company of which they were stockholders may have been cognizant of the unfavorable comments, there is no proof that it authorized, ratified, or condoned them. On the contrary, whenever informed of their utterance, and of the attempted molestation of the right of the occupants of the dwellings to occupy and use them rent free, or of the wrongful creation of dissatisfaction among the employees, the officers of the company, notably Howard, admonished him to desist, and he did desist, at least in so far as the

quiet use and enjoyment of the houses were concerned. But the evidence does not trace such knowledge home to the lien creditors. That they, or some of them, were and yet are owners of the company's capital stock, does not necessarily imply notice to them. But if they had such knowledge, yet if Grimes' acts and conversation were not authorized by them or by the company, and if such obnoxious treatment was not within the scope of the agency, neither was responsible for what Grimes said or did, except as to the right to collect rent for the houses, and his acts and conduct would not affect the stockholders, who did not directly or impliedly authorize or ratify them. His agency was not general, but limited, that of a custodian whose principal duty was to protect the property in his care against unauthorized invasion. It did not confer the right to slander, and the company's officers sought to suppress that, when informed of it. Replying, April 2, 1918, to a letter of Mr. Strieby, Bond's counsel, dated March 30, referring to annoyance by Grimes, as reported to him by Bond, Mr. Howard told Grimes not to obstruct in any way Mr. Bond's use of the property, and for the first time notified him of the extension of the contract to April 17, 1920; he having theretofore inadvertently omitted to impart to him that information. Instead of authorizing such conduct, or treating it as within the actual or implied scope of the agency, the principal repudiated it.

The act of a servant may, it is true, be within the scope of the employment, if the act done is necessary to accomplish the purpose of the employment, and the servant so intends, even if in doing the act he exceeds the power conferred upon him by the master. The master or principal may also be civilly liable for the slander or libel published or circulated by his servant or employee, provided he is at the time acting within the scope of the employment. The purpose contemplated by the act done or the slander circulated, rather than the method of doing it, is the test whether it is within the scope of the employment. 26 Cyc. 1533, 1534; 2 C. J. 848, 849; 25 Cyc. 427; 2 Mech. Agency, §§ 1926, 1957, 1981. There is in the evidence nothing even tending to show that, while Grimes was uttering the terms of reproach or slanderous words, he was engaged in the active service of his principal, Fairfax Forest Mining & Manufacturing Company, although it was during the agency. Generally, if not exclusively, the conversations, in which the words were used, occurred at the railway station, where the laborers were awaiting the arrival of trains to carry them home, or on their way to resume work upon the property. At no time

does it appear that Grimes was doing anything for the company at the time, or was advancing the interests of his employer in any way, or for any purpose connected with the duties assigned to him, or that what he did or said was beneficial to the company or in the furtherance of its corporate affairs. His conversation with Pace and his companion was as to the improbability of an extension of the lumber contract. That was at his house during the noon hour, probably during the noon meal, in which the three participated.

[1] Courts of equity can and will, when the facts and circumstances of a case warrant it, grant relief by an extension of a contract. But there are present in this case no facts and no circumstances justifying such an extension. Such relief has been granted in oil and gas litigation, where the lessor by his conduct and acceptance of benefits induces "the lessee [or operator] to believe that he will not insist upon the production of oil in paying quantities" within the time specified in the lease. *Ohio Fuel Oil Co. v. Greenleaf*, 84 W. Va. 67, 90 S. E. 274, and cases cited.

Our conclusion therefore, is to affirm the decree and remand the cause.

MILLER, J., absent.

(89 W. Va. 301)

STATE v. STAFFORD. (No. 4265.)

(Supreme Court of Appeals of West Virginia.
Oct. 25, 1921.)

(Syllabus by the Court.)

1. Grand Jury \S 7—Indictment not quashed where grand jurors were selected as statute required at levy term.

Prior to the Legislature of 1919, the county court was required to prepare annually a list of grand jurors and deliver same to the clerk of the circuit court at its levy term, which begins on the second Tuesday in August and by operation of law is adjourned until the fourth Tuesday in that month, at which the levy must be laid as provided in section 2, c. 28A, Barnes' Code, 1918 (Code 1913, sec. 875); and an indictment found and returned by grand jurors properly selected from such list so prepared, either at the session begun on the second Tuesday in August or at the adjourned session begun on the fourth Tuesday of that month, should not be quashed for the alleged reason that such list was not prepared and delivered at the levy term.

2. Homicide \S 305—In prosecution for attempt to murder, instruction as to guilt of party watching to prevent surprise of those doing the shooting held sufficient.

An instruction, given in a trial on an indictment for felonious attempt to kill, instructing

the jury, in effect, that if they believe from the evidence that the defendant, and others jointly indicted with him, all or any of them being armed with guns, went within shooting distance of a mine tippie and cage then used for bringing men out of the mine, and did, on a day named, lie in wait until certain persons named in the indictment came out of the mine in such cage, and that such other persons jointly indicted with defendant, or any of them, did then and there shoot with such guns at the persons coming out of the mine in such cage, with felonious intent then and there to kill them, or any of them, and that defendant was then and there present or within about 300 yards of such persons jointly indicted, and watching to prevent surprise while such other persons were committing the offense, or with intention of giving assistance, should occasion arise, to such other persons and was near enough to do so, then the defendant would be guilty of an attempt to commit murder in the first degree, sufficiently states a concerted design between defendant and those actually doing the shooting, and sufficiently states that defendant, by "watching to prevent surprise," was participating in the murderous intent.

3. Criminal law §813, 1172(6)—Abstract instruction improper, but will not require reversal unless it has misled jury.

An instruction which propounds an abstract proposition of law should not be given, but, if given, and there be evidence to which it is applicable, the appellate court will not reverse for that cause, unless it is clear that the jury has been misled.

4. Criminal law §761(2)—Instruction correctly defining statutory offense is not reversible on theory of assuming facts not proven.

The giving of an instruction which correctly states a definition of a statutory offense for the violation of which defendant is indicted and being tried is not reversible error on the theory that it assumes facts not proven, and thereby invades the province of the jury.

5. Homicide §307(3)—Instruction that verdict must be guilty of attempt to murder or not guilty, proper, where lesser offenses barred by limitation.

An instruction, given in the trial of an indictment charging defendant with a felonious attempt to kill, "that under the law and the evidence in this case that they [the jury] can return only one of two verdicts, guilty of an attempt to commit murder in the first degree, or not guilty," is properly given, where the evidence is conclusive and uncontradicted that the offense, if any, was committed on the 18th day of November, 1917, and the indictment was not found and returned until the March, 1919, term of the court; as all offenses lesser than attempt to commit murder in the first degree have been barred by limitation before the finding of the indictment.

6. Criminal law §840—Court may permit attorneys employed to assist prosecutor to continue trial in absence of prosecutor.

Under section 7, c. 120, Code 1918 (Code Supp. 1918, sec. 4719), competent attorneys

may be employed by any person to assist the prosecuting attorney in the prosecution of any person charged with crime; and if in the progress of a trial the prosecuting attorney is compelled by sickness or other valid cause to be absent from the trial, it is not error for the court, without objection on the part of defendant, to permit the attorneys so employed to proceed with the trial and prosecute the same to conclusion, unless it clearly appears that defendant was prejudiced thereby.

7. Jury §97(4)—Juror held competent, although stating that he did not think much of labor unions, where defendant belonged to one.

A juror who on his voir dire says that he has no bias or prejudice against defendant because such defendant is an Italian, or is and was a member and officer of a labor organization at the time of the alleged offense, and that he could render a fair and impartial verdict from the evidence, regardless of the nationality of defendant or of the fact that he did or did not belong to a labor union, is a competent juror, although he also says that he "didn't think much of labor unions," and did not believe that labor unions were very conducive to law and order.

(Additional Syllabus by Editorial Staff.)

8. Homicide §256—Evidence held to sustain conviction of attempted murder.

In a prosecution for attempt to murder, where the whole defense rested upon alibi, evidence held sufficient to sustain conviction.

Error to Circuit Court, Raleigh County.

Tony Stafford was convicted of attempting to kill by shooting, and he brings error. Affirmed.

C. M. Ward, of Beckley, and John M. McGrath, of Princeton, for plaintiff in error.

E. T. England, Atty. Gen., R. Dennis Steed, Asst. Atty. Gen., and S. B. Avis, of Charleston, for the State.

LIVELY, J. Defendant prosecutes this writ of error from a judgment of the criminal court entered on the 6th day of April, 1920, sentencing him to confinement in the penitentiary for five years.

At the March term in 1919, defendant, George Lucas, Tom McGinnis, Dorr Snuffer, Tom Murphy, Ed Hornick, Will Owens, Tom Lethco, Tony Sorazzo, and Carl Crim were jointly indicted for a felony, the indictment charging them with unlawfully and feloniously attempting to maliciously, deliberately, and unlawfully kill John Ranson and others by shooting at them with guns on the 16th day of November, 1917. Some of the defendants demanded separate trials, and the state elected to try Tony Stafford.

In October, 1917, the E. E. White Coal Company had a controversy with some of its employees, at the Glen White mines, who were members of the United Mine Workers

of America, and a strike resulted, the company's employees who were not members of the union remaining at work. The dispute was decided against the strikers by the United States mediators, and thereafter occurred the shooting for which defendant and the persons named above were indicted. The state's evidence was to the effect that Tony Stafford, who was an organizer of the United Mine Workers, suggested to Tom McGinnis, the secretary of the miners' local at Glen White, after the decision of the mediators had been rendered, that some radical means would have to be employed to win the strike; that Stafford later proposed that he furnish the guns and McGinnis the men to shoot at the nonunion miners when the cage, in which they were carried up the mine shaft at the close of the day's work, appeared at the surface; that in pursuance of this arrangement Stafford did furnish a number of high-powered guns and ammunition; and that on the afternoon of November 18, 1917, defendant Stafford, together with Tom McGinnis, George Lucas, Dorr Snuffer, Carl Crim, Tom Murphy, Will Owens, and others, assembled on the mountain side, where the guns and ammunition had previously been hid, and lay in wait within shooting distance until the men at work came up in a cage; that from 50 to 300 shots from high-powered rifles were fired at a cage containing, among others, John Ranson, John Spears, and H. E. Nuckolls; the bullets striking all around the men, but hitting no one. Witnesses testified that Tony Stafford, defendant, was armed with a shotgun, and stationed about 300 yards behind the other men for the purpose of watching to prevent surprise and to give assistance if needed. There was no direct proof that he fired any shots, but witnesses stated that he was the only one armed with a shotgun and that buckshot had been fired, also that paper shells were found on the mountain side the day after the shooting. Tom McGinnis, Dorr Snuffer, George Lucas, and Carl Crim, as witnesses for the state, confessed their participation in the shooting, admitted that they shot at the men in the cage to kill them, and stated that such was the advice given to them by defendant, Stafford. They also testified as to Stafford's connection with the plans which resulted in the shooting. Stafford denied that he had anything to do with the arrangements leading up to the shooting, and testified that he was in the town of Beckley, about seven miles distant, when it occurred. Several witnesses for defendant testified that Stafford was seen by them in Beckley at different hours during the day of the shooting, and others stated that they did not see him at the meeting hall of the Glen White local union on that day.

Many assignments of error are made, but six only are urged, and to these we will confine our consideration.

[1] On October 6, 1919, defendant filed two pleas in abatement to the indictment, averring that the grand jury which had found and returned the indictment had not been selected from a list of grand jurors prepared by the county court in the manner prescribed by law. The court, without objection or exception, proceeded to try the issue joined on these two pleas, and found in favor of the state. Error is assigned because the court so decided. The state objected to the filing of these pleas on the ground that they were tendered by defendant alone, and were not sworn to by him, but by one Lawrence Dwyer, citing *Rader v. Adamson*, 37 W. Va. 582, 16 S. E. 808. It is not necessary to decide this contention, in view of the disposition we make of this assignment of error. Section 2, c. 157, Code 1918 (Code 1913, sec. 5538), directs that the county court shall at its levy term annually prepare a list of not less than 100 nor more than 150 freeholders, qualified to serve as grand jurors, and deliver the list so prepared to the clerk of the circuit court, from which grand jurors shall be drawn at the time and in the manner therein set out. Defendant alleged and sought to prove that the grand jury which found and returned the indictment was not selected from the list so prepared; that the county court did not prepare such list at its levy term; that, on the contrary, it prepared such list and delivered the same to the circuit clerk on September 4, 1918, at a special term of the county court. When is the levy term of the county court? This is the controlling question raised by these pleas. Section 1 of chapter 28A, Code 1918 (the chapter on tax levies [Code 1913, sec. 874]), requires the county court to hold a session on the second Tuesday in August in each year, then make up its budget and ascertain the total amount necessary to be raised by the levy for the current year, the assessed value of the property subject to taxation, and the rate of levy proposed on the property as a whole, and publish the statement in two newspapers. The session shall then stand adjourned until the 4th Tuesday in August, at which time it shall convene, hear objections to the estimate and proposed levy, if any, and lay the levy. It appears that the court did meet, as required, on the 2d Tuesday in August, 1918; that it was in special session on August 21, when it called a special session to meet on the 27th day of August, 1918, for the purpose of transacting certain items of business named in the call, and, in pursuance thereof, did meet on the 27th and continued in session from day to day until the 4th of September, and during which time it laid the county levies, and on which last-named day it prepared a list of grand jurors, and delivered the same to the circuit clerk in strict accordance with section 2, c. 157, Code 1918. It is clear that the session directed to be held on the second

Tuesday in August, with adjournment over until the fourth Tuesday in the same month, constitutes the levy term, within the meaning of the requirement that the list of grand jurors shall be prepared at the "levy term." The beginning of the levy term is on the second Tuesday in August, and by operation of law continues (with the adjournment) until such time after the fourth Tuesday as the business shall have been finished and the session closed. A list of jurors prepared and delivered on any day of this session so beginning and ending would be "at the levy term." It does not make any difference that a special term was called for "Monday, the 27th day of August" ("the 27th" is apparently an inadvertence); the court was in session on the day following, the fourth Tuesday, as required by statute, and considered and laid the county and district levies. Nor is it of importance that the purposes for which the special session was called to meet on Monday did not include the item of preparation of the grand jury list, nor that the call was improperly or properly posted. The court could not make the regularly adjourned session held on the fourth Tuesday (the 27th) a special session by naming it such; nor prevent it from being the levy session by giving it any other name. The statute governs in that.

[2] Defendant's second assignment of error relates to the giving of the state's instruction No. 5, which is as follows:

"The court instructs the jury that if they believe from the evidence that on the 16th day of November, 1917, Tony Stafford, Carl Crim, Dorr Snuffer, Tom McGinnis, Tom Murphy, Tony Sorazzo, George Lucas, Will Owens, Ed Hornick, Tom Lethco, or either, or all, or any, of them armed with rifles, guns, and pistols loaded with powder and leaden and steel balls and bullets, did go within range and shooting distance of the tippie of the Glen White mines, in which was the cage that is used for bringing men up out of said mine, and the said Carl Crim, Dorr Snuffer, Tom Murphy, Tony Sorazzo, George Lucas, Will Owens, Ed Hornick, and Tom Lethco did then and there lie in wait until John Ranson and the other persons mentioned in the indictment in this case came up on said cage, and did then and there shoot at the said John Ranson and said other persons mentioned in the indictment, or either, or any, or all of them, with said rifles, guns, and pistols, loaded as aforesaid, with intent then and there to kill them, or either, or any, or all, of them; and if the jury believes from the evidence that the said Tony Stafford was then and there present or within about 300 yards of the said Carl Crim, Dorr Snuffer, Tom Murphy, Tony Sorazzo, George Lucas, Will Owens, Ed Hornick, and Tom Lethco, and watching to prevent surprise whilst said Carl Crim, Dorr Snuffer, Tom Murphy, Tony Sorazzo, George Lucas, Will Owens, Ed Hornick, and Tom Lethco were on the hillside committing said offense or with the intention of giving assistance, should occasion arise, to the said Carl

Crim, Dorr Snuffer, Tom Murphy, Tony Sorazzo, George Lucas, Will Owens, Ed Hornick, and Tom Lethco and was near enough to afford it should the occasion arise, then the court instructs the jury that the defendant, Tony Stafford, would be guilty of an attempt to commit murder of the first degree."

It is claimed that this instruction makes the defendant guilty if he was present or near and watching to prevent surprise or with the intention of giving assistance, regardless of whether those who did the shooting knew of his presence or purpose. The mere presence of one at the scene where there is an attempt to kill by another or others is not sufficient to make him a principal in the act; there must be some conduct on his part by which he encourages, incites, or abets the attempt to kill. A mere negative acquiescence in the act, unknown to the principal, is not sufficient. But if there is preconcert and design, then his presence, although not accompanied by any overt act, would make him equally guilty with the person committing the act. His presence with preconcert would incite and encourage the commission of the offense, as the actual perpetrator would likely rely upon active assistance if it should become necessary. But this instruction is based on active participation by defendant in the commission of the crime. If he was "watching to prevent surprise" or with the intention of giving assistance, and was near enough to do so, he was an actual participant. If the others were lying in wait to do the shooting, he was also lying in wait to prevent surprise, and was thus actively aiding, abetting and participating in the crime. Can it be questioned that defendant did not know the intent and design of those who did the shooting? If, under this instruction, the jury believed that defendant was present or within 300 yards of the others, who were firing high-powered guns at men emerging from a mine, with intent of killing them, and was there for the purpose of preventing surprise or giving aid, would it not irresistibly follow that he knew the purpose of the shooting, the intent and design of those participating therein? If he was there for the object set out in this instruction he was a participant in the murderous design. Moreover, the instruction includes defendant as one of the number who, being armed with loaded guns, went within shooting distance of the mine on the 16th of November, 1917, and while it does not in terms state preconcerted action, or knowledge of defendant's presence when the shooting began (if that should be necessary where he actually participated), the inference of common design and action is so apparent that the jury could not have been misled. Where two or more persons, acting with a common intent, jointly engage in a common undertaking and jointly commit an unlaw-

ful act, each is guilty of the offense committed to the same extent as if he were the sole offender. Each is responsible for the acts of the others. 16 C. J. p. 128, title, "Criminal Intent and Community of Unlawful Purpose." Where the accused commits any act which facilitates the commission of the offense, it is not necessary that the perpetrator should know that the accused intended to render or had rendered assistance. *State v. Tally*, 102 Ala. 25, 15 South. 722. In order to show a community of unlawful purpose, it is not necessary to show an express agreement or an understanding between the parties. *Gibson v. State*, 89 Ala. 121, 8 South. 98, 18 Am. St. Rep. 96; *Howard v. Commonwealth*, 96 Ky. 19, 27 S. W. 854. A conspiracy or common purpose may be inferred from the circumstances. Preconcert may be shown by circumstances as well as by direct evidence.

[3, 4] The giving of the state's instruction No. 6 is objected to on the ground that it states an abstract proposition of law, and was calculated to lead the jury into the belief that the trial court believed the defendant guilty of an attempt to commit murder in the first degree. It is in the following words:

"The court further instructs the jury that under the law of this state any willful, deliberate and premeditated killing of a human being by another is murder of the first degree, and that any felonious, willful, malicious, deliberate, and unlawful attempt by one human being to take the life of another is an attempt to commit murder in the first degree."

It is well settled that abstract propositions of law should not be given when there is no evidence on which they can be predicated; but where they are given, and there is evidence in the case to which they are applicable, but no particular reference is made to the evidence in such instructions, it will be presumed that the jury made the proper application. *State v. Long*, 108 S. E. 279; *Blashfield's Inst. to Juries*, § 432, p. 973. There was sufficient evidence in this case to support the verdict. To support the contention that the instruction would lead the jury into believing that the trial court believed the defendant guilty of an attempt to commit murder in the first degree, an instruction given in *State v. Allen*, 45 W. Va. 65, 30 S. E. 209, is relied upon, and is as follows:

"The court instructs the jury that previous threats or acts of hostility, however violent they may be, will not justify a person in seeking and slaying his adversary."

This instruction was held bad because it assumed certain things as facts, namely, the seeking and slaying of deceased by defendant, and intimated to the jury what the judge believed the evidence to be touching those facts. A comparison of the two instructions

shows that the objectionable elements in the instruction in the *Allen Case* are not found in the instruction now under consideration. In no portion of the instruction does the court single out any fact peculiar to this case, as was done in the *Allen Case*, and in *People v. Strong*, 30 Cal. 151, and *Whitely v. State*, 38 Ga. 50, cases cited to support the opinion in the *Allen Case*. The first portion of the instruction gives in substance the statute relating to first degree murder as found in section 1, c. 144, of the Code (Code 1913, sec. 5152), as far as that statute has any application to this case, and the latter part merely defines an attempt to commit murder in the first degree. Taken as a whole, the instruction is proper as one defining the crime of an attempt to commit murder in the first degree. *State v. Clark*, 64 W. Va. 637, 63 S. E. 402; *Longley v. Comm.*, 99 Va. 807, 37 S. E. 339; 16 C. J. § 2362; *State v. Ireland*, 72 Kan. 265, 83 Pac. 1036. It cannot be construed as indicative of belief in the guilt of the accused by the trial judge. Shall we say that a correct definition of a crime indicates that the trial judge who gives it in an instruction believes the defendant is guilty, where it assumes no facts as proven?

[6] Assignment of error is based on the giving of instruction No. 8 for the state, which reads:

"The court instructs the jury that under the law and the evidence in this case that they can return only one of two verdicts, guilty of an attempt to commit murder in the first degree, or not guilty."

Ordinarily this instruction would be incorrect and compel reversal. When there is a verdict for murder, the jury must fix the degree thereof. Section 19, c. 159, Code 1918 (Code 1913, sec. 5595); *Burton v. Commonwealth*, 108 Va. 892, 62 S. E. 376; *State v. May*, 62 W. Va. 129, 57 S. E. 366. It is argued that if the intention was to kill, then the crime would be an attempt to commit murder in the first degree, no one having been killed; but that if the intention was to cripple, the crime would be attempt at murder in the second degree; and, if simply to scare, then the attempt would be to commit an assault. This is correct, but when we turn to the punishment for attempts we find that if the offense attempted be punishable with death, then the person making such attempt shall be guilty of a felony, and confined in the penitentiary not less than one nor more than five years; but if the offense be punishable with confinement in the penitentiary, then the person attempting shall be guilty of a misdemeanor. Section 9, c. 152, Code (Code 1913, sec. 5466). The evidence is conclusive and uncontradicted that the attempt was committed on November 16, 1917, and the indictment was found and returned at the March term, 1919, more than one year from the time of the commission

(199 S.E.)

of the offense; hence the misdemeanors under this indictment had been barred by limitation; and a verdict for less than an attempt to commit murder in the first degree would have been equivalent to a verdict of not guilty. It would have discharged the prisoner. Under this indictment and the law and evidence, it was not error to give this instruction.

[6] Error is assigned because, it is asserted, the prosecution was inspired, managed, and controlled by employed counsel; and that neither the prosecuting attorney nor his assistant were present or participated in the trial. The record does not bear out this assignment. M. L. Painter, the prosecuting attorney, appeared at the preliminary examination of defendant before a justice of the peace, summoned witnesses before the grand jury, and examined them, participated in and controlled the preparation of the indictment, was present and actively engaged in the conduct of the first trial, which resulted in a hung jury; was present at the beginning of this trial, struck from the jury of 20 those jurors required to be struck off by the prosecution, and was present and giving active attention to the trial up to the time when he received a telegram which called him to Richmond, Va., to attend the fatal illness of his wife in a hospital in that city. We think the record shows sufficient participation of the prosecution in the inception, preparation, conduct, and trial of the case to fully overcome this assignment of error; and that the court committed no prejudicial error in permitting the trial to proceed under the management of special counsel after the prosecuting attorney was called away to attend his dying wife. *Jackson v. Commonwealth*, 96 Va. 107, 30 S. E. 452. We find no objection made to the absence of the state's attorney, or to the participation of employed counsel in the case, until after the verdict, and we cannot see wherein the defendant has been prejudiced. The objection should have been made when the prosecuting attorney was called away.

[7] The remaining assignment of error is predicated on the refusal of the court to sustain a peremptory challenge of defendant to Howard O'Neal, a juror selected on his voir dire on the panel of 20. Upon an extended and thorough examination of this juror, both by the prosecution and defense, it developed that he had no bias or prejudice against defendant, either on account of his nationality or because he was a member of the United Mine Workers, a labor union, and had no bias or prejudice against him for any other cause, and that he could go upon the jury and render a fair and impartial verdict according to the evidence. However, he stated that he "didn't think much of labor unions," and did not think such unions very conducive to law and order. This juror was at that

time loading coal at another coal operation at Pemberton, several miles distant from the Glen White mine, at which first-named coal operation a strike had been in progress a year or so before, when he had continued to work, being a nonunion workman and not knowing what the strike was about. The court, upon objection, refused to permit him to answer two questions, both of which asked, in substance, that if it developed upon the trial that there was a strike at the Glen White mines at the time of the offense, and that the union miners, including defendant, who was an officer in the union, were not working, and the nonunion members were working, would these facts influence his mind to some perceptible degree in arriving at the innocence or guilt of the accused? It was evident that these questions, in substance, had been repeatedly answered in the negative by the juror, and the court desired to put an end to repetition. To illustrate, he was asked:

"Would you have any bias or prejudice against this defendant, Tony Stafford, by reason of the fact that he was a member and an officer of the United Mine Workers of America, at Glen White, at the time of this strike, and during the time of the shooting? Answer: Well, I don't know as it would. Question: Mr. O'Neal, if you were selected as a juror in this case, do you feel that you could go into the jury box, and would do so, and render a fair and impartial verdict from the evidence, regardless of the nationality of the person on trial, or whether they belonged to a union or did not belong to a union? Answer: According to the evidence, I believe I could."

The only criticism, if any, which could be made of this juror is that he did not have a high regard for labor unions as conducive to law and order. The judge aptly remarked that it would be difficult to find a man in the county who did not believe or did believe in labor unions, and if that rule was adopted as a basis of selection it would be impossible to obtain a jury. The labor union was not on trial, simply one of its officers and members who had been indicted for the alleged commission of a crime. It would be difficult to obtain a jury to try a person charged with exhibiting and operating a gambling device, if all who did not believe such operations were conducive to law and order were excluded. It is not meant to compare labor unions with the gambling fraternity, but only to illustrate. We pause here to say that labor unions are lawful organizations, and, where properly conducted, have been of great benefit to their members, and have accomplished beneficent designs. Defendant was entitled to a panel of 20 jurors, free from bias and prejudice, with minds free to render an impartial verdict. It does not make any difference that this particular juror was struck off and was not one of

the 12 who returned the verdict. *Dowdy v. Commonwealth*, 9 Gratt. (Va.) 727, 60 Am. Dec. 314. But upon a careful review of the questions propounded to, and answers given by, this juror upon his *voir dire*, we concur with the trial judge in the conclusion that he was a competent juror.

[8] The general assignment that the court erred in refusing to set aside the verdict and grant a new trial impels us to examine the evidence. It is enough to say that defendant's whole defense rested upon an alibi. Four witnesses, Tom McGinnis, George Lucas, Carl Crim, and Dorr Snuffer, jointly indicted with defendant, and who participated in the shooting, testified that defendant had originated the plan, was present at its execution and directing its progress. There were circumstances and other evidence tending to corroborate them. Eight witnesses, and perhaps more, testified that defendant was at Beckley on the day of the shooting, and could not have participated in the actual execution of the crime. Upon this question of fact the jury has passed judgment, and we will not disturb its finding.

Perceiving no error, we affirm the judgment and sentence of the lower court.

Affirmed.

MILLER, J., absent.

(89 W. Va. 379)

STATE v. EVANS et al. (No. 4012.)

(Supreme Court of Appeals of West Virginia.
Nov. 1, 1921.)

(Syllabus by the Court.)

1. Witnesses \S 370(1)—Absent proof of arresting officer's other acts, malice will not be inferred from use of reasonable force.

In the absence of proof of other acts of malice or hostility on the part of an arresting officer, such motives are not to be inferred from the employment of reasonable physical force in effecting the apprehension of an offender.

2. Criminal law \S 368(3)—Evidence of physical force to overcome resistance in arresting for unlawful transportation is not ordinarily admissible as a part of the *res gestæ*.

In a trial under an indictment charging two defendants with the statutory offense of carrying more than one quart of liquor from one point to another within the state within 30 consecutive days, evidence of the use of physical force to overcome resistance in making the arrest ordinarily is not admissible as part of the *res gestæ*.

3. Criminal law \S 363—"Res gestæ" defined.

The term *res gestæ* means the acts, declarations, and circumstances which stand in causal connection with, and are illustrative of,

the principal transaction undergoing investigation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, *Res Gestæ*.]

4. Criminal law \S 793, 877—One of two co-defendants may be convicted; instruction held confusing as to finding one or both defendants guilty of unlawful transportation.

In the joint trial of two defendants for carrying more than one quart of liquor from one point to another within the state within 30 consecutive days, an instruction which charges the jury that, although they may believe from the preponderance of the evidence that the liquor belonged to or was in the possession of the defendants, yet "unless it has been shown from the evidence beyond all reasonable doubt as to which one of the defendants the liquor belonged, or was in possession of, if only one of them, then you shall find the defendants not guilty," serves only to confuse the jury, as section 24, c. 159, Code 1913 (sec. 5600) enables them in such cases to find either one or both of the defendants innocent of the offense charged.

5. Criminal law \S 814(3)—Refusal of instruction not warranted by proof is not error.

Where, as in this case, no proof warranted such an instruction, its refusal was not erroneous.

Error to Circuit Court, McDowell County.

Wiley Evans and another were convicted of unlawfully transporting more than one quart of liquor within 30 consecutive days, and they bring error. Affirmed.

Litz & Harman and Joseph M. Crockett, all of Welch, for plaintiffs in error.

El T. England, Atty. Gen., and R. Dennis Steed, Asst. Atty. Gen., for the State.

LYNCH, J. Defendants having been tried, convicted, and sentenced by the criminal court of McDowell county, upon the second count of an indictment charging them with carrying from one point to another within the state more than one quart of liquor within 30 consecutive days, and their application to the circuit court of the same county for a writ of error having been refused, they obtained the writ from this court. The errors now assigned are the refusal to admit certain evidence offered by them, and heard by the criminal court in the jury's absence, and now a part of the record, and to give the only instruction offered by them.

[1] The testimony so rejected consisted of statements by defendants and witness Harliss that Cal Houchins, the deputy sheriff who made the arrest, while effecting defendants' capture, without cause or provocation, assaulted and beat defendant Evans, with the butt of his pistol, knocking him down and inflicting severe bodily injuries upon him. Houchins and the two men who were with

him, and who assisted in making the arrest, were witnesses in the case, but the questions directed to them, and their answers, related principally to the condition of the defendants as to intoxication at the time of the arrest, and to their possession of the suit case, containing nearly three gallons of liquor, which under the indictment was the real issue involved. They were asked no questions, and volunteered no information concerning the injuries, if any, inflicted upon Evans.

As to defendants' disclaimer of ownership of the suit case of liquor, which they claim to have just discovered lying upon the railroad tracks, when and where deputy Houchins came upon them, and the equally insistent statements of Houchins and those with him that defendants were walking down the tracks carrying the suit case, and that they admitted the nature of its contents before the arrest. These are all facts and circumstances which are to be, and presumably were, weighed and considered by the jury; and, unless the testimony excluded was material to these issues, or would have been, if admitted, useful in determining the value of other evidence properly admitted, it is difficult to perceive in what way defendants, because of its rejection, suffered such substantial prejudice as the law requires to warrant a reversal. *State v. Farley*, 78 W. Va. 471, 89 S. E. 733.

Defendants' counsel earnestly insists that Houchins' alleged unwarranted maltreatment of defendants was indicative of malice, hatred, and enmity, which the prosecuting witnesses bore towards his clients, and that as such it was highly relevant, either for the purpose of minimizing the probative value of their testimony, or for establishing proof of an ulterior motive in prosecuting the trial.

Hostility of a witness towards the defendant may, it is true, have some bearing upon the evidentiary quality of his testimony, but it scarcely follows that in the absence of proof of other kindred circumstances, such a motive is to be ascribed to an officer of the law, from the mere employment of physical force in the apprehension of an offender, who resists the arrest. It is the duty of all persons to submit to and not oppose the efforts of a proper prosecuting officer, and when resistance is offered, whether it be an act of aggression or an attempt at escape, it is the officer's duty to employ reasonable force to accomplish his purpose. *State v. Weisengoff*, 85 W. Va. 271, 284, 101 S. E. 450. It is of further significance that the circumstances surrounding the case do not seem to bear out defendants' view of this issue. Though defendants by a general statement deny any resistance of the arrest, it appears from the testimony of the state's witnesses that the defendants not only violently denied Houchins' authority to take them without a warrant, but that defendant Williams backed away with the suit case and said that no

"s— of a b— could stop him." Such conduct, if it occurred, savors strongly of opposition. Defendants also sought to show some connection between the employment of Houchins and the Baldwin-Felts Detective Agency, but, it does not appear in what manner this association would affect his relations to Evans, a school-teacher.

[2, 3] Influenced, perhaps, by a premonition of a failure of the court to perceive such causal connection between the evidence of the alleged assault and the offense charged against defendants as would render rejection of the evidence ground for reversal, defendants' counsel invokes the doctrine of *res gestæ*, arguing that the conduct of Houchins was an immediate integral circumstance of the act in question, and therefore relevant and essential. As to this contention, it is only necessary to recall the limitations of that doctrine.

"The *res gestæ* may be therefore defined as those circumstances which are the undesigned incidents of a particular litigated act, and which are * * * illustrative of such act. * * * Their sole distinguishing feature is that they should be the necessary incidents of the litigated act; necessary in this sense, that they are part of the immediate preparations for or emanations of such act, and are not produced by the calculating policy of the actors. In other words, they must stand in immediate causal relation to the act—a relation not broken by the interposition of voluntary individual wariness seeking to manufacture evidence for itself." *State v. Prater*, 52 W. Va. 132, 146, 43 S. E. 230, quoting Wharton, Evidence, sec. 259.

See, also, 2 Jones, Commentaries on Evidence, 810; *Hermes v. Chicago, etc., R. Co.*, 80 Wis. 590, 50 N. W. 584, 27 Am. St. Rep. 69; *Ward v. White*, 86 Va. 212, 9 S. E. 1021, 19 Am. St. Rep. 883. As we view it, the conduct of the officer in making the arrest in the present case is not an element of, nor illustrative of, the litigated act—the carrying of the intoxicating liquor from one point to another within the state. In the absence of such correlation, the evidence in question was not admissible on the theory advanced; and without showing other acts of hostility or malice towards defendants, no inference of their existence is deducible from the fact of the unwarranted maltreatment of Evans, if fact it be. The jury could well believe that he or Williams was the aggressor, and that Houchins did only what appeared necessary to subdue the resistance of the arrest.

[4, 5] The instruction offered by defendants and refused would, if given, have told the jury that, although they may believe from the preponderance of the evidence that the suit case belonged to or was in the possession of the defendants, yet, "unless it has been shown from the evidence beyond all reasonable doubt as to which one of the defendants the liquor belonged or was in possession

of, if only one of them, then you shall find the defendants not guilty." Counsel contends that without this instruction to guide the jury defendants' rights were not properly safeguarded, but fails to point out in what particular respect they were prejudiced. Section 24, c. 159, Code (sec. 5600) provides that—

"Where two or more persons are charged and tried jointly, the jury may render a verdict as to any of them as to whom they may agree."

This statute was in effect at the time of defendants' conviction, and the jury was free to return a verdict of not guilty as to either one or both of the defendants, in case they deemed the evidence before them insufficient to sustain the allegations of the indictment. The instruction requested would seem to obscure and confuse, rather than clarify, the issue.

For these reasons, the judgment is affirmed.

(89 W. Va. 395)

DILLON v. TURKEY GAP COAL & COKE CO. (No. 4321.)

(Supreme Court of Appeals of West Virginia.
Nov. 1, 1921.)

(Syllabus by the Court.)

1. Principal and agent §171(1)—Principal may ratify agent's originally unauthorized act by accepting benefits and agreeing to performance.

The act of an agent in making a contract, though originally unauthorized, may be subsequently ratified by the principal by his accepting its benefits and agreeing to its performance.

2. Brokers §64(2)—Cannot be denied commission by principal's failure to enforce contract on which compensation was made to depend.

When a broker has fully performed his contract of agency to sell property, he cannot be denied the compensation stipulated for in his contract by the failure of his principal to enforce a valid and binding contract against a solvent purchaser of the property, the subject-matter of the agency, so as to bring about the contingency on which the broker's compensation was made to depend.

Error to Circuit Court, McDowell County.

Action by J. F. Dillon against the Turkey Gap Coal & Coke Company for broker's commissions for selling mining machinery. Verdict and judgment for plaintiff, and defendant brings error. Judgment affirmed.

D. J. F. Strother and Anderson, Strother, Hughes & Curd, all of Welch, for plaintiff in error.

Joseph M. Crockett, of Welch, for defendant in error.

MILLER, J. This is an action begun by plaintiff, a broker, for the recovery of commissions alleged to be owing him by defendant, for making sale for it of certain mining machinery, then situate in West Virginia, to Riley Brothers & Company, located in Ohio, and to whom said machinery was consigned by defendant, and delivered to them by the carrier.

The contract, in writing, with plaintiff was negotiated and entered into through McQuail, vice-president and general manager of the defendant company, and one Cockill, superintendent on the ground, the contract being signed on defendant's behalf by Cockill.

The provision of the contract of agency relied on by plaintiff is as follows:

"In consideration of services rendered in said sale, the Turkey Gap Coal & Coke Company agree to pay to the said J. F. Dillon, One Thousand Dollars as soon as the Three Thousand Dollars has been collected from the purchaser of said plant."

The terms of payment by Riley Brothers, as stipulated in defendant's contract with them, signed on its behalf by said Cockill, was the sum of \$3,000.00 payable,

"\$300.00 cash in hand paid, the receipt of which is hereby acknowledged, \$2,000.00 to be paid through the Citizens National Bank, of Middleport, Ohio, as soon as bill of lading is presented to said Bank. The remaining \$500.00 to be paid as soon as plant is put in operation."

That the property so sold had been delivered to Riley Brothers, and that defendant had received the cash payment and turned it over to plaintiff on account of his commissions, are facts not only proven, but conceded by defendant company. The grounds or propositions of defense are two: First, that Cockill had no authority in the first instance to agree with plaintiff that he might sell the property on the terms stipulated, so as to bind defendant to collect from the purchaser the whole consideration of \$3,000.00 and pay over to him the amount of his commissions included in the purchase price; that Cockill's authority was to sell or authorize Dillon to sell at \$2,000.00 net to it, the agent to have all that he might receive therefor in excess of the \$2,000.00. Second, that as the balance of \$500.00 had not yet been collected from the purchasers, the condition of the payment thereof by defendant to plaintiff had not been fulfilled, and that the action was premature.

On the trial the jury, after being instructed by a single instruction given by the court on its own motion, to which both parties excepted, returned a verdict in favor of plaintiff for the amount demanded, \$500.00, with interest from June 30, 1920; and the court below pronounced the judgment for plaintiff thereon, to which the present writ of error relates.

[1] On the first proposition, want of authority in Cockill to enter into the contracts, we find no merit. The evidence shows that McQuail, the general manager, from the very beginning had knowledge of the terms of both the contract of agency, and those entering into the contract with Riley Brothers. But however this may be, the fact is undisputed that the defendant subsequently ratified the contracts, by collecting the down payment from Riley Brothers and turning it over to plaintiff on his commissions, and subsequently, with knowledge of all the facts, by agreeing with plaintiff that it would proceed to collect the balance of the purchase money and turn it over to him in settlement of his commission account, but afterwards failed, neglected or refused to do so. It is unnecessary to cite authority for the proposition that an act of an agent, though unauthorized, may subsequently be ratified and the principal bound thereby.

[2] On the second proposition, namely, whether the right to demand of defendant the balance of his commissions had at the time of the action accrued to plaintiff, there is presented a more serious question. It is conceded that this balance has not been collected by defendant, and this in violation of its promise to plaintiff that it would proceed to do so. That the plant of Riley Brothers, after the delivery of the machinery sold them by defendant, was put in operation, is fully proven, and that the balance due by the terms of the contract had matured for payment, there is no question. Nor is the fact of their solvency in any way questioned. Moreover, the evidence is that they were entirely solvent, and the money collectible. It is not denied that plaintiff repeatedly demanded of the defendant that it proceed to collect the balance due from Riley Brothers, nor that the latter refused to do so. Having received all the money coming to it, the evidence shows that it proposed at one time, if plaintiff would indemnify it against costs that might be incurred, he might make use of defendant's name to bring an action against Riley Brothers, which proposition was not accepted, it seems; at least plaintiff never undertook to institute and prosecute such action. Certainly the obligation did not rest upon him, but upon the defendant, by the force of its contract.

While it is true, as a general rule, as argued by counsel for defendant, and for which proposition they cite numerous authorities, that a broker can not recover compensation in advance of the contingency on which he has stipulated in his contract such compensation should depend, in this case the payment of the purchase money by the purchasers; yet there is a very important exception to this general rule, and that is when the broker has found a purchaser, and seller

and purchaser have entered into a valid and binding contract, and the broker has done all that is required of him by the terms of the contract, and his principal refuses to enforce his contract against the purchaser so as to bring about the contingency relied on, and by such neglect and refusal, or by surrender by the vendor of his rights, the broker can not be thus deprived of his compensation. *Hugill v. Weekley*, 64 W. Va. 210, 61 S. E. 360, 15 L. R. A. (N. S.) 1262; *Bankers' Loan Co. v. Spindle*, 108 Va. 426, 62 S. E. 266; *Linton v. Johnson*, 81 W. Va. 569, 94 S. E. 945. These cases decide generally that when a broker has fully performed his contract, he can not be deprived of his compensation by the failure or refusal of the seller to enforce the valid and binding contract entered into between him and the purchaser. Cases from other states in point on this proposition are: *Pinkerton v. Hudson*, 87 Ark. 506, 113 S. W. 35; *Grosse v. Cooley*, 43 Minn. 188, 45 N. W. 15; *Wray v. Carpenter*, 16 Colo. 271, 27 Pac. 248, 25 Am. St. Rep. 285.

The instruction given the jury, objected to by both parties, did not properly state the law of the case, but as it was more favorable to the defendant than it was entitled to, and it was not prejudiced thereby, we are not disposed to disturb the verdict because of the erroneous instruction.

Our conclusion is to affirm the judgment.

(89 W. Va. 422)

CAMICIA et al. v. IAFOLLO. (No. 4323.)

(Supreme Court of Appeals of West Virginia.
Nov. 1, 1921.)

(Syllabus by the Court.)

Adjoining landowners — Owner may not have damages from adjoining owner for misrepresentation as to boundary where not knowingly false.

The owner of a city lot cannot recover from an adjoining owner damages sustained by him by reason of a mistake in locating his building, because of a representation made by such adjoining owner as to the correct location of his lot, where it appears that such representation was not knowingly false, and that such injured party had equal or superior information to the one making the representation.

Error to Circuit Court, McDowell County.

Action by Toney Camicia and others against S. M. Iafollo. Directed verdict and judgment for the defendant, and the plaintiffs bring error. Affirmed.

D. J. F. Strother and Strother, Taylor & Taylor, all of Welch, for plaintiffs in error.

G. W. Howard and Litz & Harman, all of Welch, for defendant in error.

RITZ, P. Plaintiffs by this action seek to recover from the defendant damages sustained by them because of an alleged false representation made by the defendant as to the location of plaintiffs' lot situate in the city of Welch. Upon a trial of the case the court below directed a verdict in favor of the defendant, and rendered a judgment of nil capiat thereon, to review which this writ of error is prosecuted.

Plaintiffs were the owners of a lot situate in the city of Welch, in McDowell county, and fronting 30 feet on McDowell street. The defendant owned a lot adjoining that of the plaintiffs, fronting 35 feet on McDowell street, the parties acquiring their lots about the same time from the same party. Adjoining the lot of the defendant, on the side opposite that upon which the plaintiffs' lot lies, was a lot owned by another party, upon which was erected a building. Shortly after the purchase of these lots by the parties the plaintiffs desired to erect a building upon their lot, and employed a contractor for the purpose. The defendant also desired to erect a building on his lot about the same time. For the purpose of fixing the location of their lot the plaintiffs went upon the ground with their contractor, the defendant also being present, and upon inquiry made of the defendant were informed that he owned 35 feet next to the other adjoining owner, and that the building upon the adjoining lot was on the line. The parties thereupon measured 35 feet from this building as the lot belonging to the defendant, and then laid off the next 30 feet as the lot belonging to the plaintiffs. The contractor thereupon proceeded to make the excavation and erect the building upon this 30 feet. About the same time the parties decided that it would be advantageous to have an alleyway between their buildings, and that, inasmuch as the defendant had a 35-foot lot, and the plaintiffs one only 30 feet in width, an alleyway of 5 feet should be taken off of the defendant's lot on the side next to the lot of the plaintiffs. It was agreed that the plaintiffs should pay to the defendant the sum of \$215 for a strip $2\frac{1}{2}$ feet wide off of his lot. They did pay this sum to the defendant, and the parties executed a deed by which the defendant conveyed to the plaintiffs $2\frac{1}{2}$ feet off of his lot upon the side next to the lot of the plaintiffs, and further dedicated another $2\frac{1}{2}$ feet for use as an alley, and for light and air, and the plaintiffs in the same deed dedicated the $2\frac{1}{2}$ feet thus conveyed to them to the same purposes. Each of the parties proceeded to erect buildings 30 feet wide and four stories high upon the lots as located as aforesaid, leaving a 5-foot alleyway between the two houses.

Some time after the buildings were completed the city of Welch, the owner of the lot adjoining the lot of the plaintiffs on the

side opposite that upon which plaintiffs' lot adjoined the lot of the defendant, desired to erect a building upon its lot. It entered into an arrangement with the plaintiffs by which it purchased a half interest in the plaintiffs' brick wall, with right to use the same as one of the walls of its building. This was done upon the assumption that this wall was upon the lot of the plaintiffs, and abutted upon the property line between them and the said city. Preparatory to beginning the erection of a building the city sent its engineer upon the ground to locate its lot. This engineer ascertained that, instead of the wall of the plaintiffs' building being upon their land, it was upon the land belonging to the city, and that the said city was the owner of $23\frac{3}{4}$ inches of the land occupied by the plaintiffs' building. Upon making this discovery the city notified the plaintiffs, who thereupon employed an engineer to definitely locate their lot. This engineer went upon the ground and determined that the result of the survey made by the city's engineer was correct. The plaintiffs and the said city thereupon entered into negotiations for an adjustment of this difficulty, which resulted in the city conveying to the plaintiffs the $23\frac{3}{4}$ inches of land belonging to it, and upon which the building of the plaintiffs had encroached, and provided in this deed between the parties that the wall should be a party wall. The plaintiffs paid to the city in securing this settlement of the difficulty the sum of \$1,581.50, and they thereupon brought this suit against the defendant seeking to recover from him this amount, upon the theory that the mistake which they made in locating their building was due to the false statement made by him as to where his lot commenced.

The evidence in the case makes it very apparent that the parties to this suit had the same means of knowledge as to the true location of their lots. They each purchased their property from the same vendor at about the same time, and the inquiry of the plaintiffs directed to the defendant, it clearly appears, was more for the purpose of ascertaining the width of the lot owned by the defendant than for any other purpose. It is true, the plaintiff who conducted the building operations states that the defendant said to him that he, the defendant, owned 35 feet from the building upon the adjoining lot. Other witnesses who were present at the transaction, including the contractor, state that the defendant's statement was that he owned 35 feet next to the lot of the adjoining owner. The plaintiff conducting the transaction further states that he was informed at the time by the owner of the building on the lot adjoining the lot of the defendant that his building was on his property line; that he knew this because he had had his lot located by a surveyor when he erected the building. It therefore appears that, not only

did the plaintiffs have the same knowledge that the defendant did as to the true location of their lot, but they had superior knowledge. The testimony makes it quite clear that the only representation made by the defendant to the plaintiffs was that his lot was 35 feet wide, and this is the way the plaintiffs understood it. There may be cases in which a party will be held liable in an action for fraud and deceit for false and fraudulent representations made by him as to the location of property which another is purchasing or dealing with, but in order to hold one liable under these circumstances it must appear that the parties did not have equal means of information in regard to the matter about which the representation is made, that the representation was relied upon by the party claiming damages by reason thereof, and that the same was false in fact. 12 R. O. L., title "Fraud and Deceit," §§ 40 and 134; Ballard v. Lyons, 114 Minn. 264, 131 N. W. 320, 38 L. R. A. (N. S.) 301, and note; Bostwick v. Lewis, 1 Day (Conn.) 250, 2 Am. Dec. 73, and note; Silver v. Frazier, 3 Allen (Mass.) 382, 81 Am. Dec. 662; Lawson v. Vernon, 38 Wash. 422, 80 Pac. 559, 107 Am. St. Rep. 880. As before stated, in this case it appears that the plaintiffs not only had equal means of knowledge with the defendant as to the location of their lot, but had superior means of knowledge upon which they relied, and this being true the court below did not err in denying the recovery upon this ground.

There is a matter complained of in the declaration as to which the plaintiffs are entitled to some relief. It is shown that because of this incorrect location of the buildings erected by the parties on their lots the 5-foot alleyway, instead of being entirely upon the 35-foot lot of the defendant, is located partly upon the lots of each of the parties, 23¼ inches thereof being upon the original 30-foot lot of the plaintiffs, and the remainder upon the lot of the defendant. The result of this is that the plaintiffs did not get the 2½ feet of land which the defendant undertook to convey to them. They have the title to it, but the defendant has constructed his building so as to cover 23¼ inches of it. Can compensation be made to the plaintiffs in this suit for this 23¼ inches of land? To do so would necessarily leave the title to the land in them, and also give them back the money which they paid for it. Of course, under the circumstances shown by the evidence in this case, the plaintiffs are in all probability estopped to evict the defendant from this 23¼ inches. The parties built their buildings, each believing that he was on his own land, and a court of equity would in all probability relieve the defendant against the effect of his conveyance as to the 23¼ inches now occupied by him, upon his making com-

pensation to the plaintiffs therefor. But that relief cannot be granted in this suit. If the parties cannot adjust the difficulty themselves, a court of equity must be appealed to where the interest of all of the parties may be protected.

We find no error in the judgment complained of, and the same is affirmed.

(89 W. Va. 352)

STATE ex rel. LIVELY et al. v. STROTHER,
Judge, et al. (No. 4457.)

(Supreme Court of Appeals of West Virginia.
Nov. 1, 1921.)

(Syllabus by the Court.)

1. Criminal law § 627(1)—Accused not entitled to copies of testimony of witnesses examined by prosecuting attorney.

One accused of a crime and brought before the court by its order, is not, by virtue of section 3, chapter 98, Acts 1921, relating to the appointment of shorthand reporters, defining their duties and the uses to which the records made by them may be put, entitled to demand or have at the hands of the court or its shorthand reporter, copies of the testimony of witnesses examined by the prosecuting attorney as directed by the court and taken down by such shorthand reporter, such proceedings not constituting a preliminary examination authorized by law, nor a case pending in court to which the accused is a party, as prescribed in said statute.

2. Criminal law § 226—Judges of criminal or circuit courts may not conduct preliminary hearing, but can only order accused taken before justice.

The preliminary hearing to which one accused of a crime is entitled can not be lawfully conducted by the judge of a criminal or circuit court. By section 1 of chapter 156 of the Code (sec. 5517) the limit of the jurisdiction of judges of such courts is to issue their warrants, reciting the accusation and requiring the accused to be brought before a justice of the county, who is authorized to hold such preliminary examination.

Original proceeding in mandamus by the State, on the relation of C. E. Lively and others, against Hon. James French Strother, Judge of the Criminal Court of McDowell County, to require Lee Pendleton, official court reporter, to turn over a copy of the evidence and statements in his possession, taken upon an alleged investigation by court order and continued before the prosecuting attorney. Peremptory writ refused.

Litz & Harman, G. W. Howard, M. S. Taylor, and W. L. Taylor, all of Welch, for relators.

G. L. Counts, of Welch, for respondents.

MILLER, J. The alternative writ, in accordance with the prayer of the petition,

commanded the Honorable James French Strother, Judge of the Criminal Court of McDowell County, to require and order Lee Pendleton, official court reporter of said court, and the said Pendleton to deliver and turn over to petitioners and relators or their counsel, a copy of the evidence and statements in his possession, taken by him upon an alleged investigation, begun upon the order of the said court, and continued before the prosecuting attorney of said county, with the aid of said Pendleton acting as such court reporter or stenographer, touching the crime of murder inflicted upon one Sid Hatfield and one Ed Chambers, of which said respondents had been accused, or show cause, if any they could, why they should not do so.

[1] The right of the petitioners to demand of the court and its reporter copies of said evidence and statements is evidently predicated upon the provisions of chapter 98, Acts 1921, relating to the appointment of shorthand reporters, defining their duties and the uses to which the records made by them may be put. The authority given the court by section one of the act is to employ such reporter "to take and report, under such regulations as said judges, or any of them, may prescribe, the proceedings had and the testimony given in any case, either civil or criminal, or in any other proceeding had in such court, including the taking of testimony before the grand jury of such court for the use of the prosecuting attorney of such court, and in proceedings before the judge of such court in vacation, and otherwise to aid the judge in the performance of his official duties."

Section 3 of said act provides:

"Said reporter shall furnish, upon request, to any party to a case, a copy of the testimony or other proceedings, written out in longhand or typewriting, and shall certify the same as being correct, and shall be paid therefor."

The return of the judge, supplemented by that of the reporter, denying the right of the petitioners to copies of the evidence and statements referred to, is that such evidence and statements were not taken before respondent Strother, or in open court, or upon any official or preliminary hearing held by him, and were not taken even in the presence of respondent outside of any official hearing, and that such evidence and statements were regarded by respondent as the private information of the prosecuting attorney, and for his use upon the trial of the petitioners for the alleged murder of said decedents.

As will be observed, the authority of the court is to appoint reporters to take and report "the proceedings had and the testimony given in any case, either civil or criminal," etc. And the right to demand and have a copy of the testimony is given to any party to a case, that is a pending case or proceeding in the court. Was there such

a case pending before Judge Strother or his court, and were the evidence and statements described taken in any such case? If not, the petitioners would not have the right to demand and receive copies thereof at the hands of respondents.

The facts disclosed by the petition and the returns are that during the trial of the deceased for an offense, and during the recess of the court, Hatfield and Chambers were shot and killed near the court house, and on reconvening, the court directed the sheriff to bring into court all those who were present and witnessed the shooting, and also directed the prosecuting attorney to examine the witnesses, which he did in the absence of the judge, taking the evidence before the court reporter, who made and furnished copies thereof to the prosecuting attorney and to another attorney, who had been assisting in the defense of Hatfield and Chambers. On the report of the prosecuting attorney that there was sufficient evidence to justify the holding of petitioners to answer any indictment that might be preferred against them by the grand jury, the petitioners voluntarily appeared on the following day, and without demanding a preliminary hearing, voluntarily entered into a recognizance with sureties for their appearance at the next term of the court to be held in said county.

[2] The contention of petitioners is that the proceeding before the prosecuting attorney, conducted by order of the court, was, or amounted to, a preliminary hearing, to which they were parties, and as such entitled to the relief sought by mandamus. It could not possibly be a preliminary hearing of the charges of murder made against them, for such preliminary hearing could neither be had before the judge, the court, nor the prosecuting attorney. The statute nowhere authorizes preliminary hearings before the judge or prosecuting attorney. By section 1, chapter 156 of the Code (sec. 5517), the judge in vacation or term time, or a justice, may issue process for the apprehension of a person charged with an offense, and section 2 thereof says, that on complaint to such officers, and examination of the witnesses and good reason to believe that an offense has been committed, he shall issue his warrant reciting the accusation and requiring the person so accused to be arrested and *brought before a justice* of the county, before whom only is there any authority given to hold a preliminary examination. Nor is the judge of the court by the statute found authorized to conduct such preliminary hearing. When apprehended upon the order or warrant of the court or judge, petitioners had the undoubted right to demand a preliminary hearing before some justice of the peace, in which event they might possibly of right demand of the reporter copies of the testimony or other proceedings taken down by him. But we

do not decide the question, for it is not presented.

The right to a preliminary examination is not a common-law right; 16 Enc. Pl. & Pract. 828; 16 C. J. 322; and may be waived by the accused. *State v. Stewart*, 7 W. Va. 731, 23 Am. Rep. 623, and cases cited; *Butler v. Commonwealth*, 81 Va. 159; 8 S. R. C. L. 89. By voluntarily appearing and asking the court to admit them to bail, we think the petitioners waived a preliminary examination, at least for the time being. *State v. Strauder*, 8 W. Va. 686. Wherefore the examination by the prosecuting attorney, though at the instance of the court, not authorized by law, could not convert that proceeding into a preliminary examination, and give the petitioners a right to demand of the reporter or of the judge copies of the testimony and proceedings thus conducted.

Our conclusion is to deny the peremptory writ.

(89 W. Va. 402)

TIERNEY v. UNITED POCAHONTAS COAL CO. et al. (No. 4322.)

(Supreme Court of Appeals of West Virginia.
Nov. 1, 1921.)

(Syllabus by the Court.)

1. Appeal and error \S 871—Decree, unquestioned until after time for review, cannot be assailed on appeal from subsequent decree.

An appealable decree entered in a cause, not in any way questioned until after expiration of the period of limitation, cannot be assailed on an appeal from a subsequent decree into which it has been carried as a basis of adjudication, allowed after expiration of such period.

2. Appeal and error \S 1195(3)—Where decree against several parties has been affirmed, it is error in subsequent decree in execution of first to relieve against part only.

If, on a bill seeking relief against several persons, on the ground of a constructive trust or constructive fraud, an interlocutory appealable decree against all of such persons has been entered and then affirmed on an appeal, it is erroneous, in a subsequent decree made in execution of the first, to grant the relief sought against some of such defendants and not against the others, in the absence of disclosure of error on the face of such first decree and subsequent impeachment thereof.

3. Evidence \S 113(1)—Ordinarily approximation is the limit of endeavor in ascertaining property values.

Ordinarily, approximation is the limit of endeavor in the ascertainment of values of property, and, to attain that, it is necessary to exclude all fanciful and purely speculative elements or grounds of value, as determined by the facts and circumstances of any given case.

4. Corporations \S 320(12)—In ascertaining value of coal lease, transferred in fraud of minority stockholders seams not opened, containing more coal than will probably be worked pending lease, properly excluded.

In the ascertainment of the value of a coal lease limited in time and taken upon a royalty basis, it is proper to exclude the coal in seams not opened, explored, nor in any way developed in the first half of the term of the lease, there being more coal in the one seam opened and worked than will probably be mined within the potential life of the lease.

5. Evidence \S 113(6)—Estimated profit from operating mine is not distinct item of value of lease to be added.

In such case, the estimated profit from the operation of the mine opened under the lease does not constitute a separate and distinct item of value to be added to that of the property. It is only a circumstance tending to prove the value of the lease, to be weighed and considered with other evidence.

6. Evidence \S 571(7)—In determining value of coal lease, evidence of practical and experienced miners held controlling.

In view of the uncertainty of estimated and unearned profits of an equipped and operated coal lease, extending over a long future period, and the slowness of value in an unequipped and unoperated coal lease taken upon the royalty basis, usually at ten cents per ton, the evidence of practical and experienced coal operators, to the effect that the value of such a lease fully equipped and in operation is the equivalent of the value of the recoverable coal in the lease, at ten cents per ton, is controlling and constitutes a sound basis of judicial ascertainment and declaration of value.

7. Corporations \S 320(12)—In ascertaining value of coal lease transferred in fraud of minority stockholders, equipment or liquid assets should not be added and liabilities should not be deducted.

In the absence of special circumstances, no other property of the owner of the lease, such as equipment or liquid assets, should be added to such value, nor should the liabilities be deducted therefrom.

8. Corporations \S 320(12)—In ascertaining value of a coal lease transferred in fraud of minority stockholders, coal subject to haulage charge equal to royalty properly omitted.

If, in such case, part of the coal included in the leases is subject to a charge for haulage through another property, equal to the royalty, it is properly omitted in such estimation of tonnage value.

9. Corporations \S 320(12)—In ascertaining value of a coal lease transferred in fraud of minority stockholders, funds and property accumulated by previous operations, not used in conducting the lease, not considered.

Funds and property accumulated by previous operations, constituting undivided profits, and not necessarily used in the conduct of the mining operations, should be added to the tonnage value, in the ascertainment of the entire value of such a property.

10. Corporations \Leftrightarrow 320(12)—In ascertaining value of coal lease transferred in fraud of minority stockholders, value of capital stock of another corporation owned by operating company properly added to tonnage value.

It is proper also to add to such tonnage value the value of capital stock of another corporation, owned by the operating company.

11. Corporations \Leftrightarrow 320(12)—In ascertaining by tonnage method value of coal lease transferred in fraud of minority stockholders, deductions not to be made for lessee's inability to mine all the coal within life of lease.

In seeking the value of a coal property by the tonnage value method above described, deductions of tonnage cannot be made upon the theory of inability of the lessee to mine all of the coal within the life of the lease, because the mining capacity of the lessee is presumptively variable and within his own control.

12. Corporations \Leftrightarrow 320(12)—In adjudicating liability to stockholders of corporations taken over at inadequate prices, profits from use of property added to value of dissenting stockholders' stock should be decreed.

In an adjudication of liability of a corporation and individuals by whom it was formed, to stockholders in other corporations taken over by it, at inadequate prices and against the will of such stockholders, it is proper to include in the decree a sum in addition to the value of the stock of the dissenting stockholders, as profits derived or derivable from the use of the property so wrongfully taken over, measured, and determined by the legal rate of interest applied to the value of such stock.

Appeal from Circuit Court, McDowell County.

Suit by L. E. Tierney against the United Pocahontas Coal Company and others, in which a decree was modified and affirmed on appeal, and from a subsequent decree executing the former one by requiring payments of money by the United Pocahontas Coal Company and Worth Kilpatrick to L. E. Tierney and the Flat Top National Bank, the losing parties appeal, and the others assign cross-errors. Decree modified and affirmed.

Malcolm Jackson, of Charleston, and Anderson, Strother, Hughes & Curd, of Welch, for appellants.

French, Easley & Easley, Sanders, Crockett, Fox & Sanders and Russel S. Ritz, all of Bluefield, for appellee.

POFFENBARGER, Judge. The decree constituting the basis of the former appeal in this cause, disposed of by the decision reported in 85 W. Va. 545, 102 S. E. 249, was interlocutory and appealable only because it settled the principles of the cause. From a subsequent decree executing the former one, by requirements of payment of large sums of money, by the United Pocahontas Coal Company and Worth Kilpatrick, to L. E. Tierney and the Flat Top National Bank, the losing

parties have appealed, and the others have cross-assigned errors.

[1] For some reason not disclosed, J. A. Armstrong, G. C. Armstrong, A. Stone, and A. D. Rice, associates of Kilpatrick in the sales of the properties of the Zenith and Indian Ridge Coal Companies to the United Pocahontas Coal Company, complained of by Tierney and the Flat Top National Bank, were excluded from the decree. Right to any decree at all against the United Pocahontas Coal Company is denied in argument, on the ground that it was a purchaser for value from the other two companies and had acquired full legal and equitable title to their properties, before this suit was instituted. But, if this position is untenable, then it is urged that the decrees should have gone against the two Armstrongs, Stone, and Rice as well as the company and Kilpatrick. The former decree adjudicated liability of the United Pocahontas Coal Company, and, as to that adjudication, it was affirmed. Assault upon it is now barred by lapse of time. It was entered May 12, 1919, and this appeal was taken from another decree May 6, 1921. The limitation is one year. If it had not been appealed from and affirmed, time would preclude this complaint. *Barbour, Stedman & Herod v. Tompkins*, 58 W. Va. 572, 52 S. E. 707, 3 L. R. A. (N. S.) 715.

[2] The former decree may be interpreted as having imposed liability, upon the ground of legal or constructive fraud, not actual fraud. It characterizes the transaction as an "illegal and unlawful merger" and "a fraud on the rights and holdings" of the plaintiffs. All of this is consistent with the theory of constructive fraud. In such cases, equity distributes the burden among those guilty of the wrongful act, when it can do so without causing undue delay or other hardship. *Chamberlayne v. Temple*, 2 Rand. (Va.) 384, 14 Am. Dec. 786; *Janvrin v. Curtis*, 63 N. H. 312; *Brice v. Myers*, 5 Ohio, 121; *Cornish v. Clark*, 14 L. R. Eq. 184. In the absence of an adjudication of actual fraud, the principle or theory of the former decree should have been adhered to. As to the ground of liability, no new evidence has been taken, wherefore it remains just as it was under the former decree. There is personal liability upon all of the defendants, but, upon a full development of all the facts, it may be equitable, as among them, to require ultimate payment of the entire amounts of the decrees, by the United Pocahontas Coal Company, since it took over all the property in question. But no cross-relief among the defendants has been asked, and we decide nothing as to any supposed right thereto.

[3] Both the commissioner's report and the decree fix the values of the properties of the Zenith Coal & Coke Company and the Indian Ridge Coal & Coke Company by adding to the

value of the unmined coal in their leases at 10 cents per ton, what are termed miscellaneous and current assets and the physical values of their plants, and then deducting their liabilities. Tierney and the bank complain of the omission of the coal in three undeveloped seams of coal within the leases, estimated by a witness as aggregating over 11,000,000 tons. They insist also upon addition of nearly \$2,000,000 for the estimated present worth of profits derivable from operation of the properties, during the potential lives of the leases. For disallowance of these alleged elements of value they excepted to the report, and here complain of the overruling of their exceptions. They claim the decree should have awarded Tierney \$224,242.20 instead of \$72,813.40, and the Flat Top National Bank \$81,723.43 instead of \$27,259.54, including interest. On the other hand, the appellants complain of an allowance of too much tonnage and inclusion of miscellaneous and current assets and physical plant values. They also deny liability for interest and charge a duplication of values in one instance.

As in almost, if not quite, all cases of ascertainment of property values, approximation is the limit of endeavor here. To accomplish a reasonable and fair approximation upon such an inquiry it is necessary to exclude all fanciful and purely speculative elements or grounds of value; and the facts and circumstances of each particular case must be allowed, as a general rule, to determine the character of the elements or grounds of value set up and relied upon.

[4] Omission of the coal in the three unworked seams was manifestly proper. None of the coal was owned in fee by the two old companies merged into, and consolidated with the new one. They were mere lessees. The value of the coal to them depended upon the mining and marketing thereof. It did not belong to them. They were to pay for it as they should take it out. At the rates at which they had been severing and removing it, there would have been no occasion to touch any of the three omitted seams, within the potential lives of the leases. The No. 3 seam would have furnished more coal than was likely to be mined, and, presumptively, the expense of new openings in other seams would not be incurred under such circumstances. As use of the omitted coal was improbable, it had no appreciable value, for its value was to be found only in utilization thereof.

[5] The probability of profits to arise from the operation of the properties is only a circumstance indicating their value. Not having been earned and being dependent upon future conditions and contingencies, they cannot be accepted as constituting present values in and of themselves. Out of the income, it is necessary to pay the royalties and operating and marketing expenses and return the

principal with interest on it, in the case of the purchase of such property. The subject-matter of the purchase, the right of mining, is constantly depleted by the operations, and ceases to exist with the exhaustion of the coal or termination of the lease. Besides, it is impossible to say, with any degree of certainty, what per cent. of profits could be realized from mining operations extending over periods of time ranging from 15 to 38 years. The trial court limited the evidence of probable profits to its proper function, namely, reflection of value in the property and rights of the companies.

[6, 7] Ordinarily, a mining lease under which nothing has been done, no entries driven, no equipment nor facilities installed, has no market value. It imposes an obligation fully equivalent, by way of reciprocation, to the advantage or benefit it confers. It alone does not give or carry a value equal to 10 cents per ton for all the coal in the territory. Generally, it obligates the lessee to pay about that much for his privilege, but, not having paid it, he cannot be deemed to have a value in his privilege, determinable upon that basis. According to the testimony of expert coal operators, the entire plant, consisting of the lease, machinery, buildings, appliances, operating capital and equipment of all kinds, is worth a sum of money equivalent to 10 cents per ton for all of the coal in the lease. A prudent operator makes his equipment correspond with the requirements of his lease. His lease without equipment is practically valueless. The equipment and lease, taken together, have value. The standard of value adopted allows something for the mining privilege over and above the costs of equipment. At any rate, the value of the equipment in these cases is very much less than the tonnage value of the coal. Properties of the class of these are frequently valued for several purposes, and the expert witnesses say such a property, fully equipped, is valued at a sum equal to the value of the coal at 10 cents per ton. What has been said makes it apparent that the tonnage value and the value of the equipment cannot be added. To do so would include, as the larger item, what, standing alone, has no value. Of course, the value found on the tonnage basis is not exact, and it may not be closely approximate, but is one that is recognized and used extensively by coal operators, in transactions involving questions of plant values. No doubt, they use it because it is more closely approximate than one obtainable in any other known way. Nor should the probable profits be added to the tonnage value. Edward Cooper, an experienced coal operator, covered all the elements of value in the use of these terms:

"The profits received from the company, that is, the stockholders' profits, in my opinion, would not be much in excess of the profits received from the money recovered from an out

and out sale of the property based on a return of ten cents a tonnage, unless you reinvested the \$1,300,000 in like property."

This clearly proves he did not regard future profits as present values to be added to the tonnage value. J. W. Beury, who participated in negotiations for the purchase of the properties of the United Pocahontas Coal Company, embracing a great deal more coal than the two old companies had, based his offers of \$1,000,000, \$1,200,000, and \$1,500,000, made at different times on probable profits, as one test, and on tonnage value, as another. No price was based upon both estimated profits and tonnage combined. And then the highest offer was less than 10 cents per ton. Of course, there is some conflict in the evidence. Tierney and the bank make very large claims, founded largely upon propositions we have already disapproved. The large profits made in other mining companies in which Mr. Tierney is interested do not disprove the soundness of the tonnage rule of valuation. They are variable and subject to many contingencies, and, as has been stated, they must return the investment with interest thereon, besides paying the royalties.

[8] Upon these principles and conclusions, it becomes necessary to eliminate from the statements of value the items designated "Miscellaneous and Current Assets" and "Physical Value of Plant" on the credit side, and the item designated "Liabilities" on the debt-or side. They are very considerable sums. In the case of the Zenith Coal & Coke Company, they are, respectively, \$65,004.17, \$221,810.75, and \$113,992.33; and in the case of the Indian Ridge Coal & Coke Co., \$241,551.99, \$201,941.25, and \$15,226.52, respectively. But for a deduction the trial court made from the tonnage, this would make the tonnage value of the former company \$522,689.30 and of the latter \$414,982.90. Because the coal in the Burkes Garden Lease of the Zenith Company is subjected to a double royalty charge of 10 cents, making the total 20 cents, one charge being the royalty and the other a charge for haulage through the Pocahontas Coal & Coke Company property, the trial court deducted the tonnage of the Burkes Garden lease, amounting to 2,310,578, leaving the tonnage of the Zenith Company, for valuation purposes, at 2,916,315, and making its value, exclusive of the items here eliminated, \$291,631.50. Tierney's interest in the Zenith Company is 3.4 per cent. of its value, or \$9,915.47. The Indian Ridge Company owned 96½ per cent. of the stock of the Zenith, which, calculated upon its tonnage value, amounts to \$281,424.40. This is to be added to the tonnage value of the Indian Ridge Company.

[9] But there is still another addition to be made to it. The "Miscellaneous and Current Assets" item in that account embraces

large amounts representing undivided profits accrued from previous operation, which cannot be deemed operating capital covered by the tonnage valuation. These amounts are, cash, \$49,290.94, bills receivable, \$149,691.07, and real estate not used in mining operations, \$26,405.31, and they make an aggregate sum of \$225,387.32. The total Indian Ridge Company valuation is \$921,794.62, made up of tonnage value, \$414,982.90, cash and other items above described, \$225,387.32, and percentage of Zenith value, \$281,424.40. Of this amount Tierney is entitled to 2 per cent., or \$18,435.89, and the Flat Top National Bank 1½ per cent., or \$12,290.59.

[10] In addition to dividends on their stock, amounting to about 6 per cent., Tierney and the bank obtain, as of March 31, 1915, several times the par value of their stock. Tierney's allowance on account of his Zenith Company stock amounts to more than 600 per cent., and those made to him and the bank on account of the other company amount to more than 1200 per cent. of their stock holdings. On the basis here adopted, the plaintiffs obtain results about as favorable as those indicated in Col. Tierney's evidence respecting the earnings of other mining companies in the Pocahontas field, ranging from 650 per cent. to 1600 per cent., over periods of 26 to 29 years of operation.

There is no duplication in the addition of 96½ per cent. of the value of the Zenith Company to the total value of the Indian Ridge Company, for the latter owned that much of the former, and Tierney and the bank were entitled to their percentages out of the entire value of the Indian Ridge Company, and Tierney, to his percentage out of the entire value of the Zenith. He and the Indian Ridge Company practically owned the Zenith. They owned all of its stock except 2 shares. Hence it was proper substantially to divide its property between them.

[11] Still further reductions in values are insisted upon by the appellants. Their argument is that, in all probability, the coal estimated in the tonnage would not have been mined under the leases, since the mining at the rate maintained would not have exhausted it. In this connection, much stress is laid upon these facts: The leases were all for 30-year terms, which in the cases of two of them had run for 15 years and the other for 22 years; one of them carried no right of renewal; and the other two were renewable for 30 years, only upon performance of conditions which had already been omitted. The tonnage of the lease having no renewal privilege is not included in the valuation. As to the other leases, the argument assumes what has not happened and may never occur. Performance of the broken conditions may be waived. Ordinarily, a renewal to an equipped and prosperous company already operating the property would not be refused

(109 S.E.)

and a new lease executed to some other person or concern having no equipment, so as to interrupt the mining, at the risk of injury and damage to the mine and loss of profits. Besides, it is possible greatly to increase the rate of mining, and such an increase may be assumed, as a probability, if found to be necessary as a means of preventing loss of mining opportunity.

[12] If one taking the property of another, converting it to his own use and realizing a profit from it, is not chargeable with damages corresponding to the value of the use, he not only escapes liability for full compensation to the injured party, but also profits by his own wrong. Here the defendants may be regarded, upon one view of their status, as having wrongfully taken and used the property of the plaintiffs and derived profit from such use. Upon another, they are constructive, if not actual, trustees using and deriving profits from the property. There is as much reason for requiring them to account for the profits as for requiring them to restore the property. It may not be accurate to call such compensation interest, but it is not unfair nor unreasonable, as regards them, to measure it by the interest rate or rule. It would be impossible to deny compensation equivalent to interest, under the circumstances here disclosed, consistently with our decisions. *Cresap v. Brown*, 82 W. Va. 467, 96 S. E. 66; *McCullough v. Clark*, 106 S. E. 61; *Pittsburgh & W. Va. Gas Co. v. Pentress Gas Co.*, 84 W. Va. 449, 100 S. E. 296, 7 A. L. R. 901; *Lutz v. Williams*, 84 W. Va. 217, 99 S. E. 440. The element of profit accruing to the wrongdoer from the use of the property always imposes interest. In *Cross v. Cross*, 4 Grat. (Va.) 258, it was held that one holding slaves of another, not in a fiduciary capacity, was not chargeable with interest on estimated hires. The holding would no doubt have been different, if the hires had been actually collected. *Baird v. Bland*, 5 Munf. (Va.) 492. It has been generally held in Virginia, under the statute as we have it, that interest will not be allowed upon conjectural and unliquidated amounts. *Baird v. Bland*, cited; *Rootes v. Stone*, 2 Leigh. (Va.) 650; *Auditor v. Dugger & Foley*, 3 Leigh. (Va.) 241; *Stearns v. Mason*, 24 Grat. (Va.) 484; *Gibson v. Governor*, 11 Leigh. (Va.) 600. Some of these decisions deny interest because of doubt as to the defendant's liability, and others, on account of the nature of the liability asserted. In this cause there has never been any room for doubt as to liability. The controversy has been limited at all times to the amount of the liability. Nor can it be said that the cause of action sounded in damages, so as to make the demand an unliquidated one, in the sense in which such demands are sometimes defined. We are clearly of the opinion that in-

terest as damages, or rendition of profits realized from the property by the defendants, should be added to the amounts hereinbefore ascertained as the sums to be decreed. From the accrual of the right of action until the date as of which the commissioner made up his report 5 years and 10 months elapsed. Interest for that period amounts to 35 per cent. of the principal. A 35 per cent. addition makes the amounts to be decreed to Tierney, on account of his Zenith Company stock, \$13,385.88, and on account of his Indian Ridge Company stock, \$24,888.45, total \$38,254.33; and to the Flat Top National Bank, \$16,592.30.

The decree complained of will be so modified as to require payment of the said sums of \$38,254.33 to L. E. Tierney and \$16,592.30 to the Flat Top National Bank, respectively, together with their costs, by the United Pocahontas Coal Company, Worth Kilpatrick, J. A. Armstrong, G. O. Armstrong, A. Stone, and A. D. Rice, with interest on said debts from January 31, 1921, until paid, and, as so modified, it will be affirmed.

(89 W. Va. 367)

J. E. MOSS IRON WORKS et al. v. JACKSON COUNTY COURT et al.

(Supreme Court of Appeals of West Virginia.
Nov. 1, 1921.)

(Syllabus by the Court.)

1. Mechanics' liens §13—Public property is not generally subject to mechanics' liens.

As a general rule, public property is not subject to liens created by chapter 75, Code 1918 (Code Supp. 1918, §§ 3842, 3851a-3857), such incumbrances being contrary to public policy.

2. Mechanics' liens §13 — If allowed upon county property, may injure public.

Such liens, may, if permitted, effectively obstruct the transaction of the affairs of the county, to the injury of the public.

3. Mechanics' liens §13 — Mechanics' liens not allowed against county courthouse and jail for labor and materials furnished by subcontractor.

The broad provisions of a Mechanic's Lien Law are not sufficient to authorize liens against a county courthouse and jail for labor employed, materials and equipment furnished by a subcontractor, for which the contractor fails to pay him, according to the terms of the contract between them.

4. Mechanics' liens §13—Legislative intention to allow liens on public buildings must be expressed in unmistakable terms.

Although the Legislature in the exercise of its legitimate powers may, in a Mechanic's Lien Law, authorize the creation of and mode of perfecting liens on public buildings, it must

clearly express its purpose to do so in unmistakable and specific terms.

5. Mechanics' liens §13—Statute construed as not authorizing liens on public property.

Chapter 6, Acts 1917 (Chapter 75, Code 1918 [Code Supp. 1918, §§ 3842, 3851a-3857]), does not, when properly construed as a whole, authorize, and apparently was not intended to authorize, the creation of such liens on public property.

6. Statutes §205 — Are to be construed as whole, so that arrangement into parts or sections is of no moment.

As a statute is to be construed in its entirety in order to determine its effect and meaning, its arrangement into parts or sections is of no moment, whether the parts or sections are in logical sequence or otherwise.

7. Mechanics' liens §13—Different sections of lien statute construed not to authorize incumbrance of public buildings.

The different sections of chapter 75, Code 1918 (Code Supp. 1918, §§ 3842, 3851a-3857), properly considered and construed, do not authorize the incumbrance of buildings devoted to public use by mechanics' or other like liens.

8. Mechanics' liens §13—Affected by sale of building so that lien is only permissible when clearly authorized.

Such liens are ineffectual except by a sale of the building incumbered by them; and, as such a sale contravenes public policy, it is permissible only as and when clearly authorized by law.

9. Counties §59—County court held not liable for neglect in accepting contract without a bond.

A county court is not liable at the suit of an assignee of a mechanic's lien creditor for its own neglect, or the neglect of its officers or agents, to perform a duty, such as the acceptance of a contract without a bond, when a bond is required, in the absence of a provision therein declarative of such liability.

(Additional Syllabus by Editorial Staff.)

10. Counties §226—A proceeding against a county to enforce a mechanic's lien is a "process."

A proceeding for the enforcement of a lien, created according to Code Supp. 1918, c. 75 (secs. 3842, 3851a-3857), is a process within the meaning of chapter 39, § 43 (sec. 1596), which forbids the sale of county property on execution or other process.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Process.]

Case certified from Circuit Court, Jackson County.

Action by the J. E. Moss Iron Works and others against the County Court of Jackson County and others to enforce a mechanic's lien for materials, equipment, and labor furnished to the courthouse and jail. Demur-

rer to complaint sustained, and case certified by the circuit court. Affirmed.

Smith D. Turner, of Parkersburg, and W. W. Smith, of Huntington, for plaintiffs.

W. F. Boggess and Lewis H. Miller, both of Ripley, for defendants.

LYNCH, J. Stated in somewhat different language, but in effect the same as that contained in the order certifying them, the questions to be discussed are these: Is the property of a county, the courthouse and jail and the lot on which they stand, within the meaning of the mechanic's lien law, as amended and re-enacted by chapter 6, Acts 1917, chapter 75, Code 1918 (Code Supp. 1918, §§ 3842, 3851a-3857)? If not is the county court liable for the unpaid debts due a subcontractor for materials, equipment, and labor furnished by him and installed in a courthouse and jail? The questions the demurrer of the county court of Jackson county raised, and the answer of the circuit court of that county was in the negative.

The Jackson county court contracted with Prescott Construction Company May 24, 1917, seven days after the revised statute became effective, to construct and repair the county courthouse and jail, furnish all the labor and material, and perform all the work necessary for that purpose, according to the plans and specifications incorporated in the contract, and made part of it, for a consideration payable as the work progressed. The original amount was \$67,133, later increased to \$100,000 by extras authorized by the county court.

Subsequently Prescott Construction Company contracted with Huntington Iron Works to furnish some of the materials and perform certain parts of the work provided for in the original and amended contract and specifications, payments therefor to be made upon the same terms and conditions, as those to be made to Prescott Construction Company. These contracts the architect, L. J. Dean, approved when submitted for his approval, as required by the agreement with the county court.

Huntington Iron Works began to furnish the materials and perform the work it undertook to furnish and do soon after the date of its contract with Prescott Construction Company, complied with the terms and conditions so prescribed, and completed it November 15, 1919, and Dean accepted it December 31, 1919, as completed; and, although the county court paid Prescott Construction Company for the work it was to perform and did perform, the latter company did not pay Huntington Iron Works the amount due it, but left unpaid a balance of \$6,380.39. For this balance Huntington Iron Works in due form prepared and caused to be recorded in the office of the county clerk of Jackson

county a notice of mechanic's lien, and perfected such lien in all respects in compliance with the mechanic's lien statute. At least there seems to be no objection as to any lack of formality in the effort to procure a formally perfect lien.

Having become indebted to the plaintiff the Moss Iron Works, in the sum of \$4,242.15, and to the plaintiff Wheeling Metal & Manufacturing Company in the sum of \$1,883.01, in some manner not disclosed in the bill, Huntington Iron Works assigned and transferred to each of them, out of the \$6,640.39, the amounts due them, respectively, and to enforce payment of the lien is the object of this suit.

[1, 2] Plaintiffs invoke the provisions of sections 12 and 14 of chapter 6, Acts 1917, chapter 75, Code 1918 (Code Supp. 1918, §§ 3851k, 3851m), as authority for the liens and the right to enforce them by a sale of the courthouse and jail, and the ground on which they stand. By section 12, the state board of control, county courts, boards of education, boards of trustees, and all other legal bodies having authority to contract for the erection, construction, improvement, alteration, or repair of any public building or structure, used or to be used for public purposes, are directed in so contracting to require the person or persons to whom it shall award any such contract to execute a good, valid, solvent, and sufficient bond, in an amount at least equal to the reasonable cost of the materials, machinery, equipment, and labor required in the completion of the contract, upon the condition that in the event such contractor shall fail to pay in full for such materials, machinery, equipment, and labor used by him in the erection, construction, improvement, alteration, or repair of such public building, or other structures used or to be used for public purposes, the bond and the sureties thereon shall be liable to the person who has furnished such material, machinery, equipment, or labor for the full payment of the expenses incurred by him in that behalf. This bond the section requires to be filed with the secretary of such board or other legal body, or other custodian of its papers and records.

According to section 14, the contractor is to be deemed and treated as the agent of the owner of the building or other structure, and the improvements appurtenant thereto, and his interest in the lot on which the building is erected, improved, or repaired, or on to which it is removed, and the owner and his property is liable for the full and true value of all work and labor done and materials, machinery, and equipment furnished by a subcontractor, if the owner fails to require the contractor to execute a bond in the amount at least equal to the reasonable costs of such material, machinery, and equipment and labor performed, or to be per-

formed pursuant to the terms of the contract, or fails to record the contract and bond, when so given, or accepts a bond for a less amount.

[3] As the statute before the amendment contained the same general mechanics' and labor liens provisions, without specific reference to property, real or personal, belonging to the public, or purchased and held for public use, as interpreted in Hall's Safe & Lock Co. v. Scites, 38 W. Va. 691, 18 S. E. 895, it did not apply to such buildings. That was a suit to enforce a mechanic's lien against the courthouse and grounds of Wayne county. The first point of the syllabus reads:

"The public buildings of a county are wholly exempt from the operation of the mechanic's lien law, and cannot be sold under execution or other process."

The statute then in force had the same general provisions as the amended statute, except in so far as section 12 enlarges earlier statutes in the particular noted. The mechanic's lien law, as it appears in the 1891 Code (chapter 75, § 3), that being the law construed in Hall's Safe & Lock Co. v. Scites, cited, says:

"Every materialman, workman, laborer, mechanic or other person performing any labor or furnishing any material or machinery, under a contract with a principal contractor or his subcontractor, for the construction, alteration, repair or removal of any house or other structure provided for in a contract between the owner thereof, or his authorized agent and such principal contractor, shall have a lien to secure * * * the value of the labor performed, and the material or machinery furnished * * * upon such house or other structure," etc.

Notwithstanding this broad and comprehensive language, language sufficiently broad and comprehensive to include a county courthouse and jail, and it was so considered by plaintiff in that case, the circuit court and this court held otherwise, and refused to approve and enforce the pretended lien. This holding is justified by an abundance of authority. Does either section of the revised mechanic's lien statute warrant the application of any other rule or principle? Section 12 contains no terms and no language significant of an intention or purpose to permit a contractor or his subcontractor to acquire a lien upon public property, as a courthouse and jail, for the default either of the original contractor or another person, firm, or corporation that agrees to furnish, and does furnish, the material, equipment, or labor required in the erection, construction, or repair of such a building. It says not a word concerning a lien of any kind or character. Its intended and clearly disclosed purpose is to make it the duty of the corporations and boards therein specified to demand and exact a bond in a definite amount, the contract price of

the work to be done, the labor to be performed, and the equipment to be furnished to complete the building. Its purpose was not to protect those bodies against the default of the contractor, except as to materials, machinery, equipment and labor.

[4, 5] And although the language of section 14 may be broad enough to include county courts and other state agencies enumerated in section 12, it does not specifically name them, nor does any other section of the chapter. Section 12 alone does that. Nowhere else is there the slightest reference to the board of control, county courts, boards of education, boards of trustees, and other legal bodies having authority to contract for the erection, construction, alteration, or repair of public buildings or other like structures, used or to be used for public purposes. Inclusion by reference or interpretation is not sufficient, when the right to perfect a mechanic's lien or materialman's lien upon public buildings is involved. To warrant the creation and enforcement of such a lien against public buildings, the authority must be specific, positive, and unmistakable in its meaning and terms. They must leave open no room for construction or interpretation. If the Legislature intended to authorize or permit the subjection of public buildings to liens as public property may be subjected, as by pursuing the method prescribed, it could and doubtless would have made its intention clear and explicit. To subject property owned and used by the public for the transaction of public business to mechanics' liens, the authorization must, according to the general, indeed the almost invariable, rule, be unequivocal, not inferential.

"There can be no mechanic's lien on public property," says Boisot, § 208, *Mechanic's Liens*, "unless the statute creating such lien expressly so provides, since such a lien would be contrary to public policy, and would also be incapable of enforcement, not being subject to forced sale."

To support this statement he cites many decisions. See, also, *Hutchinson v. Krueger*, 34 Okl. 23, 124 Pac. 591, Ann. Cas. 1914C, 98, note. The statutes construed in these decisions, so far as we have examined them, authorize mechanics', artisans', and laborers' liens on all buildings and structures. Of course, courthouses and jails are structures under the meaning of such legislation, and yet, with but few exceptions, courts have not construed them so as to include buildings devoted to public uses. There being such harmony among the authorities to this effect, further citation seems needless.

[6, 7] Plaintiffs, however, would have us accept their theory, which, if tenable, would require such a construction of sections 12 and 14 as would warrant the liens claimed by them. According to plaintiffs, no other

construction is permissible or possible in view of the context. That challenge goes direct to the heart of the subject dealt with by the authorities cited, and by numerous others that could be cited. As before stated, a statute which has for its purpose the authorization of incumbrances in the form of mechanics' and other like and similar liens against public property devoted to governmental uses must be explicit and positive. With this condition sections 12 and 14 fully complied, if plaintiff's argument is meritorious; but do they? Section 12 does, it is true, require a bond where the contract is for the construction or improvement of property owned, useable, and used, or to be used for the transaction of public affairs, but, as we have seen, it need not be recorded as part of the public record. The purpose of such a bond the section fully discloses; it is for the protection, not of the contractor himself, but of those who contract with him for material, equipment, and labor necessary for the completion of his contract. That being its paramount, if not its exclusive purpose, the contractor has a material interest in its execution and in insisting upon its execution, as the county court has, notwithstanding the provision exacting it. But such interest does not begin and end in the contractor, it extends to every one with whom he contracts, where a public building is to be improved. If a subcontractor undertakes to equip such a building, it only devolves upon him to refuse to furnish the equipment, unless the bond required is given, as it is mainly to protect him. While it is true, if plaintiff's theory is sound, that without such bond the contractor becomes the agent of the county court, and the county court liable to the subcontractor for the equipment or labor so furnished, yet in that section and in the other sections of the statute there is no word or language sufficient to justify the inference of an intention on the part of the Legislature to fix liability either upon the county court or the property of the county, for the payment of an indebtedness of the contractor who engages to erect, improve, or repair a public building for county purposes, except such general terms as relate exclusively to privately owned property.

Nor is there to be found a sufficient basis for such an inference in the language of section 9, although its provisions and the provisions of section 12 are similar. The general provisions of the act, considered as a whole, although apparently inclusive, are not broad enough to indicate publicly owned buildings, when construed in accordance with the prevailing weight of judicial authority.

Some significance certainly is to be attributed to the omission in section 12 of the requirement to record in the county court clerk's office the bond called for in that section. It is to be filed, not with the clerk of

the county court for record, but with the secretary, or other custodian of the records and other papers of the governmental agencies therein specified. Whatever influenced the Legislature to substitute delivery to the clerk or custodian of the records and papers of such bodies for recordation in the county record office need not be surmised, in the face of the provision to the contrary. The fact remains outstanding that by no provision of the statute considered is it necessary to record the contract in the county court clerk's office, when public buildings are the subject of the improvement. When so filed it is available to any one who may come to inspect it. While in the custody of the clerk, or other like official representative of such bodies, it is accessible to any one lawfully entitled to know of its contents. Not so, when it is the bond given for the protection of a private owner of property, improved under the terms of a contract.

A second reason will appear upon a reasonable construction of the sections preceding No. 12. It is not necessary to enter into detail as to the provisions contained in most of them. Their provisions are general, and have for their purpose designation of the persons entitled to their protection, and the method of acquiring liens on private property and prescription of the method for perfecting such liens. In this respect they are not materially unlike the usual mechanic's lien statutes. By section 8 an owner may limit his liability under the terms of a contract for the construction and repairs of his real property to the price agreed upon by him and the contractor, by recording the contract in the proper office of the county wherein such property is located, prior to the beginning of the building, erection and construction of improvements thereon, and by recording with the contract a valid and solvent bond in a penalty equal to the contract price with solvent surety, conditioned that in the event any such laborer, materialman, or other person, having perfected his lien allowed by the act, be deprived by the recordation of his contract from receiving from said owner the amount of his said lien, then the said bond and the sureties thereon shall be responsible to said lienor for the amount of said lien account, or for any balance thereof not collected by said lienor from said owner and from said property. The provisions of this section somewhat resemble those contained in section 12. In other particulars they are different. They differ in this: The bond required in section 8 (Code Supp. 1918, § 3851g), when recorded with the contract, limits the liability of the owner to the amount agreed upon by the parties, and if the indebtedness of the contractor exceeds such amount, the sureties must pay the excess to the materialmen and laborers whom the contractor has not paid. The converse of these provisions

appears in section 12, in that its purpose was to create a liability upon the owner who fails to require a bond, such as the section calls for, and does not record it and the contract as therein required, even though the amount so due and unpaid exceeds the contract price. So that these two sections, when read together, seem to be counterparts in a general system of liability. In other words, private property improved by the erection or repair of buildings thereon is exempt from liability if the contractor executes the bond specified, and the owner records it together with the contract. The lack of sequence of the sectional provisions does not affect the right to construe them together, when the provisions intimately relate to the same subject-matter. They are, in a sense, *pari materia*, whatever may be their position in the act, in that they provide for the execution and recordation of bonds, and for the consequences that ensue for the failure to execute them. Their arrangement in the act, though not orderly, does not affect the question at issue. Section 14 being the counterpart of section 9, they are to be construed together, notwithstanding the interposition of other sections.

"A statute is passed as a whole, and not in parts or sections, and is animated by one general purpose and intent. Consequently each part or section should be considered in connection with every other part or section, and so as to produce a harmonious whole." *Sutherland, Statutory Construction* (2d Ed.) § 368. "Words and clauses must be read in a sense which harmonizes with the subject-matter and general purpose of a statute." *Id.* § 370.

[8] But to what extent, if at all, may a contractor or subcontractor avail himself of the benefit of such a lien on public property of any character, real or personal, useable and used for the transaction of the public affairs of the county, if he can not sell it to raise a fund sufficient to satisfy the lien?

[10] The only mode prescribed by law for the satisfaction of mechanic's liens of any kind is by a sale of the property so incumbered. But section 43, chapter 39 (sec. 1596), expressly forbids the sale of "lands, buildings, * * * and books belonging to a county and used for county purposes, * * * to execution or other process." A proceeding for the purpose of enforcement of a lien, created according to chapter 75, is in effect a process, within the meaning of the section cited. This prohibition alone furnishes ample justification of the ruling upon the demurrer.

[9] The discussion by plaintiff's counsel of the second question certified proceeds upon the theory that, even if a mechanic's lien is not enforceable by a sale of county property, yet, because the county court neglected to exact the bond required by section 12, its neglect imposes liability upon that court, and

that, to make the liability effective, the decree to be entered in the cause should include the county court. The right of plaintiffs to this relief they base upon the agency brought into being by the failure to require the bond prescribed in section 12. In other words, according to this argument, the Legislature intended to substitute Prescott Construction Company, probably an insolvent corporation, in lieu of the Jackson county court, as to any indebtedness due to the creditors of the substituted agent, and thereby create or sanction a liability where otherwise none would have existed. There is no statute that goes to that extent, so far as we are advised; at least none is cited by counsel. Such a provision is in section 14, but, according to our construction of the act as a whole, it does not embrace, and we believe was not intended to embrace, county courts. If the Legislature had deemed advisable a law inconsistent with the general policy recognized by most courts as to the nonliability of governmental agencies for mechanic's liens, it should have made its purpose clear. In the absence of such clearly expressed intent "a county court is not responsible in damages, at the suit of an individual * * * in consequence of [its] neglect or the neglect of its officers, and agents, to perform a duty enjoined by law." *Watkins v. County Court*, 30 W. Va. 657, 5 S. E. 654. Plaintiffs and defendant county court had the same opportunity to know legislative requirement for a bond, and the neglect to demand it is as much the fault of one as the other. Plaintiffs could have refused to furnish what they furnished for the completion of the construction company's contract, until such bond as the statute requires was executed for their protection. Neither they nor the county court perhaps recalled that provision, as it became operative only a few days before the date of the contract.

As what has been said responds to the questions certified, the order of this court will approve the ruling upon the demurrer.

(89 W. Va. 384)

ROBERTS et al. v. HUNTINGTON DEVELOPMENT & GAS CO. (No. 4304.)

(Supreme Court of Appeals of West Virginia, Nov. 1, 1921.)

(Syllabus by the Court.)

1. Acknowledgment §62(2)—To impeach acknowledgment of duly authorized officer, the proof must be clear and controlling beyond reasonable doubt.

In order to impeach the certificate of acknowledgment of a duly authorized officer, the proof thereof must be clear, cogent, satisfactory and controlling beyond reasonable doubt.

2. Mines and minerals §55(1)—Instrument releasing minerals and mineral rights in lands sued for in ejectment held a valid and binding quitclaim deed.

An instrument reciting the pendency of certain ejectment suits, and reciting the names of the plaintiffs and defendants therein, and whereby the makers thereof in terms or effect undertake to release or disclaim to the plaintiffs in those suits and those claiming under them, any right, title, claim or demand to certain minerals and mineral rights in the land sued for in said actions, and describing the land by reference to certain recorded deeds, and duly acknowledged by the makers before a proper officer, sufficiently identifies the grantees, and being made for a valid consideration, is in effect a quitclaim deed, and valid and binding on the grantors, their heirs and assigns.

3. Mines and minerals §55(1)—Desire to settle conflicting claims to land, surface of which makers possessed, held sufficient consideration for quitclaim deed to mineral rights.

The pendency of such ejectment suits, the fact that the makers were in possession of the surface of the land, and desirous of having settled any and all conflicting claims to the land so occupied by them, and to be relieved from all obligation in relation thereto, constitutes a sufficient consideration for the making and execution of such quitclaim deed to such minerals and mineral rights.

4. Mines and minerals §55(2)—Technical words of legal import must yield to manifest intent in construing quitclaim deed.

In construing such an instrument effect must always be given to the plain intent of the parties, when such intent can be ascertained from the instrument, and is not repugnant to any rule of law; and technical words of legal import, when employed, must yield to such manifest intent of the parties.

5. Estoppel §15—Mines and minerals §55(1)—Grantee in quitclaim deed need not be described by name, if properly distinguished by description.

The fact that in such an instrument the grantee may not be described by name will not affect the validity of the deed, if the designation or description be sufficient to distinguish the person or persons intended from the rest of the world.

6. Estoppel §29(1)—Maker of quitclaim deed and his grantees estopped to assert any right, title, or interest in land quitclaimed.

The maker of such an instrument is estopped by the deed from asserting any right, title or interest in the land so granted or quitclaimed, and being so estopped, those claiming under him are also estopped thereby.

Appeal from Circuit Court, Putnam County.

Bill by M. T. Roberts and another against the Huntington Development & Gas Company. Decree for plaintiffs, and the defendant appeals. Reversed, and plaintiff's bill, and amended and supplemental bills, dismissed.

J. S. Clark and Henry A. McCarthy, both of Philadelphia, Pa., and Vinson, Thompson, Meek & Renshaw and Fitzpatrick, Campbell, Brown & Davis, all of Huntington, for appellant.

Wilkinson & Wilkinson, of Hamlin, for appellees.

MILLER, J. The object of the present bill was to have removed as a cloud upon plaintiffs' alleged title to two tracts, comprising one hundred and thirty-eight (138) acres of land in Putnam County, alleged to have been acquired by them in the year 1887, by deeds from Margaret Billups, a certain recorded instrument, commonly known as a disclaimer, the pertinent parts of which are as follows:

"Whereas, certain actions of ejectment are now pending in the District Court of the United States for the District of West Virginia in favor of Henry McFarlan and others against Lewis Adkins and others, John P. Yelverton and others against Jeremiah Witcher and others, Gustavus A. Sacchi against James A. Holley and others, Gustavus A. Sacchi against J. M. Reece and others and Gustavus A. Sacchi against A. J. Barrett and others; for the recovery of a certain tract of land heretofore conveyed by Henry McFarlan and others, Trustees of the Guyandotte Land Company, to Gustavus A. Sacchi by deed bearing date on the 27th day of June, 1885, and recorded in the office of the Recorder of Cabell County in Book A (new series) page 104; and

"Whereas, Charles M. & Dortha D. S. Billups are in possession of and claiming title to a portion of said land so sought to be recovered and are desirous of settling any and all conflicting claims to lands so occupied and claimed by them:

"Now Therefore the said Charles & Dortha — in consideration of the premises and of being released from all litigation in relation to the land hereinafter described and from liability for costs in relation to lands sought to be recovered as aforesaid, do hereby disclaim all right, title, claim, demand or interest in and to all and any land set out and described in said deed and said declarations in said actions of ejectment except those pieces or parcels of land situate, lying and being in the county of Putnam and State of West Virginia on Big Creek of Trace Fork of Mud and being part of a survey of 200 acres made for Andrew Barrett on the 10th day of May 1838 being 55½ acres situate on the waters of Big Creek of Trace Fork of Mud in Putnam County, West Va., beginning at an ash, (etc.).

"Also that other piece or parcel of land adjoining the above tract beginning at a white oak and two beeches a corner to said survey of 200 acres, thence N. 84° E. 48 poles crossing the creek to a gum and red oak, thence a straight line 159 poles to a beech, thence a south course crossing the creek 35 poles to a beech and dogwood bush, thence a straight line and south-east direction to the beginning, containing 35 acres more or less.

"But the said Charles and Dortha D. S. Billups hereby disclaim all title to or interest in

all coal (except so much as shall be required for domestic purposes) and iron ore, hydrocarbon oils, salt brine, natural gas and all other minerals in, upon or under the said tract of land herein excepted with the exclusive right to the said plaintiffs and those claiming under them for rights of way for tram, rail and wagon roads through said land so excepted and to dig for and mine coal, iron ore, bore for oil or natural gas and the necessary conveniences on said land for storing oil and coal and the transmission of the same by the best and most convenient means to market.

"And the said Charles and Dortha — further agree that the plaintiffs in either of said actions may take judgment against them in ejectment for the interests by them herein disclaimed and to that end they empower any attorney of said court to appear for them and consent that such judgment be entered and that this disclaimer be filed as a part of the record in such cause.

"Given under our hands and seals this 22nd day of May, 1891.

"C. M. Billups [Seal.]

"Dortha Billups [Seal.]"

This paper purports to have been acknowledged by both the makers, before Alexander Eggleton, Notary Public, August 8, 1891, and was recorded in the clerk's office of the county court of Putnam County, March 21, 1893.

Two main grounds are alleged and relied on as the bases for the relief prayed for and decreed to plaintiffs by the decree of July 30, 1920, appealed from. First, that the instrument in question is a forgery as to Dortha, or Dortha D. S. Billups, and was never executed or acknowledged by her in any form, or by any one with her authority: Second, that said instrument is not a deed, nor a deed of bargain and sale, operating to pass any title to the minerals and mineral rights described therein.

On the first of these questions, that of the alleged forgery of the instrument, the record shows that about the time of the alleged execution of the instrument, numerous other deeds or contracts in substantially the same form were executed by other defendants in the several ejectment suits described in the instrument, and either recorded as deeds or carried into judgments in those suits. The contract involved here does not appear to have been covered by any judgment against the makers. Mrs. Billups is not shown to have been a party to any of those ejectment suits, but Charles M. Billups, her husband, was, who along with his wife was then in possession of the land. The notary public before whom the acknowledgment was taken, now deceased, was a near neighbor of the Billupses, and passed and repassed their place almost every day, so they testify. He had no interest in any way in the subject matter of the alleged instrument. Charles M. Billups admits the execution of the instrument on his part, and as to him there is no question of forgery presented, but the

title to the land was not in him, but in his wife, Dortha D. S. Billups. Mrs. Billups, the evidence shows, could neither read nor write. Her name was signed to the paper as Dorothy Billups, but the certificate of acknowledgment contains her full name, Dortha D. S. Billups, and identifies her as the same person whose name is signed to the instrument. The instrument is dated May 22, 1891, but does not purport to have been acknowledged until August 8th following, which is a significant fact taken in connection with the other evidence. This suit was instituted, not by the Billupses, but by plaintiffs, near relatives, and remote grantees, in October, 1916, more than twenty-three years after the recording of the paper in Putnam County, and more than twenty-five years after the date and acknowledgment thereof. Such is the record evidence of the making and executing of the instrument.

We next turn to the oral evidence of the witnesses relied on to support the decree. We have first the testimony of C. M. Billups. He admits he signed and acknowledged the contract on his part before Eggleton, Notary. He says he did this after being threatened with prosecution for cutting timber belonging to plaintiffs in the ejectment suit over the line claimed by his wife. This fact is unimportant on the question of forgery of his wife's name. As to her signing and acknowledging the paper he says that he had no recollection of his wife having signed and acknowledged the disclaimer, and as to her refusal at any time, he says:

"I can only state just what I know and what I am positive. It strikes me like she did in the first place kind of kicked, but whether she finally signed it I couldn't tell for my life. I have no recollection,—my recollection is kindly bad."

Of course as Mrs. Billups could not write, some one who could would have to sign her name for her, and that she may not have signed her name or made her mark is not a very significant fact. When pressed with the question: "Why did you disclaim your wife's mineral?" Billups answered:

"I suppose I was always doing business for her was the reason I done it; I don't know what else. Of course I always done business just the same as for myself and was bound up and could not get out of it any way, and of course there had to be something done, or big trouble."

That Mrs. Billups in the beginning may have objected to executing the paper, as her husband swears, is in keeping with the evidence of all the other witnesses for plaintiff unless it be that of Mrs. Billups herself, who swears that she did not execute it or authorize the execution thereof by any one else. As observed, nearly three months elapsed between the date of the instrument, when Bill-

ups may have signed it, and when Mrs. Billups may have refused to do so, as Billups says, when she "kind of kicked," and the date of the acknowledgment, when according to Billups and other witnesses, she may have relented and actually authorized her husband or some one else to sign the contract, and herself acknowledged it before the notary public. His certificate, a quasi judicial act, so certifies at all events.

The testimony of two other witnesses, namely, Victoria Cottrell, a daughter of Mr. and Mrs. Billups, and W. M. Ashworth, at the date of the instrument in the employ of E. L. Butterick, who appears to have been attorney for the plaintiffs in the ejectment suits, is relied on. The pertinent part of Mrs. Cottrell's testimony is that she remembers that about the year 1891, her father was in trouble about cutting timber on what was known as the company's land, and she recalled that Ashworth and Eggleton were at her father's house for the purpose of getting her father and mother to sign a paper writing or deed of disclaimer of the minerals under the land owned by her mother; that her father had signed such writing, but her mother had not. And as to what was said on that occasion she says:

"Of course it has been some time, you know, and I don't remember more than this, she made this remark that she would die before she would sign it."

She further testified that she did not know of Eggleton being back at her father's house at any other time when he signed and acknowledged the paper. She could not be positive that she was at home all the time from May 22, 1891, to August 8, 1891, and that she did not know of Mr. Eggleton going back to her home to see her mother about the disclaimer after her father had signed it. She was finally asked: "Could he (referring to Eggleton) have come when you were away from home?" Answer: "Yes, he could have come." She could not remember the date or season of the year when he was present with Ashworth to secure the paper, so that her evidence is not inconsistent with defendant's theory, based largely on the testimony of other witnesses and the difference between the date of the deed and the date of the acknowledgment, that Mrs. Billups, though objecting in the beginning afterwards consented, and the instrument was signed on her behalf by some one, and she acknowledged it before Eggleton.

The strongest evidence perhaps in support of plaintiffs' case is that of Ashworth, representing Butterick, attorney for plaintiffs in the ejectment suits. He acknowledges that Mrs. Billups objected, and refused to sign the instrument; said she never would. But on cross-examination Ashworth says his understanding is that there was only one

paper to be executed at the time he was present, but would not be positive about that. And he says that if Mrs. Billups on another day, after her husband had acknowledged it, also acknowledged it, he knows nothing about it. And when shown another disclaimer deed like the one involved here and purporting to bear the same date and to have been acknowledged on the same day before Eggleton, Notary Public, he could not say which one of the two instruments it was that Mrs. Billups refused to sign or acknowledge. The only other witnesses examined on the subject of forgery were Spurlock, Sponaugle, Linkous and the plaintiffs, all of whose testimony on this proposition was hearsay and wholly incompetent. It related to what others had told them after the transaction.

[1] Are these facts and circumstances and the testimony of these witnesses sufficient to overthrow and brand as a forgery a solemn deed or instrument, twenty-five years after it purports to have been executed before a public officer? If so, there is little safety in the titles to land. The treachery of memories, and the cupidity and avarice of former owners and claimants of the land would be sufficient to overthrow deeds and other instruments. The rule of law laid down in this state, as elsewhere, is that in order to impeach the certificate of acknowledgment of a duly authorized officer, the proof must be clear, cogent, satisfactory and convincing beyond reasonable doubt or controversy. *Pickens v. Knisely*, 29 W. Va. 1, 11 S. E. 932, 6 Am. St. Rep. 622; *Swiger v. Swiger*, 58 W. Va. 119, 52 S. E. 23; *Hill v. Horse Creek Coal Land Co.*, 70 W. Va. 221, 73 S. E. 718; *Mankin v. Davis*, 82 W. Va. 757, 763, 97 S. E. 296. It was decided in the *Swiger Case* that the evidence of the grantor denying the execution of the deed, and the opinion of the experts that the signature thereto was not that of the grantor, was not sufficient to overthrow the verity of the certificate of acknowledgment. And in *Hill v. Horse Creek Coal Land Co.*, supra, it was decided that the denial of the execution of a deed and acknowledgment thereof, unaided otherwise than by the fact that the signature was by mark, and the party could write, and denied having signed any paper, was not sufficient to overcome a certificate of acknowledgment thirty years old, and pronounced genuine by the officer who certified the acknowledgment. See also, *Houlihan v. Morrissey*, 270 Ill. 66, 110 N. E. 341, Ann. Cas. 1917A, 364, and note; *People's Gas Co. v. Fletcher*, 81 Kan. 76, 105 Pac. 34, 41 L. R. A. (N. S.) 1161, and note; 1 C. J. p. 896, and note 60.

[2] The remaining question is as to the adequacy of the instrument to pass title to the minerals and mineral rights disclaimed. It is apparent from the language of the in-

strument that the makers thereof intended to release or disclaim to the plaintiffs in the several ejectment suits referred to and those claiming under them any right, title, claim or demand to the land sued for in said actions, being the land theretofore conveyed by Henry McFarland and others, trustees of the Guyandotte Land Company, to Gustavus A. Sacchi, by deed of June 27, 1885, and recorded in Cabell County, in Deed Book A (New Series) page 104, except the tract described as containing 55½ acres, and a tract of 35 acres also described therein; and as to the tracts so excepted to also disclaim all title to or interest in all coal (except so much as shall be required for domestic purposes) and iron ore, hydrocarbon oils, salt brine, natural gas and other minerals in, upon or under the said tract of land therein excepted, with the exclusive right to said plaintiffs and those claiming under them for right of way for tram, rail or wagon roads through said land so excepted, and to dig for and mine coal, iron ore, bore for oil and natural gas etc. The instrument so states its purpose. The plaintiffs were well known or easily ascertainable, and there can be no question as to the parties to the instrument nor the subject-matter or matters of the disclaimer.

[3] The consideration for this disclaimer was, as the instrument recites on its face, the pendency of the suits, the fact that the makers were in possession of the lands sued for, their desire to have settled any and all conflicting claims to the lands so occupied by them, and to be relieved from all litigation in relation thereto, and from liability for costs. Certainly these were sufficient considerations for the deed or instrument of disclaimer. It is conceded that if this instrument was genuine, and had been filed in the ejectment suits, and judgment taken in favor of the plaintiffs therein, such judgment would have worked a complete estoppel as to claimants or any one holding under them; but the contention of counsel is that this was not done; that no judgment was taken; and the paper not being in form a deed, and containing no words of bargain or sale, or grant or other operative words, there is no manifest intent in the instrument to pass any title.

[4] We need not travel outside of our own decisions for a statement of the well settled rules of construction, namely, that effect must be given to the intent of the parties to an instrument, when it is plainly and clearly expressed, or can be settled or ascertained from the instrument, and is not repugnant to any rule of law, and that technical words or form of the instrument are not essential to the validity or effectiveness of the instrument, where the intent is so manifested; and that technical words of legal import, where employed, must always yield to such

manifest intent of the parties. *Parsons v. Balto. B. & L. Ass'n*, 44 W. Va. 335, 29 S. E. 999, 67 Am. St. Rep. 769; *Crookshanks v. Ransbarger*, 80 W. Va. 21, 92 S. E. 78; 18 *Corpus Juris*, p. 170; *American Emigrant Co. v. Clark*, 62 Iowa, 182, 17 N. W. 483. In the recent case of *T. J. Woodall v. Clark et al.*, Trustees, 254 Fed. 526, 166 O. C. A. 84, the Circuit Court of Appeals for this circuit, affirming Judge Keller, of the District Court, held the instrument there involved, practically the same as the one we have under consideration here, to be in effect a quitclaim deed. And again, in *Miller v. Estabrook et al.* (C. C. A.) 273 Fed. 143, the same court held a like instrument to be in effect a quitclaim deed. And when we read and consider the whole instrument and all its parts, as we are reminded by counsel that we must, there is nothing to be found there to manifest any intent other than to quitclaim to the plaintiffs in the pending ejectment suits all right, title and interest in and to all coal (except, etc.), and iron ore, hydrocarbon oils, salt brine, natural gas and all other minerals in, upon and under said tracts of land, with the exclusive right etc., as there described. These were interests severable from the rest of the land, and as held in *Freudenberger Oil Co. v. Simmons et al.*, 75 W. Va. 337, 83 S. E. 995, Ann. Cas. 1918A. 873, were the proper subjects of grant or exceptions in a deed.

[5] It is contended, however, that there are no grantees named in the instrument, and that for this reason the instrument lacks an essential element in order to pass title. But this argument was met and decided adversely to the contention of counsel in the two federal cases cited. It is true, the persons to whom the disclaimers were made are not specifically named in that part of the instrument, but the plaintiffs in the ejectment suits are named or recited in the previous part thereof; and the rights and interests disclaimed, are, by the very language of the instrument, "with the exclusive right to the said plaintiffs and those claiming under them for rights of way for tram, rail and wagon roads through said lands so excepted." These words taken in connection with those following, providing that, "plaintiffs in either of said actions may take judgment against them in ejectment for the interests by them herein disclaimed," etc., removed all doubt as to the grantees intended, and sufficiently describes them. In *1 Devlin, on Deeds*, § 184, it is said:

"The fact that a grantee is not described by name will not affect the validity of a deed, if

the designation or description be sufficient to distinguish the person intended from the rest of the world."

On this subject we also refer to *American Emigrant Co. v. Clark*, supra.

[6] The argument is also advanced that the instrument is executory only, and not having been carried into judgment, as the plaintiffs were authorized to do, the title never passed. That was the right of plaintiffs in the ejectment suits; but as to the defendants nothing remained to be done on their part. As to them the instrument was fully executed. And being executed under seal, and delivered, the grantors were thereby forever estopped by the deed from asserting any right, title or interest in the several interests in the land so granted or quitclaimed. One may be estopped to deny the truth of facts agreed upon and settled by force of entering into the contract, and arising from acts done under or in performance thereof. 21 *Corpus Juris*, 1110; *Headley v. Hoopen-garner*, 60 W. Va. 626, 55 S. E. 744. In *Dickerson v. Colgrove*, 100 U. S. 578, 25 L. Ed. 618, an owner of land was held to be estopped as against a purchaser by a letter which he wrote to the vendor and which was shown to the purchaser. And in *Summerfield v. White*, 54 W. Va. 311, 46 S. E. 154, it was distinctly held that one claiming under another so bound by an estoppel is himself bound thereby. In this case the plaintiffs are bound thereby, if not by actual knowledge, by force of the recorded instrument. Section 11, chapter 72, of the Code (section 3790) provides:

"And all deeds heretofore made, whether by officers, agents, commissioners, or individuals, shall be valid and effectual, and bind the parties thereto and the persons whose estates and interests are thereby conveyed, notwithstanding any defects, or informality therein, in the same manner and to the same extent, as if the same had been in due and legal form, if it sufficiently appear by the contents of the deed what is intended."

Having held the instrument sufficiently formal, and indicating the interests of the parties, it was a recordable instrument, and being recorded was notice to the plaintiffs as purchasers, of the rights of appellants.

Our conclusion, therefore, is to reverse the decree, and to dismiss plaintiffs' bill and amended and supplemental bills, and that appellant recover of the plaintiffs its costs here incurred and in the court below, and it will be so ordered.

(182 N. C. 528)

NASH et al. v. SHUTE. (No. 418.)

(Supreme Court of North Carolina. Nov. 23, 1921.)

1. Judgment ¶719—Conclusive as to all matters within scope of pleadings.

A judgment by a court having jurisdiction of the cause and the parties will estop the parties and their privies as to all issuable matters directly presented by the pleadings, and also as to all matters within the scope of the pleadings which were material and relevant and were in fact investigated and determined.

2. Boundaries ¶51—Judgment in boundary proceedings cannot determine title.

In processioning proceeding, the clerk, in view of C. S. § 362, which provides that occupation constitutes sufficient ownership for the purposes thereof, has no jurisdiction to settle questions of title.

3. Boundaries ¶52(3)—Determination not conclusive as to title.

A judgment rendered by the clerk in a processioning proceeding is not conclusive on the parties on any question of title.

4. Boundaries ¶52(3)—Finding of ownership not conclusive against easement.

Even if the finding in a processioning proceeding that one of the parties was the owner of the premises in dispute was conclusive on the issue of ownership, it would not be conclusive that such ownership was unincumbered, and therefore would not preclude a claim by the adjoining owner of an easement by prescription to have his eaves project over the land.

Exceptions and Appeal from Superior Court, Union County; Ray, Judge.

Civil action by H. G. Nash and others against J. T. Shute. Judgment for plaintiffs, and defendant excepts and appeals. Error.

Plaintiffs, claiming ownership of a lot in city of Monroe abutting on Hayne street, institute this action alleging that defendant's, owner of a lot to south of plaintiffs', has built a brick opera house and post office thereon, which, in the eaves and other incidents above the surface, wrongfully project over plaintiffs' line, causing water from defendant's building to fall on plaintiffs' said lot and otherwise interfering with plaintiffs' rightful enjoyment of their property, and the prayer is for a mandatory injunction requiring defendant to remove the eaves and other projections, to restrain the trespass and nuisance thereby caused, and for general relief.

Defendant answers, admitting plaintiffs' ownership of the lot as claimed, and alleging, in effect, a prescriptive right to maintain said projections and the effects of same, etc., by open and adverse user for more than

20 years next before action brought. On the hearing and in support of their position, plaintiffs offered in evidence the record in proceeding before the clerk to establish the line between the two lots under Consolidated Statutes, c. 9, § 361 et seq., in which said proceedings plaintiffs alleged ownership of present lot: that defendant owned the lot just adjoining on the south, and defendant claimed the true dividing line was as much as five feet in and upon the lot as claimed by plaintiffs, and beyond the brick buildings which defendant had constructed upon his property.

Defendant answered, admitting plaintiffs' ownership as claimed, alleged that defendant had never claimed the true line to be five feet north of defendant's buildings, but admitted that the true dividing line was as plaintiffs claimed, and on these admissions appearing in defendant's answer the clerk entered the following judgment:

"This cause coming on to be heard before the undersigned clerk of superior court of Union county, N. C., upon the verified pleadings filed in the cause, and it appearing to the court that the defendant admits the location of the lines claimed by plaintiffs to be at the places where plaintiffs contend that they are, and that there are no issues either of fact or law to be decided by a court and jury:

"Now, therefore, upon motion of plaintiffs, it is ordered, adjudged, and decreed that the true dividing line between the lot of plaintiffs and the lot of the defendant J. T. Shute is a line commencing at the northwest corner of J. T. Shute's brick opera house building on the eastern boundary of Hayne street and running thence with the northern wall of said brick opera house building and with the old post office building of J. T. Shute about N. 87° E. 180 feet, more or less, to Beasley street, the northeast corner of said J. T. Shute's post office building; and it is further ordered, adjudged, and decreed that the true dividing line between the lot of plaintiffs and the lot of defendant S. B. Hart is a line commencing at a point on the eastern boundary of Hayne street 30 feet north of the northwest corner of the said J. T. Shute's brick opera house building and running thence parallel with the dividing line between the lot of plaintiffs and the lot of the defendant J. T. Shute to Beasley street; and the cost of this action be divided between the plaintiffs and the defendant J. T. Shute.

"This the 6th day of November, 1919.

"R. W. Lemmond, C. S. C."

The record was admitted by defendant, and the court, being of opinion that defendant was estopped by the proceedings and judgment before the clerk from maintaining any claim for an easement or other right in plaintiff's property, judgment was entered substantially as claimed by plaintiff, and defendant excepted and appealed.

Stack, Parker & Craig, of Monroe, for plaintiffs.

Vann & Millikin, of Monroe, for defendant.

HOKE, J. [1] In *Coltrane v. Laughlin*, 157 N. C. 282, 72 S. E. 961, it was held, in effect, that—

"When a court having jurisdiction of the cause and the parties" enters judgment therein, purporting to determine the controversy, the judgment will estop "the parties and their privies as to all issuable matters" directly presented by the pleadings and "though not issuable in a technical sense," it will conclude, "among other things, as to all matters within the scope of the pleadings, which are material and relevant and were in fact investigated and determined."

And this statement of the principle is in accord with numerous decisions where the subject has been directly considered. *Holloway v. Durham*, 176 N. C. 550, 97 S. E. 486; *Propst v. Caldwell*, 172 N. C. 594, 90 S. E. 757; *Cropsey v. Markham*, 171 N. C. 44, 47 S. E. 950; *Gillam v. Edmonson*, 154 N. C. 127, 69 S. E. 924; *Tyler v. Capeheart*, 125 N. C. 64, 34 S. E. 108; *Jordan v. Farthing*, 117 N. C. 188, 23 S. E. 244.

[2] The record relied upon by plaintiff as an estoppel in the present case is a proceedings before the clerk, and terminated before him, to settle the location of a disputed boundary line under the provisions of chapter 9 of the Consolidated Statutes. Proceeding under this statute, the court is bound by its limitations and restrictions, *Proctor v. Commissioners*, 108 S. E. 360, at the present term, and the law confers on the clerk no jurisdiction to settle questions of title. He can only authoritatively determine the location of a disputed line, and very properly this is all that his judgment professes to decide:

"It is ordered and decreed that the true dividing line between the lot of plaintiffs and the lot of defendant J. T. Shute is a line commencing at the northwest corner of J. T. Shute's brick opera house building on the eastern boundary of Hayne street, and running thence with the northern wall of said brick opera house building and with the old post office building about N. 87° E. 180 feet, more or less, to Beasley street, the northeast corner of said J. T. Shute's post office building."

[3] The statute itself provides in section 362:

"That the occupation of land constitutes sufficient ownership for the purposes of this chapter."

The judgment of the clerk only undertook to determine the location of the surface line between the parties, and did not purport to settle the extent or character of the proprietary interests of the owners or claimants on either side. Not only were these matters

not investigated or determined in any hearing before him, but the clerk, as stated, was without jurisdiction over them, and the parties are therefore not concluded by his judgment in respect to them. The decisions which were cited by counsel as upholding the claim of an estoppel by judgment were cases where, the issue of title being raised in the pleadings, the cause was transferred to the superior court, and under the statute applicable became in effect an action to determine the title, etc. That court, having general jurisdiction, could enter a judgment concluding the parties as to the questions presented by the pleadings. *Hilliard v. Abernethy*, 171 N. C. 644, 88 S. E. 865; *Maultsby v. Braddy*, 171 N. C. 300, 88 S. E. 423; *Woody v. Fountain*, 143 N. C. 66, 55 S. E. 425.

There is nothing in *Whitaker v. Garren*, 167 N. C. 658, 83 S. E. 759, that militates against this ruling. In that case the trial judge, under several decisions construing a former statute, had held that in a subsequent suit between the parties to try out the question of title a proceedings under the statute the clerk to settle a disputed line could be allowed no effect whatever, and could not be received in evidence. The court in *Whitaker v. Garren* only held that, under the statute now prevailing, "the action of the clerk in a proceedings to settle the line was admissible as to the location of the line," but it was not held that the judgment of the clerk in a proceedings which terminated before him could work an estoppel on questions of title.

[4] Apart from this, in a proceedings of this character a finding on the question of ownership does not necessarily signify the holder of an unincumbered title. A recognized definition of easement is "a liberty, privilege, without profit, in the land of another, existent distinct from the ownership of the soil," and, unless it should appear from the issue and evidence pertinent that a full and incumbered title was the question determined, such a finding would not of itself necessarily work an estoppel as to the existence of an outstanding easement in the property. *Stokes v. Maxson*, 113 Iowa, 122, 84 N. W. 949, 86 Am. St. Rep. 367; *Burr v. Lamaster*, 30 Neb. 688, 46 N. W. 1015, 9 L. R. A. 637, 27 Am. St. Rep. 428; 9 R. C. L. pp. 735, 736.

On the record we are of opinion that the proceedings and judgment of the clerk as to correct placing of a surface line does not work an estoppel on defendant as to the easement claimed by him, and the cause must be remanded, that the issues arising on the pleadings may be properly determined.

Error.

(182 N. C. 543)

McKAUGHAN v. MERCHANTS' BANK & TRUST CO. (No. 359.)

(Supreme Court of North Carolina. Nov. 30, 1921.)

1. Banks and banking — 148(2)—Liable for payment of forged indorsement not induced by negligence.

A bank is liable for the payment of a check on a forged indorsement, unless the drawer was guilty of some negligence which caused the bank to make the payment.

2. Banks and banking — 140(2)—Liable for payment on unauthorized indorsement of payee's name.

A bank is liable for paying a check drawn to the order of one whose name was signed to a forged trust deed upon the indorsement of the payee's name by a customer known to the bank, who was unauthorized to make such indorsement.

3. Banks and banking — 140(2)—Amount received by maker credited on bank's payment of check on unauthorized indorsement.

Where a creditor gave to his debtor a check payable to the order of the debtor's sister in reliance on a forged deed of trust covering the sister's property, which check was cashed by a bank on the unauthorized indorsement of his sister's name by the debtor, and the amount of the debt paid to the creditor, the payment to the creditor is to be deducted from the amount of the check, which he is entitled to recover from the bank, even though he had lost the security for the original debt, since such loss was occasioned by his reliance on the forged deed of trust, and not by the bank's payment on the unauthorized indorsement.

Appeal from Superior Court, Forsyth County; Webb, Judge.

Action by L. C. McKaughan against Merchants' Bank & Trust Company. Judgment for plaintiff for a part only of the amount claimed by him, and both parties appeal. No error.

The defendant bank paid and charged to plaintiff's account a check with an unauthorized indorsement. The plaintiff was a tender of money, and one W. B. Byerly being indebted to him in the sum of \$1,000, with interest, and the debt being past due, applied to the plaintiff for an additional loan, out of which the old loan was to be taken up. The new loan was to be \$3,000, out of which Byerly was to pay the plaintiff the old loan, amounting with interest to \$1,065.84.

Byerly stated to plaintiff that he would give as security a deed of trust on 10 acres of land belonging to his sister Adella Byerly. The plaintiff had the papers drawn and delivered them to Byerly for execution. Byerly brought them back with their due execution certified by a notary public, whereupon the plaintiff made out a check payable to Adella

J. Byerly, whose name purported to be signed to the deed in trust, for \$2,848.15, having deducted from the loan certain fees and costs, and gave the said check to W. B. Byerly to whom the loan had been made.

W. B. Byerly occupied offices across the hall from the plaintiff, and was associated in the real estate business with one Sid Venable who had been in jail about a real estate transaction. There was evidence that Venable came over to the plaintiff to get the check and was present in plaintiff's office when the check was drawn and was handed to W. B. Byerly. The plaintiff's partner, H. O. Sapp, lived near W. B. Byerly and his sister, Adella J. Byerly.

W. B. Byerly presented the check to bank, where he had long had an account, indorsed "Adella J. Byerly, by W. B. Byerly." The proceeds of the check (\$2,848.15) were placed to the credit of W. B. Byerly on August 5, 1919, and were subsequently drawn out on his order. On August 6, 1921, a check for \$1,065.85 from W. B. Byerly back to plaintiff was deposited with the bank by plaintiff and paid. At no time did Adella Byerly apply to plaintiff for a loan or come to his office and there was no communication between them, although she lived only a short distance. The loan was to W. B. Byerly and the security he offered of a mortgage on his sister's property was a forgery and void.

Adella Byerly testified that she never authorized W. B. Byerly to sign any papers or indorse any checks for her, and that the signature on the check "Adella J. Byerly" was not written by her, nor authorized by her; that she knew nothing about it, and did not execute the deed in trust in question; that her name is Adella L. Byerly, but that she usually drops the L; that neither the deed in trust on the land nor the check was signed by her or by her authority or with her knowledge. The notary public who took acknowledgment states that Adella Byerly is not the person who signed and acknowledged the deed in trust before him, and he is of the opinion that the woman who signed and acknowledged the deed in trust was the wife of W. B. Byerly. Thomas Maslin, president of the defendant bank, testified that on August 5, 1919, before this check of \$2,848.15 was put to the credit of W. B. Byerly he had a balance to his credit of 13 cents, and that out of this deposit, check for \$1,065.84 was paid and charged to W. B. Byerly and was credited to the plaintiff.

The court instructed the jury that if they believed the evidence they should answer "No" to the second issue, "Did the negligence of the plaintiff cause said payment to be made by the plaintiff bank as alleged in the answer"? To this instruction the defendant excepted. There was no contest that the de-

defendant paid and charged to the plaintiff's account the check described in the complaint, upon the unauthorized indorsement of the payee; that the plaintiff was not indebted to the drawee of said check at the time it was issued, and that the drawee of said check (Adella Byerly) had no information of its being drawn; that the plaintiff, the drawer of said check, received \$1,065.84 out of proceeds of said check, and the court so instructed the jury, and also that, if they "believed all the evidence in the case, to answer the issue \$1,782.31, with interest from August 5, 1919."

The defendant excepts because of the instruction as above in regard to the second issue, and the plaintiff excepts because the amount of the payment, \$1,065.84, which he received from the bank out of the proceeds of the check, was deducted from the amount of his check paid by the bank under the instruction as to the fifth issue. Both parties appealed.

H. O. Sapp, Swink & Hutchins, and O. O. Efrd, all of Winston-Salem, for plaintiff.

J. E. Alexander, of Winston-Salem, for defendant.

CLARK, C. J. The plaintiff, having canceled the security he held for the \$1,065.84, contends that though he was paid by Byerly's check that sum out of the proceeds of the check which he handed to Byerly, he is entitled to recover the full amount of the check which he made payable to Adella Byerly, and which by an indorsement unauthorized by her was paid by the bank.

[1] A bank is liable for the payment of a check on a forged indorsement unless the drawer was guilty of some negligence which caused the bank to pay it.

"A bank is authorized to pay only to the person designated by the depositor. It cannot charge against the depositor's account an amount paid by it on a forged indorsement of the depositor's check unless such payment is properly attributable to the negligence or other fault of the depositor, or unless the money has actually reached the person whom the drawer intended should receive it, or the drawer himself." 7 C. J. § 414, p. 686.

In 2 Daniel's Neg. Instruments, it is said, as quoted in note 23 to 7 C. J. 678:

"Cases have arisen in which checks have been paid on forged indorsements made by the person to whom the drawer delivered the check, mistaking his identity for the one who is designated as payee; and, although it be a forgery of the name of the person whom the bank took him to be, it has been considered that the bank should be protected in paying the check because the drawer was in fault in the first instance, and the person who forged the instrument was the person to whom the drawer actually delivered the instrument."

We do not think this quotation, however, is in point. For there was no mistake as to

the person W. B. Byerly, to whom the check was paid, which was indorsed "Adella J. Byerly, by W. B. Byerly."

[2] We do not think these, however, and other similar authorities, have a bearing upon this question. The indorsement of the check to the bank was not forged by W. B. Byerly, who obtained the money thereon. The check was obtained from the plaintiff by the forgery of a mortgage purporting to be signed by Adella Byerly, and the check procured on such forgery was handed by the drawer to W. B. Byerly, but the check was made payable to Adella J. Byerly. Whether the plaintiff was negligent or not in making a check payable to Adella J. Byerly upon the faith of a forged mortgage purported to be executed by her, and acknowledged before a notary public who certified that Adella J. Byerly had signed the deed in trust is not the issue in this case.

The plain fact here is that the plaintiff gave a check, payable to Adella J. Byerly, and that check was paid by the bank, not upon her forged signature, but to W. B. Byerly, a depositor well known to the bank, who indorsed the check "Adella J. Byerly, by W. B. Byerly." It is therefore not the case of the payment of a check upon a forged indorsement, but upon a genuine indorsement made by W. B. Byerly and the defect is not a forgery, for there was none in this respect, but the bank negligently assumed that W. B. Byerly had authority to indorse the paper "Adella J. Byerly by W. B. Byerly." There was no negligence of the plaintiff shown to justify this negligence of the bank.

Upon the evidence the court properly directed the jury to answer all the issues in favor of the plaintiff except as to the fifth issue, as to which he directed the jury to credit the check with the amount, \$1,065.84, repaid to the plaintiff out of the proceeds of the plaintiff's check which had been credited to Byerly.

[3] The amount returned to the plaintiff came out of the proceeds of the check issued to Adella J. Byerly, and, inasmuch as the plaintiff had canceled the mortgage held by him against W. B. Byerly by reason of the forged instrument delivered to him, such cancellation, as between the plaintiff and W. B. Byerly, was a nullity, and his remedy as to so much of the proceeds (\$1,065.84) as was repaid to him is to be sought by reinstatement of his lien against Byerly; and if that has been lost by the sale of the property in the meantime to other parties, it is the plaintiff's loss.

As between the plaintiff and the bank the amount of the check paid by it on Byerly's unauthorized indorsement should be credited with the \$1,065.84 which was repaid to the plaintiff by Byerly out of the proceeds of the check, for this measures the loss which the

plaintiff has sustained by reason of the payment of the check upon the indorsement thereof by W. B. Byerly. The \$1,065.84, if lost, has been lost by plaintiff's acceptance of the forged security.

As to both appeals we find no error.

(152 Ga. 375)

MITCHELL v. STATE. (No. 2779.)

(Supreme Court of Georgia. Dec. 14, 1921.)

(Syllabus by the Court.)

1. Homicide ⚡127—Indictment for murder by poisoning not demurrable.

The court did not err in overruling the demurrer to the indictment.

2. Homicide ⚡166(12), 338(1)—Evidence of insurance paid defendant on life of other than deceased held erroneous and prejudicial.

One ground of the motion for a new trial assigns error on the admission, over timely objection, of the following evidence: "I suppose Dr. Mitchell has paid my company around \$50. We declined to pay this. We paid Dr. Mitchell \$500 when he lost his first wife." This testimony was objected to by the defendant's counsel upon the ground that the evidence in regard to insurance on his former wife, who is now dead, was not admissible, and could not in any way shed any light upon this homicide. Evidence had already been admitted tending to show that the accused was the beneficiary of insurance policies taken out on the life of his nephew, the deceased, Henry Sam Mitchell; and this was urged as a motive for the defendant to commit the crime. The evidence objected to in this ground of the motion, to the effect that the insurance company had paid the accused \$500 when he lost his first wife, was irrelevant and prejudicial, and the error requires the grant of a new trial.

3. Criminal law ⚡1064½—Ground of motion not unqualifiedly approved not considered.

Other grounds of the motion for a new trial were not unqualifiedly approved by the trial judge; therefore no ruling upon them will be made.

4. Criminal law ⚡1134(4)—Newly discovered evidence not considered, when judgment reversed on other ground.

Another ground of the motion for a new trial is based upon alleged newly discovered evidence. As the case is, for the reasons stated in the second headnote, to be remanded for a new trial, it is unnecessary to rule upon this ground.

5. Criminal law ⚡371(12), 419, 420(12), 442—Homicide ⚡166(12)—Insurance policies and applications admissible to show motive, and not inadmissible as hearsay tending to prove another crime or for want of execution.

Several grounds of the motion complain of the admission of documentary evidence, such

as life insurance policies, the applications therefor, and the like, the objection being that they were hearsay, irrelevant, and inadmissible, that such documentary evidence tended to charge the defendant with an independent crime other than that for which he was being tried, and that the execution of the documents had not been proved. These documents were admissible for the purpose of showing motive; and therefore the court did not err, as against the objections raised in admitting the same.

6. Homicide ⚡166(12)—Policies on deceased's life, payable to accused's relatives, admissible on question of motive.

Other grounds of the motion for a new trial complain of the admission of policies of insurance on the life of the deceased, Henry Sam Mitchell, the ground of objection being that the policies were payable, one to Ella Mitchell, and one to Marie Mitchell. It appears from the evidence that these two designated beneficiaries were relatives of the deceased and of the accused; and the evidence was not inadmissible for any of the reasons assigned.

7. Grounds of motion incomplete and indefinite.

Other grounds of the motion for a new trial are incomplete, or too indefinite to raise any question to be decided by this court.

8. Charge not erroneous.

The grounds of the motion assigning error on excerpts from the charge of the court are not meritorious, all of which have been settled by previous decisions of this court.

9. Criminal law ⚡698(1) — When evidence admitted subject to connection of defendant therewith, defendant must renew objection.

Where counsel objects to the admission of evidence, and the court neither finally admits nor rejects the same, but states to counsel, "Unless the defendant is in some way connected with it I will rule it out, but I will not rule it out now," it is the duty of objecting counsel to renew his objection or move to rule the testimony out; otherwise it will be presumed that the objection is waived.

10. Witnesses ⚡388(1)—Exclusion of statements of person who had not at the time testified, offered as foundation for impeachment, not error.

It was not error to exclude the sayings of a person who had not at the time testified as a witness in the case; the object of the testimony being to lay the foundation to impeach the witness. The legal method of laying the foundation for such impeachment is to first interrogate the person whose impeachment is sought, when he is sworn and placed on the stand as a witness; and therefore the court properly excluded sayings which at the time amounted only to hearsay evidence.

11. Criminal law ⚡419, 420(1), 921—Testimony of witness as to refusal of Bureau of War Risks to let original papers leave office held not hearsay as a whole nor ground for new trial.

One ground of the motion for a new trial complains that the court admitted, over timely

objection, the following testimony of a witness for the state: "My business is operative of the United States Secret Service. I am familiar with the rules and regulations of the Treasury Department in Washington in reference to keeping of file of certain papers. It is required by the Bureau of War Risks that all applications for insurance and the change of beneficiary, and affidavits in support of the insurance claim, that the original of those papers be kept and filed in the city of Washington in the United States Treasury Department; of course persons who are interested can go and see the originals, but they won't allow the original papers to go out of the office." This evidence is not shown to be harmful to the accused; and, as it was not, as a whole, subject to the objection that it was hearsay, this ground of the motion does not show cause for a new trial.

12. Criminal law — 867—Argument of counsel concerning effect of nonenforcement of law held not to require mistrial.

One ground of the motion complains that the court refused to declare a mistrial, on motion of defendant's counsel, because of the language used by the solicitor general in his concluding argument to the jury, movant alleging that "the solicitor general was arguing to the jury that the nonenforcement of the law would make human life as cheap here as in the jungles of Africa." The refusal to declare a mistrial because of the use of this language was not error.

13. Other grounds insufficient to require new trial.

The grounds of the motion for a new trial not mentioned above do not show cause for the grant of a new trial.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

M. C. Mitchell was convicted of murder, and he brings error. Reversed.

Dr. M. C. Mitchell, a negro practitioner of medicine, was convicted of the murder of his nephew, Henry S. Mitchell, and given a sentence of life imprisonment. The indictment charges that Dr. Mitchell prepared and administered and caused to be administered, internally to Henry S. Mitchell, arsenic or other poisons of like character, which produce death. The indictment was demurred to upon the grounds that it does not charge any offense; does not charge the time and place when the poison was alleged to have been administered; does not charge that the "other poisons of like character" were deadly and likely to produce death, or that the defendant administered these other poisons with intent to kill unlawfully and with malice aforethought; does not set out any amount of poison as having been administered, and does not with sufficient clearness allege the manner in which the poison was administered. Error is assigned on excep-

tion taken pendente lite to the overrulings of this demurrer. Error is also assigned upon the overruling of a motion for new trial.

The contention of the state was that the defendant had administered the poison which produced the death of Henry S. Mitchell, in order that he might realize some twenty-odd thousand dollars of insurance carried upon the life of Henry S. Mitchell, the policies covering which were payable to Dr. Mitchell or to some member of his family. The evidence introduced by the state tended to show that after the discharge of Henry S. Mitchell from the army he lived for some time the life of a vagrant in and around Montezuma, where the defendant was engaged in the practice of medicine and the conduct of a drug store; that during this time an examination by a physician revealed the fact that the deceased had syphilis in an advanced stage; that the beneficiary in a certificate of insurance carried by the deceased with the Bureau of War Risks was changed, and the same was made payable to the defendant; that with knowledge of the condition of the deceased the defendant procured the issuance of a number of insurance policies upon the life of the deceased, payable to himself or to members of his family; that in some instances the reports of the medical examination, purporting to have been filled in and signed by a physician formerly engaged with the defendant as a partner in the practice of medicine, were forgeries; that these forgeries were committed by the defendant; that premiums upon the policies were paid by the defendant, and, while remittances covering the claims under the policies were made payable to the beneficiaries named in the policies, the proceeds were collected by the defendant; and that the defendant had made an unsuccessful attempt to burn the deceased to death, and, having failed in that, resorted to the use of poison. In his statement the defendant explained that he had raised the deceased and cared for him as if he had been his own child; that the members of his family "had a lot of insurance"; that during the time the deceased was in the army he had three or four policies payable to his grandmother, the mother of the defendant; that the premiums on these policies were paid by the defendant and his mother; that defendant knew nothing of the taking of the certificate of war-risk insurance; that the change in beneficiary in that certificate was made voluntarily by the deceased, because of the ill health of defendant's mother, the original beneficiary; that the clothing of the deceased accidentally caught on fire, and the defendant extinguished the flames. The defendant claimed that the death was caused by the burning or

the inhalation of flames. The evidence discloses that the burning occurred on December 27, 1919, and that death followed on December 31, 1919. The body was embalmed, and, after having been buried for approximately a year, was exhumed. Experts who removed and examined the viscera testified that they contained traces of arsenic, showing that the deceased had taken a sufficient amount of the poison to have produced death, and that there were practically no evidences of injury from burning. A negro physician, who was called to attend the deceased immediately after the burning, testified that the injuries were only slight. A physician who treated the deceased for syphilis testified that quite awhile before the death of the deceased he had administered through the veins one dose only of "606." There was expert evidence to the effect that this remedy is a preparation of arsenic; that the doses are ordinarily given about one week apart, in order to allow for the elimination of the dose from the system; that one dose would in no event contain sufficient of the poison to produce death; and that only a very small amount, if any at all, would find its way into the alimentary canal.

John R. Cooper, W. O. Cooper, Jr., and W. A. McClellan, all of Macon, for plaintiff in error.

Chas. H. Garrett, Sol. Gen., and Martin & Martin, all of Macon, and Geo. M. Napier, Atty. Gen., and Seward M. Smith, Asst. Atty. Gen., for the State.

GILBERT, J. Judgment reversed. All the Justices concur.

(182 N. C. 493)

PILLEY, Com'r, v. SULLIVAN. (No. 30.)

(Supreme Court of North Carolina. Nov. 23, 1921.)

1. Perpetuities §6(1)—Restraint on alienation held void.

Where one devise of land was in fee simple and another was of an estate for life with remainder in the daughter of the tenants for life, a provision that the devisees should not sell or convey the land, but that it should descend by inheritance to their next of kin, and, if either or both die without heirs or intestate, that it should be equally divided among all the heirs of the testator's children, is void as repugnant to the estate devised, and in contravention of public policy.

2. Wills §439—Primary purpose in construing is to give effect to intention of testator.

The primary purpose in construing a will is to ascertain and give effect to the intention of the maker.

3. Wills §450, 461, 470, 471—Rules of construction stated.

In construing a will, the entire will should be considered, clauses apparently repugnant being reconciled, and effect given where possible to every clause and word, and sometimes the word "or" should be construed as meaning "and."

4. Wills §461, 506(4), 622 — Limitation of devise construed; "or;" "heirs;" "either or both."

Where a devise was to testator's son and his wife for life, with remainder to their daughter, and another devise was to his daughter with condition that the land should not be sold by any of the devisees, "but the same shall descend by inheritance to their next of kin, and if either or both should die without heirs or intestate, then it shall be equally devised among all my children's heirs, share and share alike," the word "or" between "heirs" and "intestate" should be construed as meaning "and," and the word "heirs" should be construed as meaning "children," while the words "either or both" in the clause "if either or both should die without heirs or intestate" cannot be construed as applying to testator's son and his wife, since the remainder after their life estate vests in their daughter.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Both; Either; Heirs; Or.]

Appeal from Superior Court, Beaufort County; Horton, Judge.

Submission of controversy without action between J. T. Pilley, Commissioner, and J. B. Sullivan. From a judgment directing plaintiff to deliver and defendant to accept a deed to land, defendant appeals. Reversed.

The statement of the agreed facts is as follows:

"(1) That J. T. Pilley was duly appointed as commissioner in a special proceeding in the superior court of Beaufort county, entitled, 'J. T. Pilley and Wife, Mattie E. Pilley, and Kathleen Lamm, by Next Friend, J. T. Pilley, and Sidney Lamm, her husband, ex parte,' and as such commissioner duly authorized and empowered to convey to J. B. Sullivan the tract of land known as the A. S. Pilley land, containing 100 acres more or less, the said proceeding being regular and sufficient to authorize conveyance of said land.

"(2) That the said land was devised by Alfred S. Pilley by his will, dated August, 1913, and recorded in Beaufort county, in Book of Wills No. 4, at page 36, the material parts of which said will are as follows:

"Third Item. I give and devise to my daughter, Harriet Chauncey, twenty-five acres of land to be divided off from the west end of my home tract.

"Fourth. I give and devise unto my son, Jno. T. Pilley and his wife, Mattie E. Pilley, a life estate in all my lands and tenements with such privileges as may be necessary for their convenience and comfort during their natural lives except the twenty-five acres above devised to my daughter, Harriet Chauncey.

"Fifth. I give and devise to my granddaughter, Kathleen Pilley, the above-mentioned land whereon I live after the death of her father and mother, John T. and Mattie E. Pilley, all except the 25 acres above devised to my daughter, Harriet.

"It is my will and desire, and it is hereby stipulated that the devisees of my land herein named shall not sell or convey the said land or any part thereof to any individual or incorporative company, but the same shall descend by inheritance to their next of kin, and if either or both should die without heirs or intestate, then it shall be equally divided among all my children's heirs, share and share alike."

"(3) It is agreed that said John T. Pilley and wife, Mattie E. Pilley, are now living, and Kathleen Pilley has married one Sidney Lamm and now has one living child.

"(4) That the special proceeding authorizing sale of said land required and directed that the proceeds therefrom should be invested in land in Greenville, N. C., the title of which should be held under the same terms and conditions as set out in said will; that the agreed consideration to be paid for the conveyance of said land by J. B. Sullivan was \$1,000.

"(5) That in the event that the court shall be of the opinion that the said Jno. T. Pilley and wife, Mattie E. Pilley, and the said Kathleen (Pilley) Lamm took a fee-simple estate under the provisions of said will, then the plaintiff is entitled to recover of the defendant the agreed consideration of the said conveyance of \$1,000 upon the delivery to the defendant of the deed making the conveyance of said land, but that, if under the said will the estate of said parties is less than the fee simple, or it be subject to be defeated by conditions therein stated, then the plaintiff shall not recover anything; that cost shall be taxed against the losing party."

His honor rendered judgment directing the plaintiff to deliver and the defendant to accept a deed to the land described. The defendant excepted and appealed.

A. W. Bailey, of Washington, N. C., for appellant.

Harry McMullan, of Washington, N. C., for appellee.

ADAMS, J. [1] The contention of the parties presents for determination the quantity of the estate embraced in Items 4 and 5 of the last will and testament of Alfred S. Pilley. The clause which purports to ingraft upon the devise an unlimited restraint on alienation is not only repugnant to the estate devised, but is in contravention of public policy, and therefore void. *Latimer v. Waddell*, 119 N. C. 370, 26 S. E. 122, 3 L. R. A. (N. S.) 668; *Wool v. Fleetwood*, 136 N. C. 461, 48 S. E. 785, 67 L. R. A. 444; *Christmas v. Winston*, 152 N. C. 48, 67 S. E. 58, 27 L. R. A. (N. S.) 1084; *Lee v. Oates*, 171 N. C. 717, 88 S. E. 889, Ann. Cas. 1917A, 514.

Lord Coke is credited with the observation that—

"Wills and the construction of them do more perplex a man than any other learning; and

to make a certain construction of them, this excedit jurisprudentum artem."

[2] Nevertheless the courts have established canons of construction which are designed as guides to the discovery of the testator's intent; for the primary purpose in construing a will is to ascertain and give effect to the intention of the maker.

[3] Accordingly, the entire will should be considered; clauses apparently repugnant should be reconciled; and effect given wherever possible to every clause and to every word. One of the arbitrary canons of construction sometimes requires that the word "or" be construed as meaning "and." 28 R. C. L. 204 et seq.; *Satterwaite v. Wilkinson*, 173 N. C. 38, 91 S. E. 599; *Ham v. Ham*, 168 N. C. 487, 84 S. E. 840, Ann. Cas. 1917C, 301. In *Dickenson v. Jordan*, 5 N. C. 380, the testator devised certain land to his grandson in fee, with the limitation that, if he died before he arrived at lawful age or without leaving issue, the land should go to his other grandson in fee. Judge Taylor said:

"According to a literal construction of the will, the occurrence of either event would vest the estate in John Spier; but it is evident that such was not the testator's intention, and this intention ought always to be effectuated, when it does not contravene the rules of law. He could not have intended that the issue of William Spier Stewart should be deprived of the estate, if their father died under age; for that would operate to take all from those who appear to have been the principal objects of his bounty; yet such would be the effect of a literal interpretation of the will. His intention seems to have been that the fee should remain absolute in William S. Stewart on the happening of either event, either his leaving issue or attaining to lawful age, or, in other words, that both contingencies, to wit, his dying under age and without leaving issue, should happen before the estate vested in John Spier. To give effect to this intention, it is necessary to construe the disjunctive 'or' copulatively; and there are various clear and direct authorities which place the power of the court to do this beyond all doubt." *Ham v. Ham*, supra, and cases cited.

An application of this principle requires that the word "or" be read "and" in the expression "without heirs or intestate."

[4] The testator evidently did not intend that the limitation over should take effect in case Kathleen, although leaving heirs, should die intestate. It is equally manifest that the word "heirs" in the expression referred to should be construed as meaning children. *Francks v. Whitaker*, 116 N. C. 518, 21 S. E. 175; *May v. Lewis*, 132 N. C. 115, 43 S. E. 550. The clause "but the same shall descend to their next of kin" should be interpreted not so much as directing the course of descent as indicating the testator's reason for the attempted restraint or alienation. The words "either or both" in the clause "if either or both should die without heirs or

intestate" cannot be construed as applying to John T. Pilley and Mattie E. Pilley, for the reason that they are only tenants for life, and upon the termination of their life estate, whether they die testate or intestate, the remainder will vest in the granddaughter, Kathleen Pilley. In this connection it will be noted that the limitation over is to "all my children's heirs, share and share alike." In point of legal interpretation the substance of the devise in items 4 and 5 is this:

"I give and devise unto my son, John T. Pilley and his wife, Mattie E. Pilley, an estate in all my lands and tenements, with such privileges as may be necessary for their convenience and comfort, during their natural lives, except the twenty-five acres devised to my daughter, Harriet Chauncey; and after their death I give and devise said land to my granddaughter, Kathleen Pilley, and if she should die intestate and without children, then said land shall be divided among all my children's heirs, share and share alike."

The testator gave to John Pilley and his wife a life estate with remainder in fee to Kathleen Pilley, defeasible in the event of her dying intestate and without children. The plaintiff therefore cannot convey an absolute fee to the defendant.

For the reasons given, the judgment is reversed.

Reversed

(182 N. C. 470)

STULTZ v. THOMAS et al. (No. 358.)

(Supreme Court of North Carolina. Nov. 23, 1921.)

1. Trial \S 165—Evidence considered most favorably for plaintiff.

On a motion to nonsuit, the evidence should be considered in its most favorable light for plaintiff.

2. Negligence \S 6—Violation of law negligence per se.

Failure to discharge an affirmative duty imposed by law constitutes negligence per se.

3. Negligence \S 136(25)—Proximate cause of injury for jury.

It is for the jury to say whether negligence in failing to discharge an affirmative duty imposed by law was the proximate cause of an injury.

4. Municipal corporations \S 809(2)—Established custom of other paving contractors no defense to action for injuries caused by violation of ordinance requiring proper guards, lights, etc.

In an action for injuries from falling over a rope barricade erected by defendant contractors around a newly laid concrete sidewalk, an established use or custom among men engaged in the same line of work cannot avail defendants as against the positive requirements

of an ordinance that excavators or others creating a dangerous condition on or near a street, alley, sidewalk, etc., place and maintain proper guard rails and signal lights or other warnings sufficient to warn the public and protect persons using reasonable care from injuries, for a breach of a legal duty comes within the very definition of negligence and is actionable if it be the proximate cause of an injury.

Appeal from Superior Court, Forsyth County; Webb, Judge.

Action by Christina Stultz against C. M. Thomas and others. Judgment for plaintiff, and defendants appeal. No error.

Civil action to recover damages for an alleged negligent injury to plaintiff by falling over a rope barricade which the defendants had erected around a newly laid concrete sidewalk in the city of Winston-Salem.

The defendants were engaged, under a contract with the city, in replacing an old sidewalk with a new concrete one in front of the premises occupied by the plaintiff's sister. The plaintiff, a woman of about 50 years of age, a seamstress by occupation, had rooms on the opposite side of the street, and took her meals at her sister's home.

The defendants' servants at about 6 o'clock in the evening of November 19, 1919, had completed the laying of the new concrete sidewalk in front of the residence of the plaintiff's sister, and erected barricades and placed red lanterns in the vicinity immediately before stopping work. They placed a plank about 12 inches wide from the gate to the curb across the new concrete for the protection of the new concrete in case persons should desire to enter or leave the premises. They erected a number of posts, three or four feet high, along the curb between the street and sidewalk, and tied a rope to the top of these posts to act as a barrier for the protection of the new concrete. A post was placed at each side of the plank at the curb so close together as only to leave room for a person to pass between, and the rope, according to the contentions of defendants, was permitted to hang down alongside the post, to pass under the plank, and ascend alongside the other post to its top; the rope hanging loosely under the plank, and the plank projecting several inches beyond the rope and the edge of the curb. According to the plaintiff's contentions, the rope was placed above the plank and was carelessly permitted to sag down to within a few inches of the plank, thus rendering it dangerous for pedestrians to pass over.

About 6 or 6:15 p. m., the plaintiff came to supper from the opposite side of the street and went into her sister's home, walking along this plank to do so. Twenty-five or thirty minutes later, the plaintiff, returning to her room, came out of the gate, walked across the plank, and tripped against some obstacle—she did not know what at the time

—which, on arising, she discovered to be the rope.

Upon issues submitted, the jury returned the following verdict:

"(1) Were the defendants independent contractors in doing the work referred to in the complaint, as alleged in the complaint? Answer: Yes.

"(2) Was the plaintiff injured by the negligence of the defendants, as alleged in the complaint? Answer: Yes.

"(3) Did the plaintiff of her own negligence contribute to her injury, as alleged in the answer? Answer: No.

"(4) What damage, if any, is the plaintiff entitled to recover? Answer: \$1,500."

From the judgment rendered on the verdict in favor of plaintiff, the defendants appealed.

Fred M. Parrish, Ray L. Deal, and Moser Shapiro, all of Winston-Salem, for appellants.

O. O. Efrid and Swink & Hutchins, all of Winston-Salem, and N. O. Petree, of Danbury, for appellee.

STACY, J. [1] Considering the evidence in its most favorable light for the plaintiff, the accepted position on a motion to nonsuit, we think his honor was correct in submitting the case to the jury.

Upon trial in the superior court, the defendants proposed to show, by several witnesses, the custom prevailing in Winston among other contractors, with respect to the precautions used by them in doing work of the same character in which the defendants were engaged. This evidence was excluded, upon objection by plaintiff, and defendants assign such ruling as error. The purpose in offering this evidence, as stated by counsel, was as follows:

"We propose to show by the witness that the custom and approved method of placing warnings and guards around newly laid sidewalks is to place ropes next to the street and place the same under the plank that leads from the street to the abutting landowners and place red lights at each end of the work, beginning and ending of the work on the streets, and it is further the custom to put the rope from a post under the plank as testified by these witnesses was done in this case, that that method was approved and in general use."

Section 106 of the Ordinances of the City of Winston-Salem provides:

"It shall be unlawful for any person, firm or corporation, to make any excavation or do any work which may create or cause a dangerous condition in or on or near any street, alley, sidewalk or public place of the city, without placing and maintaining proper guard rails and signal lights or other warnings, at, in or around the same, sufficient to warn the public of such excavation or work, and to protect all persons using reasonable care from injuries on account of same."

[2, 3] A failure to discharge an affirmative duty imposed by law has been held by us,

in a number of cases, to constitute an act of negligence per se (*Taylor v. Stewart*, 172 N. C. 203, 90 S. E. 134); and where such conduct, on the part of the defendant, has been shown or established, it is a question for the jury to say whether or not such negligence is the proximate cause of the plaintiff's injury. *Ridge v. High Point*, 176 N. C. 421, 97 S. E. 369; *Paul v. R. R.*, 170 N. C. 231, 87 S. E. 66, L. R. A. 1916B, 1079; *Fox v. Texas Co.*, 180 N. C. 543, 105 S. E. 437; *Stone v. Texas Co.*, 180 N. C. 546, 105 S. E. 425, 12 A. L. R. 1297, and cases there cited.

[4] We do not think that an established use or custom among men engaged in the same line of work can avail as against the positive requirements of the ordinance, or statute. In fact, a breach of a legal duty, or a duty imposed by law, comes within the very definition of negligence; and, if such be the proximate cause of an injury, it constitutes actionable negligence. *Drum v. Miller*, 135 N. C. 215, 47 S. E. 421, 65 L. R. A. 890, 102 Am. St. Rep. 528; *Larson v. Ring*, 43 Minn. 88, 44 N. W. 1078; *Malloy v. Walker*, 77 Mich. 448, 43 N. W. 1012, 6 L. R. A. 695.

In the *Malloy Case*, just cited, the Michigan statute imposed a penalty upon municipalities for failing to make their highways safe for travel. The defendant neglected to provide proper and safe barriers at a dangerous place. The court held that a general usage or custom as to placing rails or barriers along a highway embankment is of no importance in determining the liability of the municipality for failing to provide such barriers at a dangerous place. This is in perfect analogy with the case at bar.

We have found no sufficient reason for disturbing the verdict and judgment.

No error.

(182 N. C. 498)

GAITHER v. CHARLOTTE MOTOR CAR CO. (No. 410.)

(Supreme Court of North Carolina. Nov. 23, 1921.)

1. Contracts \S 127(4) — Courts disregard contract designating county for action thereon.

It is the general policy of the courts to disregard contractual provisions requiring actions thereon to be brought in a designated county, since such stipulations concern the remedy which is created and regulated by law, even though a party can waive the objection that the suit was not brought in the county designated by C. S. \S 463 et seq.

2. Contracts \S 127(4) — Contract fixing place of action thereon affects jurisdiction of other courts.

A contract providing that an action thereon can be brought only in designated county, even though such county is the residence of one of

the parties where the action might be brought under C. S. § 463 et seq., affects the jurisdiction of the courts of other counties under the statute and will not be enforced.

Appeal from Superior Court, Richmond County; Ray, Judge.

Action by W. W. Gaither against the Charlotte Motor Car Company. From a judgment denying defendant's motion to remove the cause to the county of its residence, defendant appeals. Affirmed.

The plaintiff is a resident of Richmond county, and the defendant a corporation engaged in business in Mecklenburg. The plaintiff and the defendant on January 26, 1920, entered into a written contract, by the terms of which the plaintiff, called the "dealer," was to sell Hupmobiles for the defendant, called the "distributor." The plaintiff deposited with the defendant \$250 which was to be returned upon plaintiff's giving up the agency. The contract was terminated January 1, 1921, and the plaintiff demanded the return of his money. In February, 1920, the plaintiff went to Chicago to assist the defendant in shipping cars, and remained there until the 1st day of April. The plaintiff alleged that the reasonable value of his services was \$343. He brought suit to recover these two sums from the defendant. When the cause came on for hearing, the defendant made a motion for the removal of the cause to Mecklenburg. The motion was denied, and the defendant excepted and appealed.

The basis of the defendant's motion is the following stipulation in the contract:

"In case of any disagreement between the distributor and the dealer any action that may be taken against the distributor shall be brought in the city of Charlotte."

C. H. Gover, of Charlotte, for appellant.

Fred W. Bynum, of Rockingham, for appellee.

ADAMS, J. The single question is whether this agreement is enforceable at the election of one party against the will of the other. The argument of the defendant's counsel rests upon the contention that venue, unlike jurisdiction, is in the nature of a personal privilege which may be waived by the parties, and that an antecedent agreement designating the place of trial is no more obnoxious to the provisions of the statute than is a waiver of the proper venue resulting from failure to object before the time of answering expires. The counsel insists that this proposition is particularly sound where the agreement, as in this case, designates as the place of trial a county in which one of the parties resides.

[1] At the outset we may say that the general policy of the courts is to disregard

contractual provisions to the effect that an action shall be brought either in a designated court or in a designated county to the exclusion of another court or another county in which the action by virtue of a statute might properly be maintained. Several reasons may be assigned in support of this policy. In the first place, stipulations of this kind concern the remedy, and the remedy is created and regulated by law. The regulation of venue is a matter within the discretion of the Legislature. At common law the place of trial was determined, not so much by the residence of the parties as by the nature of the action; but the common-law regulation has been modified by statute. Accordingly the counties in which actions of the various classes may be brought are distinctly defined. C. S. § 463 et seq. To permit parties to a contract to enforce a stipulation which purports definitely to fix the forum long before there is a cause of action would be to nullify the law and to substitute the will of the parties in its stead. It is true that an action may be tried in a county not designated by the statute unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county; but the failure of the defendant to object, after the summons has been served and the complaint filed, bears faint resemblance to an agreement made. It may be, months or years before, and induced perhaps by necessity.

"Any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented." *Paper Co. v. Paper Co.*, 223 Mass. 8, 111 N. E. 678, L. R. A. 1916D, 691.

[2] There is another objection. Certainly there is a difference between venue and jurisdiction. If venue signifies the place of trial, and jurisdiction the power, right, or authority of the court to hear and determine a cause, it is somewhat difficult to understand why the practical effect of the agreement in question, if enforced, would not be to deprive the superior court of Richmond of its jurisdiction—not its jurisdiction of other actions of similar character, but its jurisdiction of this particular action, its jurisdiction of a cause which it has the legal right to determine. The purpose of this agreement is to limit jurisdiction of the action to the courts of Mecklenburg county. But if jurisdiction can be limited to one county, it may be limited to any other county. Parties cannot, by contract made in advance, oust the jurisdiction of the courts.

We refer to some of the decisions. A leading case on the subject under discussion is *Nute v. Ins. Co.*, 6 Gray (Mass.) 174. Suit had been brought to recover on a policy of insurance, in which it was stipulated that

the assured might, within four months after the determination of the loss, institute his action "at a proper court in the county of Essex," where the defendant conducted its business. The assured within the four months prescribed brought suit in the county of Suffolk, and the court of common pleas held that the action could not be maintained. In granting a new trial, Chief Justice Shaw said:

"In cases recently determined, it has been held that a stipulation in a policy of insurance, or in a by-law constituting in legal effect a part of such policy, by way of condition to their liability, that no recovery shall be had unless a suit is commenced within a certain time limited, was a valid condition, and that, unless complied with, the plaintiffs were not entitled to recover. *Cray v. Hartford Fire Ins. Co.*, 1 Blatchf. C. C. 280. *Wilson v. Aetna Ins. Co.*, 27 Verm. 99. In this case it is strenuously insisted that a stipulation, that an action shall be brought in a particular county, where by law it may be brought, is strictly analogous, and ought to be enforced as a condition precedent by a court which, without such stipulation and condition, would clearly have jurisdiction of the subject-matter and of the parties. * * * Upon the particular questions here presented, the court are of opinion that there is an obvious distinction between a stipulation by contract as to the time when a right of action shall accrue and when it shall cease, on the one hand; and as to the forum before which, and the proceedings by which an action shall be commenced and prosecuted. The one is a condition annexed to the acquisition and continuance of a legal right, and depends on contract and the acts of the parties; the other is a stipulation concerning the remedy, which is created and regulated by law. Perhaps it would not be easy or practicable to draw a line of distinction, precise and accurate enough to govern all these classes of cases, because the cases run so nearly into each other; but we think the general distinction is obvious.

"The time within which money shall be paid, land conveyed, a debt released, and the like, are all matters of contract, and depend on the will and act of the parties; but, in case of breach, the tribunal before which a remedy is to be sought, the means and processes by which it is to be conducted, affect the remedy, and are created and regulated by law. The stipulation, that a contracting party shall not be liable to pay money, or perform any other collateral act, before a certain time, is a regulation of the right, too familiar to require illustration; a stipulation, that his obligation shall cease if payment or other performance is

not demanded before a certain time, seems equally a matter affecting the right. A stipulation, that an action shall not be brought after a certain day or the happening of a certain event, although, in words, it may seem to be a contract respecting the remedy, yet it is so in words only; in legal effect, it is a stipulation that a right shall cease and determine if not pursued in a particular way within a limited time, and then it is a fit subject for contract, affecting the right created by it.

"But the remedy does not depend on contract, but upon law, generally the *lex fori*, regardless of the *lex loci contractus*, which regulates the construction and legal effect of the contract."

Hall v. Ins. Co., 6 Gray (Mass.) 185; *Amesbury v. Ins. Co.*, 6 Gray (Mass.) 596.

In *Matt v. Aid Association*, 81 Iowa, 135, 46 N. W. 857, 25 Am. St. Rep. 483, where action was brought in another county of the same state in which the county specified was situated, the court held that "a condition in the contract limiting the venue or place where the action shall be brought is invalid."

We have said that the agreement, if enforced, would empower the defendant, contrary to the will of the Legislature, to choose the courts in which its case should be tried, and thereby deprive of jurisdiction one of the courts authorized to hear the cause. The overwhelming weight of authority is against the exercise of such right. *Paper Co. v. Paper Co.*, supra; *Life Ass'n v. Woolen Mills*, 82 Fed. 508, 27 C. C. A. 212; *Bartlett v. Ins. Co.*, 46 Me. 500; *Shipping Co. v. Lehman* (D. C.) 39 Fed. 704, 5 L. R. A. 464. In *Rea's Appeal*, 13 Wkly. Notes Cas. (Pa.) 546, it was held that a clause in a trust agreement restricting the jurisdiction to the court of a certain county was entirely without effect, that jurisdiction was not thereby conferred upon the court of the county named, and that the jurisdiction of courts designated by law was not thereby ousted. We are not inadvertent to the fact there are cases apparently maintaining the contrary doctrine. Some of them are cited in the brief of the defendant's counsel; but upon examination it will be seen that the apparent lack of uniformity may generally be found in the difference between provisions that are statutory and those that are contractual. For the reasons given we hold that there is no error in the ruling of his honor. The judgment is therefore affirmed.

Affirmed.

(182 N. C. 477)

(109 S.E.)

In re ROSS' WILL. (No. 419.)

(Supreme Court of North Carolina. Nov. 23, 1921.)

1. Appeal and error \Leftrightarrow 1026—New trial not granted for technical error.

Verdicts and judgments will not be set aside and new trial granted for a technical or formal error, but to accomplish this result it must appear, not only that the ruling was erroneous, but that it amounted to a denial of some substantial right, and this rule applies especially where the trial was a long drawn out and vigorous contest.

2. Appeal and error \Leftrightarrow 901—Error must be affirmatively established.

The presumption on appeal is against error, and the appellant is required to make error appear plainly.

3. Wills \Leftrightarrow 53(2)—Capacity determined as of time of execution.

The mental capacity of testatrix to make a will is to be determined as of the date of its execution, or of its republication, as by a codicil, and not as of the date when the instructions for the preparation of the will were given, though, of course, the conduct of testatrix at the time such instructions were given is competent and relevant on the issue of capacity.

4. Wills \Leftrightarrow 330(1)—Instruction making competency at time of instructions for preparation test held erroneous.

A charge predicated the validity of the will on the condition of testatrix when she gave instructions for its preparation was erroneous as making capacity at that time, rather than at the date of execution, the test, where the evidence showed that several days elapsed between the giving of such instructions and the execution of the will and that testatrix was subject to intermittent spells of melancholia.

5. Trial \Leftrightarrow 253(3)—Instruction held erroneous as withdrawing issue of due execution.

Where the issue of due execution of a will was raised by caveators so that the propounders had the burden of affirmatively showing it, a portion of the charge, asserting that the paper was the will of testatrix if the jury found certain facts as to her mental capacity, was erroneous as taking from the jury the issue of due execution.

6. Wills \Leftrightarrow 330(1)—Instruction as to capacity of feeble-minded person held erroneous.

An instruction that, though the jury should find that testatrix was feeble-minded and alone unable to furnish details concerning her property and the persons to whom she wished to will it, but should further find that testatrix and her sister conferred together, and that the sister gave the necessary details in the presence of testatrix who assented thereto, they should find the writing to be the will of testatrix, was erroneous as to the quantum of mental capacity necessary to the making of a valid will, since testatrix had not the capacity to assent if she had not the capacity to instruct and to construe

the term "assent" as implying sufficient capacity would make the charge self-contradictory.

7. Wills \Leftrightarrow 50—Feeble-minded person incapable of furnishing names of beneficiary is incompetent.

A feebleness of mind to such an extent that testatrix was unable to furnish details concerning her property and the persons or institutions to whom she wished to will it renders her incapable of making a will.

Walker, J., dissenting in part.

Appeal from Superior Court, Union County; Ray, Judge.

Caveat to contest the will of Maggie A. Ross, deceased. From a judgment admitting the will to probate, the caveators appeal. New trial granted.

Alleged mental incapacity, undue influence, and want of due execution are the grounds upon which the caveat is based.

The jury returned the following verdict:

"Is the paper writing propounded, and every part thereof, and the codicil attached thereto, the last will and testament of Maggie Ross, deceased? Ans. Yes."

From the judgment rendered, the caveators appealed.

Walter Clark, Jr., of Charlotte, and Stack, Parker & Craig, of Monroe, for appellants.

Cansler & Cansler, of Charlotte, Vann & Milliken, of Monroe, Frank Armfield, of Concord, and John C. Sikes, W. O. Lemmond and W. B. Love, all of Monroe, for propounders.

STACY, J. [1, 2] The trial of this cause in the superior court was a long drawn out and vigorous contest. It required 15 days to try the case. Nearly 100 witnesses were examined, the record is voluminous, and we would not be disposed to grant a new trial for any technical or formal error. In fact, it is now the settled rule of appellate courts that verdicts and judgments will not be set aside for harmless error, or for mere error and no more. To accomplish this result, it must be made to appear, not only that the ruling complained of was erroneous, but that it was material and prejudicial, amounting to a denial of some substantial right. Our system of appeals, providing for a review of the trial court on questions of law, is founded upon sound public policy, and appellate courts will not encourage litigation by reversing judgments for slight error, or for stated objections, which could not have prejudiced the rights of appellant in any material way. *Burris v. Litaker*, 181 N. C. 376, 107 S. E. 129; *In re Edens' Will*, 109 S. E. 269, at the present term, and cases there cited. Again, error will not be presumed; it must be affirmatively established. The appellant is required to show error and he must make it

appear plainly, as the presumption is against him. In *re Smith's Will*, 163 N. C. 464, 79 S. E. 977; *Lumber Co. v. Buhmann*, 160 N. C. 385, 75 S. E. 1008; *Albertson v. Terry*, 108 N. C. 75, 12 S. E. 892. (See, also, 1 *Michie, Digest*, 695, and cases there cited under title "Burden of Showing Error.")

After carefully examining the record, with a full appreciation and observation of the above rules of procedure, we are unable to sustain the following portion of his honor's charge, which was given at the request of the propounders and to which the caveators have specifically excepted:

"Though the jury should find from the evidence that Miss Maggie Ross was feeble-minded and that alone and unassisted she could not have furnished her attorney, H. B. Adams, details concerning her property, nor the persons or institutions to whom she wished to will same, nor directions as to the disposition of said property, but should further find that Maggie Ross and Sallie Ross conferred together with their attorney concerning the execution of their wills, that Sallie Ross gave to said attorneys such details concerning the property of Maggie Ross and the persons or institutions to whom same was to be willed and directions as to the dispositions of said property, Maggie Ross being present hearing such details and directions given, and by words or acts assenting to said details, directions and dispositions, and should further find that Maggie Ross' attorney, H. B. Adams, deceased, faithfully embodied the information, directions and details so given him concerning said property, persons and institutions to whom it should be willed and said disposition of said property, then the court charges you that said paper writing would be the last will and testament of Maggie Ross and that said paper writing offered here for probate was formally executed by her according to the rules given you by the court."

There are several objections to this charge. In the first place, it fails to observe the difference in time between the giving of the instructions to the attorney and the execution of the will. It does not appear upon what date the Misses Ross conferred together with their attorney concerning the execution of their wills; but, in a letter written by said attorney on November 15, 1907, he uses the following sentence:

"It has required a little longer time to write your wills than I anticipated, however, I inclose them to you this evening by registered mail, so as to insure their safe delivery."

The wills were executed five days later, on November 20, 1907. It evidently required some time for their preparation, as the two are rather lengthy and bear evidence of careful drawing with each containing more than 40 separate items.

Ordinarily, the question of a few days might not be capitally important, but this would depend entirely upon the circumstances of the given case. It appears from the instant record that the testatrix was 68 years

of age at the time of the execution of her will; she was feeble-minded, in ill health, given to fits of weeping or crying, and was subject to spells of melancholia. Mrs. Harriett Taylor, one of her neighbors, testified:

"She would have these melancholy spells sometimes as often as three times a week, sometimes once a week, sometimes once every two or three weeks, and sometimes twice a week. She would sit for hours and not speak a word. * * * These spells would last a day or two sometimes. She would sit and twirl her thumbs, stroke her chin, and stare out of the window into space. * * * Her memory was not very good. * * * She could not carry on a connected conversation."

There was further evidence tending to show that the testatrix was crying at the time she signed the will. One of the subscribing witnesses gave the following testimony:

"I do not remember anything that Miss Maggie Ross said while we were there outside of her kind of boohoo that I positively recollect. She never said anything about the papers, nor asked me to witness them, to my recollection. At the time Miss Sallie said, 'These are our wills and we want you to witness them,' Miss Maggie was in the room, but I can't be positive as to just what position, but I know we were all in there together. I can't say I know what she heard."

[3, 4] The competency of the testatrix to make the will in question is to be determined as of the date of its execution, or of its republication, as by a codicil (*In re Journeay*, 162 N. Y. 611, 57 N. E. 1113), and not when instructions for its preparation were given (*Memorial Home v. Haeg*, 204 Ill. 422, 68 N. E. 568; *Mitchell v. Corpening*, 124 N. C. 472, 32 S. E. 798; 40 Cyc. 998; *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668). Of course, the conduct of the testatrix at the time of this conference is competent and relevant, as bearing upon the question of her testamentary capacity; but, notwithstanding her mental condition at that time, this would not necessarily establish her competency to execute the will at the subsequent date. 28 R. C. L. 93. The above special instruction, however, takes no note of this difference in time and really makes her capacity at the time of the conference, and not at the date of signing, the test of her ability to execute the will. This is not in keeping with the law as heretofore declared. *Claffey v. Ledwith*, 56 N. J. Eq. 333, 38 Atl. 433.

[5] Again, the giving of this special prayer was erroneous because it takes from the jury the question as to the due execution of the will. This was one of the grounds of the caveat, and the burden was on the propounders to establish the formal execution of the paper writing alleged to be the last will and testament of the said Maggie A. Ross. *Mayo v. Jones*, 78 N. C. 402.

(189 S.E.)

[8] But the overshadowing objection to this instruction is to the substance of the charge bearing upon the quantum of mind, or mental capacity, necessary to the making of a valid will. It will be observed that the basis of this prayer is not only that the testatrix could not alone and unassisted give her attorney details concerning her property, but that she could not inform him of the persons or institutions, to whom she wished to will the same. The practical effect of this instruction was to say that although Maggie Ross was incapable of making a will, yet, if she assented to what her sister did, such conduct on her part would meet the requirements of the law and amount to a valid testamentary disposition of her property. We do not think she could understandingly and competently assent to her sister's act when, at the time, she was wanting in the requisite mental capacity to act for herself. We are not advertent to any authority holding that one person may make a will for another, when the person for whom the will is to be made is wanting in testamentary capacity. In fact, the very statement of the proposition would seem to refute itself.

If the word "assent," appearing in its present context, is to be construed as giving such assent as the law requires, with sufficient capacity so to do, then the charge is self-contradictory; because the instruction starts with the assumption that the testatrix is without sufficient testamentary capacity. If she be without the necessary capacity of mind, then she could not legally assent to the act of another in disposing of her property by will. But in all events the instruction was prejudicial to the rights of caveators, and we must hold it for reversible error.

[7] If a woman who is so feeble-minded that, alone and unassisted, she cannot furnish her attorney "details concerning her property, nor the persons or institutions to whom she wished to will same, nor directions as to the disposition of said property," then it can hardly be said that she is capable of making a will, disposing of a large estate, under the test as laid down in this and other jurisdictions. *Bond v. Mfg. Co.*, 140 N. C. 381, 52 S. E. 929; *Sprinkle v. Wellborn*, 140 N. C. 181, 52 S. E. 666, 3 L. R. A. (N. S.) 174, 111 Am. St. Rep. 827; *Cameron v. Power Co.*, 138 N. C. 365, 50 S. E. 695, 107 Am. St. Rep. 532; *Bost v. Bost*, 87 N. C. 477; *Slaughter v. Heath*, 127 Ga. 747, 57 S. E. 69, 27 L. R. A. (N. S.) 1 and note.

In *Barnhardt v. Smith*, 86 N. C. 473, *Smith, C. J.*, gives the following terse and plain statement of the law, which has been cited with approval in many subsequent decisions:

"The rule laid down by Lord Coke, 'that the person must be able to understand what he is about,' approved in *Moffitt v. Witherspoon*, 32 N. C. 185, *Horne v. Horne*, 31 N. C. 99, and

more recently in *Paine v. Roberts*, 82 N. C. 451, as a general and practical rule for the guidance of juries, approximates an accurate statement of the law as to the degree of mental capacity required to make a valid disposition of property as the subject will admit."

See, also, *Lawrence v. Steel*, 66 N. C. 584, and *In re Broach's Will*, 172 N. C. 520, 90 S. E. 681, and cases there cited.

Finally, in the recent case of *In re Craven's Will*, 169 N. C. 561, 86 S. E. 587, Mr. Justice Walker, speaking for a unanimous court, clearly states the law, with citation of authorities, bearing upon the question of testamentary capacity, and the following quotation from the well-considered opinion delivered in that case would seem to be decisive of the question now before us:

"It follows that one who is incapable at the moment of comprehending the nature and extent of his property, the disposition to be made of it by testament, and the persons who are or should be provided for, is not of a sound, disposing mind. And if this mental condition be really shown to exist, the will must fail, even though he may have a glimmering knowledge that he is endeavoring to make a testamentary disposition of his property. It is here to be observed that some of the earlier cases have laid down the rule of testamentary capacity with much more subservience to and consideration for the purported expression of one's last wishes. They seem to have assumed that there must be a total want of understanding in order to render one intestate; that a court ought to refrain from measuring the capacity of a testator, if he have any at all; and that unless totally deprived of reason and non compos mentis, he is the lawful disposer of his own property, so that his will stands as a reason for his actions, harsh as may be its provisions. This ascribes altogether too great sanctity to the testamentary act of an individual as opposed to the law's own will set forth by the statutes and founded in common sense; and it is well that the best considered of our latest cases recede from so extreme and false a standard. Notwithstanding the modern rule to be favored, we should still, however, bear in mind that incapacity is more than weak capacity; and, as already intimated, mere feebleness of mind does not suffice to invalidate a will, if the testator acted freely and had sufficient mind to comprehend intelligently the nature and effect of the act he was performing, the estate he was undertaking to dispose of, and the relations he held to the various persons who might naturally expect to become the objects of his bounty.

"While it is true that it is not the duty of the court to strain after probate, nor in any case to grant it where grave doubts remain unremoved and great difficulties oppose themselves to so doing, neither is it the duty of the court to lean against probate, and impeach the will merely because it is made in old age or upon the sick bed, after the mind has lost a portion of its former vigor and has become weakened by age or disease. Weakness of memory, vacillation of purpose, credulity, vagueness of

thought, may all consist with adequate testamentary capacity, under favorable circumstances. And a comprehensive grasp of all the requisites of testamentary knowledge in one review appears unnecessary, provided the enfeebled testator understands in detail all that he is about, and chooses rationally between one disposition and another. Schouler on Wills (2d Ed.) 68 to 72, and notes. In the important case of *Delafield v. Parish*, 25 N. Y. 9, the court, after announcing the fairer rule of testamentary capacity above set forth, spoke of the testator's mind as acting without external pressure wherever it acted properly. 'The testator must,' said the court, 'have sufficient active memory to collect in his mind, without (insidious) prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and be able to form some rational judgment in regard to them'; and we may add, long enough to have been able to dictate or write out his wishes, and to execute the will with all due formalities."

There are other exceptions appearing on the record, worthy of consideration; but, as they are not likely to arise again, we deem it unnecessary to consider them now.

New trial.

WALKER, J. (concurring in the result). We have a well-established rule in appellate courts that, in reviewing a charge of the court, we should read it as one connected whole, and not distributively, allowing one part to correct any seeming error in another part of it, provided the two are not in deadly conflict. If we follow this rule, not more clearly stated than in *State v. Exum*, 138 N. C. 599, 50 S. E. 283, where human life was the issue, and examine the extract from the charge in this case in the light of other portions of it, we will find most assuredly that the law as to the mental capacity required to make a will was fully and accurately stated by the learned presiding judge, and the jury were especially instructed to consider the other parts of the charge to which we have referred in connection with what was to follow, and told that if, within the definition and explanation given to them by the court, the testator did not have sufficient mental capacity, at the time she executed the script, they should find against its validity. It is my opinion that there was no error in the selected instruction, when properly construed, but surely there was none if we read it in connection with those that preceded it. But, even if there was any error in the instruction of the presiding judge selected by the court as the ground for a new trial, there was a codicil to the will which, in law, amounted to a republication of it (*Watson v. Hinson*, 162 N. C. 72, 77 S. E. 1089, Ann. Cas. 1915A, 870; *Gulland v. Gulland*, 81 W. Va. 487, 94 S. E. 943; *Lawrence v. Burnett*, 109 S. C. 416, 96 S. E. 144), and there was no

such objection to the charge, as to the execution and validity of the codicil. For all that appears, she executed the same without any help or suggestion from others, and this cured any error in regard to the will, if there was any.

But I think there was an error otherwise in the charge, which was prejudicial to the caveators; that is, if we are to follow a decision of this court of recent date, on competency of evidence as to mental capacity, and especially with reference to declarations and conduct of the testator. While I question the correctness of that decision, and of others which may have followed it, it has the weight of authority, and precedent, until it is reversed or modified, and should have been heeded by the court below.

Therefore, I concur in the result, but dissent from the opinion so long as the new trial is based upon the error alleged in it.

(132 N. C. 429)

WOOSLEY v. COMMISSIONERS OF DAVIDSON COUNTY et al. (No. 400A.)

(Supreme Court of North Carolina. Nov. 16 1921.)

1. Schools and school districts ~~§~~42(2) — Board of education without power to superimpose high school district on existing districts.

Under C. S. §§ 5460, 5473, authorizing the county board of education to divide the county or any part into school districts, etc., the board, prior to Pub. Laws 1921, c. 179, was without authority to superimpose a high school district on existing districts not consolidated or abolished, but still functioning for other than high school purposes, as the statute refers to the establishment, etc., of districts in the sense of territorial divisions or geographical regions.

2. Statutes ~~§~~96(1)—Special law incorporating school districts and authorizing issuance of bonds ineffectual when district not lawfully created.

As the action of the board of education of Davidson county in establishing the Lexington high school district was beyond its power, the special acts of 1921 incorporating such district and authorizing it to issue bonds are inoperative, in view of Const. art. 2, § 29, forbidding the Legislature to pass any local, private, or special acts establishing or changing the line of school districts.

Appeal from Superior Court, Davidson County; Webb, Judge.

Controversy submitted without action on an agreed statement of facts between O. V. Woosley and the Commissioners of Davidson County and others. From a judgment granting an injunction, defendants appeal. Affirmed.

Controversy without action, heard upon an agreed statement of facts, the material and controlling parts of which are as follows:

"(1) That the board of education of Davidson county in meeting duly assembled on the 16th day of February, 1921, created or attempted to create a school district, to be known as the Lexington high school district, by adopting the following resolution by unanimous vote; all the commissioners present and voting:

"Be it resolved, by the board of education of Davidson county, that it is in the opinion of the said board for the best interest and for the educational advantage of the residents of the following named school districts, to wit, Dacotah district, Fowler district, Hargrove district, Greenwood district, Pilgrim district, Nakomis district, Southside district and Lexington district, that a high school district be created to comprise the said districts.

"Therefore, be it further resolved, that a high school district, to be known as the Lexington high school district, comprising the districts above set forth, be, and the same is hereby, created."

"That prior to February 16, 1921, no school district was in existence containing as a whole the territory now embraced in the alleged school district known as the Lexington high school district, and no other or further action than that set forth above has been taken by the county board of education in relation to the creation of said school district.

"(2) That the General Assembly of North Carolina, at its regular session of 1921, passed an act (not yet published in book form), entitled 'An act to authorize the Lexington high school district of Davidson county to issue bonds and to provide a tax levy for the payment thereof and a tax levy for maintenance,' which act was ratified on the 2d day of March, 1921.

"(3) That the General Assembly of North Carolina, at its regular session of 1921, passed an act (not yet published in book form), entitled 'An act incorporating the Lexington high school district,' which act was ratified on the 7th day of March, 1921. That said act created a governing body for the proper and more efficient management of the Lexington high school district, which governing body was known and designated as the Lexington high school commissioners and was constituted a body politic and corporate with the power to exercise the rights and privileges incident to corporations, and the said act made other provisions for the conduct of the high school in said district.

"(4) That pursuant to the first act above mentioned, ratified the 2d day of March, 1921, and as provided therein, the board of education of Davidson county on the 7th day of March, 1921, petitioned the board of county commissioners of Davidson county to call an election in the Lexington high school district for the purpose of submitting to the qualified voters of said district the question of the issuance of \$225,000 of bonds, to be used in erecting and equipping a school building in said district and the purchase of a site therefor, and the levy of an annual tax for the payment of principal and interest, and also for the purpose of submitting to the voters the question of the levy of an annual tax for the maintenance of the high school so erected.

"(5) That pursuant to the said petition, and under the authority conferred upon them by the said special act, the board of commissioners of Davidson county, at their regular meeting on the 7th day of March, 1921, granted the prayer of the board of education as set forth in said

petition, and ordered a new registration of voters, and ordered the said special election to be held in the Lexington high school district on the 19th day of April, 1921, which said election was duly carried.

"(6) That of the eight school districts mentioned and set forth in the resolution of the county board of education, passed February 16, 1921, as the districts which are to be comprised in the Lexington high school district, six are school districts created by the county board of education under the general law, and without any vote of the electors for such creation, and no tax is levied therein. In each of the said districts a school committee is in charge of the school properties therein. That one of said districts, to wit, Nakomis district, is a special tax school district and by vote of the electors thereof a local tax is levied for the maintenance of the school. That the Lexington district referred to in said resolution is not a school district in any sense save that the boundaries thereof are coterminous with the boundaries of the town of Lexington, the charter of which town vests the management of the schools therein in a special board of school trustees, and the town levies a tax therein for school purposes and for the payment of school bonds issued by the town for the school buildings.

"(7) That the board of education of Davidson county, in the resolution adopted February 16, 1921, did not attempt to consolidate the eight districts mentioned in the said resolution into one district and thereby wipe out and abolish the several then existing school districts, and no action has been taken by the county board of education or any other board to annul or repeal the creation of said constituent districts or to abolish the said committees having charge of the school property in said districts, and all of the same are continuing to function as if the Lexington high school district had not been created, and the school taxes have continued to be levied and collected in the said Nakomis district and in the town of Lexington, for the said county board of education attempted to create the Lexington high school district by overlapping or superimposing the said district on the eight districts comprised therein, and pursuant to the authority contained in the second act above mentioned, ratified March 7, 1921, has elected a board of commissioners for the said Lexington high school district, the members of which having qualified."

"(9) That is the declared intention of the board of education of Davidson county and the board of commissioners of Lexington high school district to erect a high school building and to maintain therein a high school for the attendance of pupils residing within the so-called Lexington high school district, who are being taught those subjects commonly called 'high school subjects' or studies, and pursuant to said declared purpose the board of commissioners of Davidson county, pursuant to the vote cast at said election, have authorized the issuance of the said \$225,000 of bonds, and are preparing to issue same, and are preparing to levy the tax for the payment of the principal and interest of said bonds, and are preparing to levy a tax for the maintenance of the said schools; and the said board of education of Davidson county, in accordance with the provisions of the said special act, are preparing to sell said bonds."

The plaintiff is a resident and taxpayer of Davidson county, living within and having property located in that section of the county which, for the purposes of this action, is designated as the Lexington high school district.

From a judgment continuing and making permanent the temporary restraining order, and holding that the board of education of Davidson county was without authority to create the Lexington high school district in the manner proposed and that the issuance of the bonds in question was without warrant of law, the defendants appealed.

J. L. Morehead, of Durham, for appellants.
Raper & Raper, of Lexington, for appellee.

STACY, J. It is conceded at the outset that the board of education and the commissioners of Davidson county have not proceeded under C. S. § 5511, for the establishment of a central high school, or high schools in a township, as provided by said section. It should also be noted that the resolution of the board of education, purporting to create the Lexington high school district, and the two special acts of the Legislature, relating thereto, were all passed prior to the enactment, on March 8, 1921, of chapter 179, Public Laws 1921, amending the public school law of the state. Hence the validity of the resolution and the special acts in question must be determined by the law as it existed at the time of their passage, there being no suggestion of a ratification by any subsequent legislation.

[1] The sections of the school law, chiefly relevant and bearing upon the questions now before us, are:

C. S. § 5469, which provides:

"The county board of education shall divide the townships, or the entire county or any part of the county, into convenient school districts, as compact in form as practicable. It shall consult the convenience and necessities of each race in settling the boundaries of the school district for each race."

And C. S. § 5473, which is in terms as follows:

"The county board of education is hereby authorized and empowered to redistrict the entire county or any part thereof and to consolidate school districts wherever and whenever in its judgment the redistricting or the consolidation of districts will better serve the educational interests of the township, or the county, or any part of the county."

It will be observed that these statutes, which were passed in obedience to article 9, § 3, of the Constitution, confer upon the several county boards of education authority (1) to divide the townships, or the entire county, or any part thereof, into convenient school districts (not to exceed the limit fixed by C. S. § 5472); and (2) to redistrict the entire county, or any part thereof, and to

consolidate school districts whenever and wherever such, in their judgment, will better serve the educational interest of the townships or of the county.

This grant of power from the Legislature, we apprehend, refers to the establishment, consolidation, etc., of districts in the sense of territorial divisions or geographical regions (*Howell v. Howell*, 151 N. C. 575, 66 S. E. 571; 18 C. J. 1292), and not in the sense of dividing or segregating pupils as distinguished from the land on which they live. "In its ordinary meaning the word 'district' is commonly and properly used to designate any one of the various divisions or subdivisions into which the state is divided for political or other purposes, and may refer either to a congressional, judicial, senatorial, representative, school or road district, depending always upon the connection in which it is used." *Olive v. State*, 11 Neb. 1, 13, 7 N. W. 444, 446.

Giving to the words of the statute their usual and customary meaning, we have found no authority for the establishment by the county board of education of such a district as the "Lexington high school district" (No. 7 agreed facts), which, to be more exact, might properly be termed a superdistrict, in that it is sought to be created by superimposing the same upon the eight districts comprised therein. An arrangement of this kind may be very desirable and helpful in the building up of an educational system for the state; but, as now advised, we do not think the Legislature had so declared its purpose and policy at the time of the attempted establishment of the district in question. Nor do we wish to be understood, by what is said here, as suggesting that probably such a district might be created under chapter 179, Public Laws 1921. This latter question is not before us, and any expression presently made would be obiter, and we make none.

[2] Holding, as we do, that the resolution of the board of education of Davidson county, passed on the 16th day of February, 1921, was insufficient to accomplish the desired purpose, and that the establishment of the proposed district was therefore ineffectual, it follows that the special acts of the Legislature, incorporating and authorizing said district to issue bonds, must be declared inoperative. *Ex nihilo nihil fit*.

There being no valid district in existence, the Legislature now is without authority itself to pass any local, private, or special act establishing or changing the lines of school districts. Const. art. 2, § 29; *Sechrist v. Com'rs*, 181 N. C. 511, 107 S. E. 508; *Trustees v. Trust Co.*, 181 N. C. 306, 107 S. E. 130.

The judgment of his honor permanently enjoining and perpetually restraining the defendant from issuing the bonds in question must be upheld upon the facts now appearing on the instant record.

Affirmed.

(182-N. C. 539)

SELWYN HOTEL CO. v. GRIFFIN et al.

(Supreme Court of North Carolina. Nov. 30, 1921.)

Appeal and error — 1126—Judgment affirmed on motion on ground that appeal was frivolous and for purposes of delay.

Where, defendants not having docketed a transcript on their appeal in a proceeding in summary ejectment, plaintiff filed a certified statement from the clerk, and affidavits showing that the case on appeal had not been settled and served within the time allowed, that defendants had no bona fide defense and had appealed for purposes of delay, and defendants in their answer simply asserted that they were not bound to bring up the appeal to that term and did not show that they had any bona fide defense, the judgment will be affirmed and the opinion certified down instanter on the ground that the appeal was frivolous and for delay.

Appeal from Superior Court, Mecklenburg County; Ray, Judge.

Proceeding in summary ejectment by the Selwyn Hotel Company against James P. Griffin and others, commenced before a justice of the peace and appealed to the superior court. From a judgment for plaintiff, defendants appeal. Affirmed on motion.

This was a proceeding in summary ejectment, begun before a justice of the peace and tried at September term, 1921. On November 11, 1921, the defendants not having docketed a transcript, the plaintiff filed a certified statement from the clerk, from which it appears that at the trial the jury, upon issues submitted, found that the plaintiff was entitled to possession of the premises; that the market rental value since 1921 was \$125 per month; that the judge rendered judgment in favor of the plaintiff for possession of the premises and \$125 per month rental from the 1st of January, 1921; that the defendant Charles H. Garmon appealed; that he had been allowed 15 days in which to serve case on appeal; that the term of court adjourned September 17, 1921; that the defendant did not serve his case on appeal within said 15 days, and thereafter on application to the judge he was allowed another 15 days to make up and serve case on appeal; and that at the expiration of said time he had not done so, and upon said record the plaintiff moved to docket and dismiss under Rule 17 (81 S. E. ix), and also because upon its face the appeal was frivolous.

Jake F. Newell, of Charlotte, for appellants.

H. C. Dockery and John M. Robinson, both of Charlotte, for appellee.

CLARK, C. J. In addition to the facts above set out, W. T. Wilson, an officer of the

plaintiff, the Selwyn Hotel Company, files an affidavit that the defendant C. H. Garmon and associates were occupying the barber shop in the Selwyn Hotel in Charlotte, N. C., under a three-year lease which expired December 31, 1920; that the said Selwyn Hotel Company duly leased said premises for the year 1921 to other parties for a monthly rental of \$150 per month; that the defendant C. H. Garmon led the plaintiff and the said lessees to believe that he would vacate the premises at the termination of the lease, but at the end of his lease he wrongfully and illegally refused to give up possession of said premises, and has wrongfully withheld the same to the serious damage and inconvenience to the plaintiff and the lessees since January 1, 1921; that the only defense which the said defendant has ever asserted was the failure of the plaintiff to give him notice of the termination of the lease, but that he has wrongfully and illegally held possession of said premises without any just cause or excuse, and that the appeal which he took from the justice of the peace to the superior court and the appeal which he took from the superior court to the Supreme Court were taken solely for purposes of delay, and that this delay is resulting in serious loss and inconvenience to the plaintiff.

This motion with affidavits and certificate was served on the attorney of the defendant November 9, 1921. The defendant answering the appeal simply asserts that he was not bound to bring up the appeal to this term of the court, and that he has been unable to get a stenographer to make a copy of the transcript; she being very busy.

It is apparent that this is purely an attempt to use the process of the court, which is intended to correct errors, for the purposes of delay, and that the appeal is entirely frivolous. It does not appear that there was any assertion of a bona fide defense either before the justice or in the superior court, nor is there any allegation of any defense in the answer to this motion.

In Barnes v. Saleeby, 177 N. C. 260, 98 S. E. 708, upon somewhat similar circumstances this court held:

"The plaintiff's motion to dismiss in this court should be allowed wherever it appears upon the record, as in this case, that no serious assignment of error is made. * * * Blount v. Jones, 175 N. C. 708; Ludwick v. Mining Co., 171 N. C. 61."

In Blount v. Jones, 175 N. C. 708, 95 S. E. 541, a case exactly in point, this court held:

"Appeals from the superior court as a matter of right must be taken bona fide for the purpose of reviewing alleged error, and when no serious assignment of error is made and it appears that the appeal is frivolous and for the purpose of delay, it will be dismissed on appellee's motion"

—citing *Ludwick v. Mining Co.*, 171 N. C. 61, 87 S. E. 949, in which this court held, Brown, J., delivering the opinion, that—

"While ordinarily an appeal lies to the Supreme from the superior court, as a matter of right, it is required that it must be bona fide for the purpose of reviewing some alleged error; and when from the record it appears that the appeal is frivolous and made solely for delay, it will, upon due notice to the appellant, be dismissed upon appellee's motion."

It not only appears upon the record sent up and by the affidavit in support of the motion to dismiss to be a frivolous appeal and from the answer that there is no bona fide defense, but it is not even alleged that the defense has given bond for payment of the judgment of the rent. But even if this had been done, though not alleged, still there is no allegation of a bona fide defense even suggested in the answer, and as the defendant has lost the right to have the case settled on appeal by not having done so within the prescribed time, to carry the case over to the spring term could only result in the appeal being dismissed at that time and the plaintiff would be wronged by being kept out of possession for several months more. The courts cannot allow their process to be thus abused.

Final judgment will be entered here affirming the judgment below, and this opinion will be certified down instant to the superior court of Mecklenburg (*Caldwell v. Wilson*, 121 N. C. 423, 424, 28 S. E. 363), and the plaintiff will be put in prompt possession of the premises. *Barnhill v. Thompson*, 122 N. C. 498, 29 S. E. 720, and other cases, are to the same purport.

Affirmed.

(182 N. C. 541)

HULIN v. WESTERN UNION TELEGRAPH CO. (No. 475.)

(Supreme Court of North Carolina. Nov. 30, 1921.)

Telegraphs and telephones §74(1)—Instruction and issue authorizing recovery on cause of action as to which nonsuit granted held error.

In an action for delay in delivery of two telegrams, where a nonsuit was granted as to the cause of action respecting one of the telegrams, it was error to submit the issue whether defendant negligently failed to transmit and deliver the telegrams, or either of them, and to charge that the jury should answer such issue "Yes" if plaintiff had satisfied them that defendant negligently failed to transmit the telegrams, or either of them.

Appeal from Superior Court, Randolph County; Bryson, Judge.

Action by J. W. Hulin against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

Civil action to recover damages for an alleged negligent failure to transmit and promptly deliver two telegrams, one announcing the serious illness and the other the death of plaintiff's mother.

The first message was sent from Star, N. C., at 1 p. m. on December 26, 1919, approximately an hour before the death of plaintiff's mother, and the second, or death, message, was sent from Troy, N. C., at 5:12 p. m. on the same day. This last message was taken "subject to delay," as the defendant had no telegraph office at Denton, N. C., the plaintiff's home. Both telegrams reached the plaintiff by mail about 5 p. m. on the following day.

The plaintiff had seen his mother on Thursday before Christmas and knew of her illness. She was about 90 years old, and her demise was not unexpected. Plaintiff lived between 20 and 25 miles from his mother's home; and, while he had no telephone in his house, nor she in hers, yet such communication was available.

At the close of plaintiff's evidence, his honor granted the defendant's motion for judgment as of nonsuit on the first cause of action, or the one growing out of the defendant's alleged negligent failure to deliver the first message within a reasonable time.

On the second cause of action, or the one based upon the defendant's alleged negligent failure to deliver the death message, as required by law, the jury returned the following verdict:

"(1) Did the defendant receive for transmission, and negligently fail to transmit and deliver, the telegrams mentioned in the complaint or either of them? A. Yes.

"(2) What damages, if any, is the plaintiff entitled to recover? A. \$1,250."

From a judgment on the verdict in favor of plaintiff, the defendant appealed.

J. A. Spence, of Ashboro, and Tillett & Guthrie, of Charlotte, for appellant.

Hammer & Moser, of Ashboro, for appellee.

STACY, J. The ruling of his honor in granting the defendant's motion for judgment as of nonsuit on the initial cause of action, or on the one growing out of the defendant's alleged negligent failure to deliver the first message within a reasonable time, is not before us for review, as the plaintiff has not appealed. But it would seem that this position is entirely correct, in so far as any substantial damages are concerned; for even if the telegram had been delivered without delay, the plaintiff could not possibly

thereafter have reached the bedside of his mother prior to her death. The question of a technical breach of duty, involving only nominal damages, is not presented for consideration. *Smith v. Telegraph Co.*, 167 N. C. 248, 83 S. E. 475, and cases there cited.

Notwithstanding the judgment of nonsuit on the initial cause of action, it will be observed that the issues submitted to the jury are not confined to the second cause of action, or to the one based upon the defendant's alleged negligent failure to transmit and deliver the death message in due time, or with reasonable dispatch. The first issue in terms refers to both of the telegrams or to either of them. Hence it does not conclusively appear, because the verdict does not necessarily mean, that the defendant was negligent with respect to the handling of the second, or death, message. The alternative wording of the issue is further intensified by the following portion of his honor's charge, to which the defendant has excepted, and the same is assigned as error:

"Has the plaintiff satisfied you from the evidence of its greater weight that the defendant received the messages spoken of, that it negligently failed to transmit them, or either of them? If the plaintiff has so satisfied you, answer the first issue 'Yes.'"

Having entered a judgment of nonsuit on the first cause of action, we think this instruction was erroneous, because it required an affirmative answer, though the jury may have found no negligence as alleged for the basis of the second cause of action. It may have been answered from the evidence bearing upon the transmission and delivery of the first message, or the one sent from Star.

For the error as indicated, the case will be remanded, to the end that there may be another trial, or a venire de novo.

New trial.

(182 N. C. 522)

In re JOHNSON'S WILL. (No. 103.)

(Supreme Court of North Carolina. Nov. 23, 1921.)

1. Executors and administrators §32(1)—Wills §221—Letters testamentary may be recalled if will is spurious.

A court, vested with power and jurisdiction to admit wills to probate, may, on motion and after due notice, set aside such proof in common form and recall the letters testamentary issued thereon, when it is shown that an invalid or spurious will has been imposed upon the court by reason of perjured testimony or other fraudulent means and practices effective in procuring the judgment.

2. Jury §16(8)—Matters of fact determined by court on motion to recall letters testamentary.

In proceeding to recall letters testamentary on ground that invalid or spurious will has

been imposed on the court by reason of perjured testimony or fraudulent means and practices effective in procuring the judgment, a jury trial is not allowed as of right, but the matters in dispute are considered and determined as questions of fact by the court before which the action is pending, or to which it may be properly carried by appeal.

3. Executors and administrators §32(1)—Petition to set aside letters testamentary not granted as matter of right.

Petition to set aside letters testamentary, on the ground that spurious will has been imposed upon the court by reason of perjured testimony or other fraudulent means and practices effective in procuring the judgment, is not granted as a matter of strict right, but, by analogy to the relief afforded in setting aside irregular judgments and orders, is referred to the sound legal discretion of the court, to be allowed only on full and satisfactory proof and on condition that the applicant has proceeded with proper diligence.

4. Limitation of actions §100(10)—Bill to set aside spurious will must be brought in 3 years after fraud discoverable.

A bill against devisee to set aside a will on the ground that it is spurious, and was imposed upon the court by perjured testimony, must be brought within three years from the time the fraud was known or should have been discovered in the exercise of ordinary diligence, under C. S. § 441, subd. 9.

In Caveat Proceedings.

5. Wills §111(3)—Testator may permit other person to sign.

It is not necessary to a valid written will that it be manually signed by the testator, and if his name is signed thereto by some one in his presence, and by his direction, or if such a signature is acknowledged by him as his signature to the instrument as his last will, it will suffice, under C. S. §§ 4131-4144.

6. Wills §260—Caveat 10 years after probate held not filed in time.

A caveat filed by one not under disability more than 10 years after probate of a will in common form was filed too late, under C. S. § 4158, where caveator did nothing to challenge or in any way question the validity of the will or probate thereof during such time.

Appeal from Superior Court, Halifax County; Kerr, Judge.

In the matter of the will of Betty V. Johnson, deceased. Petition by Dr. J. A. H. Edwards against the devisees to set aside the will, and petitioner also entered caveat to the will. From a judgment for devisees, petitioner appeals, and from a judgment establishing the will, the caveator appeals. Judgments affirmed.

From the record it appears that the last will and testament of Mrs. Betty V. Johnson, deceased, had been formally admitted to probate before the clerk of Halifax coun-

ty, acting as probate judge, on May 17, 1907, said will purporting to have been made and duly witnessed on June 1, 1906; that Dr. J. A. H. Edwards, a nephew of testatrix, had heretofore, in 1920, instituted an action in the superior court in the nature of a bill in equity against the devisees in said will to set aside the same and the probate thereof, on the ground of fraud and undue influence, etc.; that said cause had been dismissed on the ground that the plaintiff's remedy, if he had one, should be sought by direct proceedings before the clerk, where the probate was had. See case, *Edwards v. White*, reported in 180 N. C. p. 55, 103 S. E. 901. That opinion having been certified down, the plaintiff, in November, 1920, filed this petition before said clerk, acting as probate judge, alleging that the probate of said will had been procured by fraudulent and perjured testimony; that same had not been made of its purported date, but in 1907, when the alleged Mrs. Johnson, his aunt, had been taken to the hospital, and when she was mentally and physically unable to execute this or any other instrument affecting her property, and said will had been thus fraudulently imposed upon the court, and was in fact and truth a spurious will, etc. These allegations were all denied by the propounders, whereupon the petitioner demanded and moved that a jury be allowed on the facts and the cause be transferred to the superior court in term for that purpose. This motion was overruled, and petitioner excepted. Thereupon the parties offered full affidavits in support and resistance of the petition, and the clerk, having heard and considered the same, entered judgment as follows:

"The court is of opinion, and finds as a fact, that no fraud has been perpetrated upon the undersigned clerk at the time of the probate of said will, and the issuing of letters testamentary; that said last will and testament was duly probated as provided by law, as appears from such probate, and the undersigned finds as a fact that said paper writing is the last will and testament of the said Betty V. Johnson; that the said proceedings be dismissed and petitioner taxed with the costs."

On appeal this cause was again considered by his honor John H. Kerr, Judge, presiding, and judgment entered fully confirming the action of the clerk. From which said judgment petitioner, Dr. Edwards, appealed.

It appears also that in November, 1920, the petitioner, Dr. Edwards, in a separate proceedings entered a caveat to said will and the probate thereof, and on the issues and devisavit vel non and the statute of limitations, which had been duly pleaded, the cause was tried before his honor John H. Kerr and a jury, at said January term of Halifax court, 1921, and verdict and findings made as follows:

"(1) Is the paper writing propounded and every part thereof the last will and testament of Mrs. Bettie V. Johnson, deceased. Answer: Yes (by the jury).

"(2) Is the caveat filed in this proceedings barred by the statute? Answer: Yes (by consent, the court answered the last issue)."

There was judgment establishing the will, and also to the effect that, on the admitted facts, the right of caveator to proceed was barred by the statute applicable. Caveator excepted and appealed.

R. B. Blackburn, of Atlanta, Ga., and Don Gilliam, of Tarboro, for appellant.

Travis & Travis, of Savannah, Ga., A. P. Kitchin and Stuart Smith, both of Scotland Neck, and Daniel & Durrence, of Claxton, Ga., for appellee.

On Petition to Set Aside the Probate.

HOKE, J. [1-3] It is recognized in this state that a court vested with power and jurisdiction to admit wills to probate may, on motion and after due notice, set aside such proof in common form and recall the letters testamentary issued thereon when it is shown that an invalid or spurious will has been imposed upon the court by reason of perjured testimony or other fraudulent means and practices effective in procuring the judgment. *Edwards v. Edwards*, 25 N. C. 82; *Dickenson v. Stewart*, 5 N. C. 99. And on a hearing of this character a jury trial is not allowed as of right, but the matters in dispute are considered and determined as questions of fact by the court before which the action is pending or to which it may be properly carried by appeal. In *Re Battle*, 158 N. C. 388, 74 S. E. 23; *Taylor v. Carrow*, 156 N. C. 6, 72 S. E. 76; *Edwards v. Cobb*, Executor, 95 N. C. 5. Under proper procedure, therefore, both the clerk and the judge on appeal from him, after fully considering the evidence offered, have found that the petitioner's allegation of perjury and fraud are not sustained, but that the will and every part thereof is the last will and testament of Betty V. Johnson, the alleged testatrix. Apart from this, a petition of this kind is not granted as a matter of strict right, but by analogy to the relief afforded in setting aside irregular judgments and orders, the same is referred to the sound legal discretion of the court, to be allowed only on full and satisfactory proof, and on condition that the applicant has proceeded with proper diligence.

[4] From a perusal of the facts in evidence it appears, and without substantial contradiction, that this petitioner was aware of this will and its contents very shortly after its probate in 1907; that for nearly 10 years he made no efforts to investigate the facts attendant on its execution, and took no steps to challenge the validity of this pro-

bate until his suit commenced in 1919 or 1920, nearly 13 years after the probate of the will in common form, which he now seeks to set aside. It is urged for petitioner that he did not know of the impeaching facts now advanced and insisted on by him till 1917, and within 3 years before his suit in the superior court, and, by analogy to the statute, allowing a suit on account of fraud or mistake to be instituted within 3 years after discovery of the facts constituting the fraud, he should now be heard. This statute applicable to an adversary proceeding between litigants is not necessarily controlling in a hearing of this character, but if it were otherwise the position would not avail the petitioner on the facts presented in the record, for the courts, in the interpretation of the statute referred to, have held that under this section a "cause of action will be deemed to have accrued * * * when the fraud was known or should have been discovered in the exercise of ordinary care" (*Peacock v. Barnes*, 142 N. C. 215, 55 S. E. 99); and, speaking further to the question in that case, the court said:

We do not hold, as appellant contends, "that the statute begins to run from the actual discovery of the mistake, absolutely and regardless of any negligence or laches by the party aggrieved. * * * A man should not be allowed to close his eyes to facts readily observable by ordinary attention, and maintain for his own advantage the position of ignorance. Such a principle would enable a careless man, and by reason of his carelessness, to extend his right to recover for an indefinite length of time, and thus defeat the very purpose the statute was designed and framed to accomplish. In such case, a man's failure to note facts * * * should be imputed to him for knowledge, and in the absence of any active or continued effort to conceal a fraud * * * or some essential facts embraced in the inquiry, we think the correct interpretation of the statute should be that the cause of action will be deemed to have accrued from the time the fraud * * * was known or should have been discovered in the exercise of ordinary diligence."

The condition of this testatrix when taken to the hospital in 1907, the time petitioner alleges the fraud took place, was known to him, or could have been readily discovered. Every witness that he now offers has all along been available to him. It is not shown that anything has been done by the propounders nor any one else to conceal the facts or mislead the petitioner in any way, nor that the facts could not have been readily ascertained if he had chosen to make inquiry. It is in keeping with a sound public policy that the settlement of these estates and titles and ownership under them should not be kept open indefinitely, and, in any aspect of this evidence, we are of opinion that the prayer of the petitioner has been properly denied.

Affirmed.

In the Caveat Proceedings.

As heretofore stated, the cause in the caveat proceedings was determined on two issues: (1) Whether the paper writing offered and every part thereof was the last will and testament of Betty V. Johnson, deceased. (2) Is the caveat filed in this proceedings barred by the statute?

[6] On the first issue there was evidence offered by the propounders tending to prove the formal execution of the will, which was submitted in accord with the statutes appertaining to the subject and authoritative decisions construing the same, the court instructing the jury, among other things, that it was not required that the witnesses to a last will and testament should subscribe in the presence of each other, nor was it necessary to a valid written will that it should be manually signed by the alleged testatrix; but if her name was signed thereto by some one in her presence and by her direction, or if such a signature was acknowledged by her as her signature to the instrument as her last will, it would suffice. *Watson v. Hinson*, 162 N. C. 72, 77 S. E. 1089, Ann. Cas. 1915A, 870; *In Re Broach's Will*, 172 N. C. 520, 90 S. E. 681; *In Re Herring's Will*, 152 N. C. 258, 67 S. E. 570; Consolidated Statutes, §§ 4131-4144.

And in reply to the impeaching evidence on the part of the caveator there was further evidence for the propounder tending to support the validity of the will. For the caveator there were facts in evidence permitting the inference that the paper writing offered was not signed or executed at the time it purported, in 1906, but was in fact written in 1907, after the alleged testatrix had been taken to the hospital, when she was entirely unfitted and incapable of making any valid disposition of her property. And, further, that the alleged will was either an outright forgery or procured by the fraud or the propounder, the executor named therein, and one of the chief beneficiaries.

In a clear and comprehensive charge, in which this opposing testimony and every position arising thereon in favor of either party was intelligently referred to, the cause was submitted. The jury on the first issue have rendered a verdict sustaining the will, and the court, trying same by consent of parties, finds on the second issue that the caveator's right is barred by the statute of limitations; and on careful examination we find nothing in the record to justify us in disturbing the results of the trial.

[8] While there seems to be no error in the determination of the first issue, we do not deem it necessary to refer specially to the objections urged to that portion of the verdict, for the reason that we concur fully in the ruling of his honor that in any aspect of the testimony the appellant's right to ca-

ter and maintain the caveat is barred by the statute controlling the matter. Prior to 1907 there was no statute making direct provision as to the time within which a caveat could be entered, but in that year the Legislature, recognizing that it was clearly contrary to sound public policy that the probate of wills and settlements of property thereunder should be left open to such uncertainties for an indefinite length of time, in chapter 862. Laws of 1907, provided that such caveats should be entered at time of application and probate of a will in common form, or at any time within seven years thereafter; that any person interested in the estate might enter a caveat to a will; and, as to all wills theretofore admitted to probate, a caveat must be entered within seven years from ratification of the act, to wit, March 11, 1907.

The statute also contained the proviso that, if any one entitled to file a caveat should be at the time within the age of 21 years, or a married woman, or insane, they should have three years to file a caveat after the removal of the disability, etc. On the facts presented, this statute, appearing in Consolidated Statutes, § 4158, in our opinion operates as a complete and conclusive bar to the maintenance of this caveat, it appearing by the admitted facts that the probate in common form was had before the clerk of the superior court of Halifax county, the proper tribunal, in 1907, and since that time the caveator, being under no disability, has done nothing to challenge or in any way question the validity of the will or probate thereof until 1919 or 1920. It is very earnestly insisted for the appellant that the statutory period should commence to run only from the time when he became aware of the essential facts; but the statute makes no such exception, and we are not allowed to make this addition to the statutory provisions. And if it were otherwise—if, as the appellant contends, we could apply to this case the statute governing adversary actions instituted on the ground of fraud, that same could be commenced within three years after fraud discovered (C. S. § 441, subsec. 9)—it would not avail the appellant on the facts presented in this record.

As shown in the appeal on caveator's motion to set aside the probate in this case, our court, in construing the statute referred to, has held that the cause of action will be deemed to have accrued at the time when the fraud was known or could have been discovered in the exercise of ordinary care. *Peacock v. Barnes*, 142 N. C. 215, 55 S. E. 99. And in this case it appears that the caveator was aware of this will and its contents at the time or very shortly after it was admitted to probate in common form, and for nearly 13, and certainly for 10, years thereafter, he seems to have done nothing to

investigate the matter and to have made no inquiry concerning it, although the witnesses on whom he now chiefly relies, the doctor and nurses at the hospital where the deceased was in her last illness and the alleged fraud was perpetrated, have been available to him during the entire period. The jury, after a full and fair hearing, have found the issue of fraud against the appellant; and in any event, owing to his long delay and his own neglect, the law provides that a further inquiry is no longer open to him, and the judgment on the verdict must therefore be affirmed.

No error.

(182 N. C. 489)

RHYNE v. FLINT MFG. CO. (No. 448.)

(Supreme Court of North Carolina. Nov. 23, 1921.)

1. Waters and water courses §85—Dominant proprietor enjoined from diverting water to premises of another.

Where defendant company, owning a large cotton manufacturing plant and a village of 70 tenement houses for employees, operated a septic tank and filter through which sewerage from the plant and houses flowed, the sewerage then flowing through an open ditch located near a branch which ran through a part of plaintiff's land, and most of the water falling on defendant's land would, if not diverted by defendant, naturally flow in another direction, and the water used to flush defendant's sewerage system was diverted from its natural flow, defendant was a trespasser, and plaintiff was entitled to an injunction, aside from all question of pollution creating a nuisance.

2. Eminent domain §10(1)—Large cotton manufacturing plant not entitled to condemn property.

Where defendant company, owning a large cotton manufacturing plant and a village of 70 tenement houses for employees, operated a septic tank and filter through which sewerage from the plant and houses flowed, the sewerage then flowing through an open ditch, located near a branch which ran through a part of plaintiff's land, *held* that defendant, being a private corporation, did not possess the right of eminent domain by which it might acquire, against plaintiff, the right to so conduct the water and sewerage upon assessment of damages: hence neither the fact that it had constructed its septic tank in accordance with plans furnished by the state board of health, under C. S. §§ 7129-7144, nor that defendant had offered to buy from plaintiff that part of his land affected by the nuisance, would exonerate defendant from injunction or liability in damages to plaintiff.

3. Nuisance §23(1)—Injury authorizing injunction.

The rule under which restraining order is sometimes denied on the ground that the in-

jury is only apprehended or contingent applies generally to cases where the injury is threatened by reason of some industrial enterprise promising benefits to the community, affecting rather the comfort and convenience than the health of adjoining proprietors, and where indication is given that adequate redress may be afforded by an award of damages.

Appeal from Superior Court, Gaston County; Ray, Judge.

Suit by John L. Rhyne against the Flint Manufacturing Company. From judgment continuing restraining order against defendant until the hearing, defendant appeals. Affirmed.

Appeal from a continuance of a restraining order to the hearing in Charlotte, October 10, 1921. The defendant company owns a tract of land on which is situated a cotton manufacturing plant of 23,040 spindles and a village of 70 tenement houses occupied by its employees. The plaintiff owns a contiguous tract of land of 252 acres, and the defendant has constructed and operates a septic tank and filter through which the sewerage flows from said plant and tenement houses, and then through an open ditch located near a branch which runs through a part of plaintiff's lands.

This is an appeal in a proceeding for a perpetual injunction, in which the restraining order was continued to the hearing. The plaintiff alleges and files numerous affidavits that the defendant, since February, 1921, has discharged the sewerage and filth from its mill and tenement houses through a sewerage system constructed by it, without properly purifying the same, into a dry ditch near plaintiff's land, from which point it naturally flows upon his land and into a small branch running through his pasture and by his spring, whereby the branch and spring have been grossly polluted and rendered unsafe and unfit for use by persons or cattle, and thereby caused the abandonment of the spring, and forced the plaintiff to abandon his pasture lands and to move his cattle, used for the purposes of a public dairy, therefrom. The injunction was continued to the hearing, and the defendant appealed. Subsequently the court granted a stay of the restraining order till November 2, 1921, so as to give the defendant an opportunity to make such changes as may be necessary to protect the plaintiff.

Mason & Mason, S. J. Durham, and Mangum & Denny, all of Gastonia, for appellant.

B. Capps, of Gastonia, Tillett & Guthrie, of Charlotte, and A. L. Quickel, of Lincoln, for appellee.

CLARK, C. J. [1, 2] The defendant seeks to assert the rights of a dominant tenant to flow the surface water and debris from its premises across the plaintiff's land. The evi-

dence is uncontradicted that the water that falls on defendant's land would, if not diverted by the defendant, naturally flow in another direction (with a slight exception), and that the water used to flush defendant's sewerage system is diverted from its natural flow. Upon these facts, aside from all question of pollution creating a nuisance, the defendant is a trespasser, and plaintiff would be entitled to an injunction. The settled law is that, while the dominant proprietor can accelerate the flow, he cannot divert the water from his premises to that of another upon which it would not naturally flow. *Roberts v. Baldwin*, 151 N. C. 407, 66 S. E. 346 and cases there cited. The defendant is a private corporation, and does not possess the right of eminent domain by which he might acquire such right in a proper case upon assessment of damages. *Jenkins v. Railroad*, 110 N. C. 438, 15 S. E. 193, and citations in 2 Anno. Ed.

Upon the affidavits of the plaintiff and admissions of the defendant the restraining order was properly continued to the hearing. The defendant seems to rely largely upon the fact that it has constructed a septic tank in accordance with plans furnished by the state board of health (C. S. §§ 7129 to 7144), which gives the state board of health authority to require sewerage or sanitary privies. We do not think, however, that this will exonerate the defendant from injunction or liability in damages to the plaintiff, who had no day in court or hearing as to the sufficiency of the septic tank either as prescribed or as built. Besides, the board of health had no authority to pass upon this matter as against the plaintiff. To allow such a defense to protect the defendant against the nuisance which it has created would be to permit the defendant, a private corporation, to take the property of the plaintiff without his consent, and even without opportunity to be heard. *Donnell v. Greensboro*, 164 N. C. 330, 80 S. E. 377.

[3] There are cases in which the court has denied a restraining order and injunction. But that line of cases has been reviewed by Justice Hoke in *Cherry v. Williams*, 147 N. C. 452, 61 S. E. 267, 125 Am. St. Rep. 566, 15 Ann. Cas. 715, where he observes that the cases which had denied the restraining order on the ground that the injury was only apprehended or contingent obtained generally where the injury was threatened by reason of some industrial enterprise which gave promise of benefits to the community, affecting rather the comfort and convenience than the health of adjacent proprietors, and giving indication that adequate redress might in most instances be afforded by an award of damages, as in *Simpson v. Justice*, 43 N. C. 115; *Hyatt v. Myers*, 71 N. C. 271; *Hickory v. Railroad*, 143 N. C. 451, 55 S. E. 840, saying:

"But, so far as we have examined, whenever this principle has been apparently applied with us to cases which threaten serious injury to health, and injunctive relief was denied to claimant, it will be found, either that there was some defect in the proof offered by plaintiff or such proof was successfully controverted by defendant, or there were other conditions present which required the application of some other principle than that which defendant here invokes for his protection."

That case is cited and approved in *Berger v. Smith*, 160 N. C. 205, 75 S. E. 1098. But in this case: (1) The plaintiff has diverted the flow of the water which he has used in operating his sewerage plant in a direction in which it does not naturally flow, and hence the plaintiff was entitled to his injunction, irrespective of the allegations of nuisance. (2) Upon the affidavits and admissions, the defendant is committing a serious nuisance upon the plaintiff's land, and is jeopardizing the health of the community by the injury to the spring and otherwise and to the cattle used in the plaintiff's dairy. (3) The septic tank may or may not have been constructed according to the regulations of the state board of health, and the defendant admits that it has not always operated efficiently. (4) While defendant alleges that it has offered to purchase that part of the plaintiff's land affected by the nuisance, this would amount to a practical grant or license to the defendant to perpetually maintain this nuisance alongside of the plaintiff's remaining land. This the defendant cannot compel the plaintiff to accept. The defendant has no power of eminent domain, and to allow such defense would enable powerful individuals or corporations to force out undesired neighbors by maintaining a nuisance, and would enable them to repeat the Biblical example of Naboth's vineyard (1 Kings, c. 21), and Nathan's ewe lamb (2 Sam. c. 12).

The defendant contends strenuously that a permanent injunction would work an inconvenience to it in the operation of its mill. It has been operated for many years without being a nuisance to the plaintiff, and has only become such since February last, when it installed its new and unsatisfactory sewerage plant, and in any event it has no right to force the plaintiff to abandon the use of his own land for pasture for his dairy cattle, and to abandon the use of his spring in order that the defendant may experiment with a disposal of sewerage in a manner that is a nuisance to the plaintiff, however satisfactory or convenient such method may be to the defendant.

In *Lumber Co. v. Cedar Works*, 158 N. C. 164, 73 S. E. 903, Brown, J., says:

"It would be a most extraordinary destruction of the rights of property if a private corporation, possessing no power of eminent do-

main, could seize the lands of another, to which it has no semblance of title, and appropriate them to its own use, simply because it was able to respond in damages. This contention of the defendants is, in our opinion, without support in reason or authority"

—and he quotes (158 N. C. at 169, 73 S. E. 905) from Connor, J., in *Cozard v. Hardwood Co.*, 139 N. C. 284, 51 S. E. 932, 1 L. R. A. (N. S.) 969, 111 Am. St. Rep. 779, as follows:

"While, as found by his honor, it is reasonable and even necessary to the successful operation of defendant's enterprise that they carry their timber over the plaintiff's land to reach the markets, and while there may be no injustice to him in permitting them to do so, and while his opposition may be either sentimental or selfish, yet the courts may not violate or weaken a fundamental principle upon the strict observance and enforcement of which the security of all private property, so necessary to the safety of the citizen, is dependent. The guaranties upon which the security of private property is dependent are closely allied, and always associated with those securing life and liberty. Where one is invaded, the security of the other is weakened."

The defendant must attain its ends, advance its interests, or serve its convenience by some method, whether in improving its sewerage system or otherwise, which shall be in accordance with the age-old maxim that a man must use his own property in such a way as not to injure the rights of others—"Sic utere tuo, ut alienum non lœdas."

The judgment continuing the restraining order is affirmed.

(182 N. C. 459)

HIGH POINT CASKET CO. v. WHEELER
(STRUDWICK & BARRINGER,
Interveners). (No. 397.)

(Supreme Court of North Carolina. Nov. 16, 1921.)

1. Appeal and error \S 877(7)—Defendant cannot complain of disposition of proceeds of judgment against him.

Where attorneys for plaintiff intervened in suit, defendant cannot complain that judgment was rendered against him in favor of the interveners for one-third of the amount of the judgment to which plaintiff was entitled, not being aggrieved thereby.

2. Attorney and client \S 148(1)—Contract for compensation held to constitute equitable assignment of judgment pro tanto.

A contract for compensation to attorneys who were to receive a certain fixed portion of the judgment recovered, constituted at least an equitable assignment pro tanto of the judgment obtained.

3. Attorney and client ⚡147 — Contract for contingent fee valid.

It is neither a violation of law nor against good morals for a lawyer, if he believes a client has been wronged, and is unable to employ counsel, to bring suit upon a promise of reward contingent upon the result, but the contract must be made in good faith, without suppression or reserve of fact or of apprehended difficulties, and without undue influence, and the compensation must be just and fair, though such a contract cannot be condemned solely because proportion taken by attorney is very large.

4. Attorney and client ⚡190(2)—Intervention proper to protect interest in judgment.

Intervention is the proper method for an attorney to protect his right under an equitable assignment pro tanto of any judgment obtained by him, and to obtain judgment against the defendant therefor.

5. Action ⚡53(1)—All controversies to be settled in one action.

It is one of the cardinal rules of the Code that all controversies relating to the same matters should be settled in one action.

6. Assignments ⚡22—Choses in action assignable.

Choses in action are assignable.

7. Assignments ⚡18, 121—All ordinary business contracts assignable and actions maintainable by assignee.

Unless expressly prohibited by statute or in contravention of some principle of public policy, all ordinary business contracts are assignable, and actions for breach of the same can be maintained by the assignee in his own name.

8. Attorney and client ⚡182(4)—Plaintiff's attorney held to have lien pro tanto on land of defendant debtor.

An attorney who had a one-third interest in a judgment obtained under an equitable assignment also had a lien pro tanto on land of the defendant.

Appeal from Superior Court, Guilford County; Finley, Judge.

Action by the High Point Casket Company against R. A. Wheeler, in which Strudwick & Barringer intervened. From an adverse judgment, defendant appeals. Affirmed.

This action was originally brought by the plaintiff against R. A. Wheeler individually. He was never sued as secretary and treasurer of plaintiff corporation. The complaint alleged that R. A. Wheeler was indebted to the plaintiff in a large sum of money, both on account of unpaid subscription to capital stock and money of the company, which he had as former secretary and treasurer received and not properly accounted for. It is alleged that prior to the beginning of the action, to wit, on September 2, 1915, Wheeler had been suspended as secretary and treasurer by action of the stockholders and the

board of directors, who had elected B. H. Bradener to that office, in place of the defendant. The cause was referred to S. Clay Williams, Esq., who tried the same as referee, and reported that the defendant was indebted to the plaintiff in the sum of \$1,687.06, and the further sum of \$550, making \$2,237.06, which the plaintiff was entitled to recover of the defendant.

Messrs. R. C. Strudwick and John A. Barringer who appeared as attorneys for the plaintiff in the action, and until the judgment was rendered on the referee's report, intervened in this action to establish their right to compensation as attorneys. They were duly retained as such by the Casket Company and were paid a retainer of \$50; the company further agreeing that they should have as compensation for their services "one-third of any recovery that might be effected in the action against the defendant." The said terms of employment were accepted by the attorneys, and they represented the plaintiff, and prosecuted the action, throughout the litigation for their client, and recovered judgment in the sum above indicated in the referee's report. The controversy was long continued and hotly contested, and there seems to be no reason to dispute the reasonableness of the compensation promised to the attorneys. The latter intervened in the principal action for the purpose of enforcing the allotment to them of one-third of the judgment recovered by the plaintiff with their professional assistance according to the contract, contending that they were entitled to the relief and to the lien on the defendant's land, which, under our statute, goes with the judgment. The petition of intervention was duly served, with a copy thereof, on the plaintiff, but not answered.

The defendant filed one exception to the report, and pending the confirmation of the same took action, as described in the petition, with a view of depriving interveners of their compensation by acquiring control of the plaintiff corporation. The defendant, in open court, withdrew his exception to the report of the referee, which was confirmed. The interveners then filed their petition of intervention, and the court rendered judgment as follows:

"It is further ordered, adjudged, and decreed by the court that the plaintiff do have and recover of the defendant in accordance with said report the sum of \$1,687.06, and the further sum of \$550, with interest on \$550 from January 8, 1917, until paid. It further appears to the court that John A. Barringer and R. C. Strudwick, attorneys at law, by leave of the court have filed in this cause a verified intervening petition whereby they claim to be equitable assignees of one-third of said judgment, and that they are entitled to be paid one-third thereof, that the said petition has been duly served upon the defendant and upon C. Q.

Prince, now president of the High Point Casket Company, and that no answer thereto has been filed. The court doth find that all allegations of said petition are true. The court doth find, and thereupon, order and decree, that by virtue of the agreement made by the plaintiff said John A. Barringer and R. C. Strudwick, attorneys, are entitled to receive one-third of the amount recovered against the defendant, and that by virtue of the terms of their employment as aforesaid they are the equitable assignees of one-third of said judgment against the defendant.

"It is further ordered and adjudged by the court that John A. Barringer and R. C. Strudwick, attorneys, be paid one-third of the amount of said judgment, and judgment is hereby rendered as to the one-third of the amount thereof in favor of said John A. Barringer and R. C. Strudwick against the defendant, R. A. Wheeler.

"It is further ordered and adjudged by the court that the defendant pay the costs of this action to be taxed by the clerk, including an allowance of \$250 to S. Clay Williams, Esq., referee."

Defendant appealed.

R. R. King, of Greensboro, for appellant.
John A. Barringer and R. G. Strudwick, both of Greensboro, pro se.

WALKER, J. (after stating the facts as above). [1] What real interest the defendant has in this controversy we are unable to see. He has to pay the judgment, in any event, and whether to the plaintiff, or one-third of it to the interveners, Messrs. Barringer & Strudwick, the attorneys of the plaintiff, can make no difference to him. A case directly in point is *Newsom v. Russell*, 77 N. C. 277, where the plaintiff was the assignee of the note on which the action was brought, and defendant alleged that it was assigned in fraud of the assignor's creditors. The court held this to be no defense, as the assignor was bound by his assignment, though made in fraud of his creditors, and then the court inquired:

"It is not the duty of the maker of the note to see to the application of the money, and it is even less his duty to fight the battles of the creditors of the bankrupt. What interest is it to him [defendant] if he is absolved from further liability by payment of his debt upon a judgment regularly obtained against him?"

Here the parties are all before the court and will be concluded by its judgment. The petition of intervention was filed in the case, and copies of it duly served on the plaintiff and the defendant, who failed to answer it or otherwise plead to it, and the court gave judgment by default against them. This fully protects defendant in any payment he makes under the judgment of the court. And *Brown v. Harding*, 170 N. C. 253, 262, 86 S. E. 1010, Ann. Cas. 1917C, 548, and 171 N. C. 689, 89 S. E. 222, is to the same effect as *Newsom v. Russell*, supra. But see, also, *Wiggin v.*

Swett, 6 Metc. (Mass.) 194, 39 Am. Dec. Extra Anno. 716; *Black v. Mirgan*, 28 Am. Dec. Extra Anno., 894; 6 Cyc. 631. The party of record who can complain of a judgment of a court, and appeal therefrom, is one who is aggrieved thereby, in the sense that his pecuniary interest is affected by it; one whose right of property or interest, may be established or divested by the decree, as was said substantially by Chief Justice Shaw in *Wiggin v. Swett*, supra, citing *Smith v. Bradstreet*, 16 Pick. (Mass.) 264; *Bryant v. Allen*, 6 N. H. 116. But, however this may be, we are of the opinion that the judgment of the court was right in itself.

[2] There can be no question as to the definite terms of this contract for compensation of the attorneys nor as to how it should be ascertained and secured, nor can it be reasonably doubted that the parties intended that they should receive a certain or fixed portion of the judgment recovered. The contract, therefore, constituted at least an equitable assignment of the judgment pro tanto. It was held in *Costigan v. Stewart*, 76 Kan. 353, 91 Pac. 83, 11 L. R. A. (N. S.) 630, that an attorney who is retained to conduct or to assist in conducting the prosecution of a proceeding under a contract by which he is to receive compensation out of the fund recovered is entitled to a lien upon such fund for his fees. And so in *Svea Assurance Co. v. Packham*, 92 Md. 464, at pages 477 and 478, 48 Atl. 359, 52 L. R. A. 95, the court said that there was no evidence to show that the amount defendant agreed to allow the attorneys was unreasonable or excessive. Cases of that character are generally defended by all the means the law affords. They often result in several trials, and usually the receipt of the compensation is greatly delayed, when taken on a contingency. If the case is settled before it has taken its usual course, the attorney is undoubtedly benefited thereby, but the client is saved the necessity, and oftentimes hardship, of paying out cash and has no personal liability for fees in the event of failure. Under such circumstances he must expect to, and usually does, give larger compensation, if successful, than he would if he agreed to pay a fixed fee, whether successful or not. When Mr. Packham made the arrangement for fees, the insurers had not paid the insurance money, and when they did they knew what he had agreed to allow. Yet they stood by without objecting to it and permitted the attorneys thus employed by Mr. Packham to proceed, knowing the terms of their employment. The case of *Davis et al. v. Gennell et al.*, 73 Md. 530, 21 Atl. 712, is a conclusive answer to such objection by them now. There the attorneys were employed upon a contingent fee by Mr. Brydon, who had sued in his own name and recovered a judgment which was determined to belong to the North Branch Coal Company.

Some of the stockholders objected to the allowance of the fee, but this court said:

They "stood by and saw the work done; they neither interfered nor objected; and they cannot now be heard in a court of equity to except to that work being paid for out of the fund realized by the labor of these gentlemen, especially when they themselves, these exceptants, are seeking to reap the benefit of that very work and labor."

Without citing other authorities on that subject, we are of the opinion that it would be inequitable to deprive the attorneys of the fees agreed to be allowed. See, also, note to the *Costigan Case*, supra. It is said in 4 Cyc. 989, 990, and notes:

"While the law will scrutinize such transactions closely, an agreement is not necessarily invalid because the payment of the fee is made contingent upon the success of the suit or upon the happening of some other event, and such an agreement is not objectionable for want of mutuality. So a contingent agreement to convey a portion of the land recovered by suit to the attorney for his fee will be specifically enforced, even though the land has greatly increased in value. * * * Where the claim is assignable, the wording of the agreement for a contingent fee must in every case be examined to determine whether the parties intended an equitable assignment in favor of the attorney."

See *Fitzpatrick v. Lincoln Sav., etc., Co.*, 194 Pa. 544, 45 Atl. 333; *Howard v. Throckmorton*, 48 Cal. 482; *Martin v. Platt*, 5 N. Y. St. Rep. 284; *Chester v. Jumel*, 125 N. Y. 237, 26 N. E. 297, 5 N. Y. Supp. 809.

If the property has been converted into a fund, the attorney is entitled to his due share of the increased amount. *Hand v. Savannah, etc., R. Co.*, 21 S. C. 162. Where the client repudiates his contract, the attorney may compel him to deliver so much of the proceeds recovered as will compensate him or may have a personal judgment for his damages sustained by reason of the client's failure to carry out his contract. *Hazeltine v. Brockway*, 26 Colo. 291, 57 Pac. 1077. Similar agreements were held to constitute equitable assignments in favor of the attorneys in the following cases: *Hoffman v. Vallejo*, 45 Cal. 564; *Sammis v. L'Engle*, 19 Fla. 800; *Fairbanks v. Sargent*, 104 N. Y. 108, 9 N. E. 870, 6 L. R. 475, 58 Am. Rep. 490; *Hagemann's Estate*, 5 Pa. Co. Ct. R. 576; *The Alice Strong (D. C.)* 57 Fed. 249, distinguishing *Kendall v. U. S.*, 7 Wall. (U. S.) 113, 19 L. Ed. 85. A right of action is assignable in this state, but by assigning an aliquot part of the fund recovered, or the recovery, or judgment, as it may be denominated, the assignee gets no vested right in the cause of action, unless it is so stated or clearly to be implied. In this case the assignment is confined to the recovery or judgment itself. In 6 *Corpus Juris*, pp. 742, 743, it is stated that there are many cases which hold that an

agreement with an attorney that he shall have as compensation a specific sum, or a stipulated percentage, to be paid out of the judgment recovered, will, on the recovery of judgment, operate as an equitable assignment pro tanto; and this has been so held even where the action in which the judgment was obtained was on a cause of action for a tort in itself unassignable. But, in order that an agreement for a contingent fee may operate as an equitable assignment, there must be in effect a constructive appropriation of so much of the amount to be recovered as will confer upon the attorney a complete and present right to receive the same without the further intervention of the client. In some jurisdictions there must be an actual appropriation of some designated proportion or percent. of the judgment. In others it is not indispensable that the portion or amount of the fund sought to be assigned should be precisely ascertained and stated in the assignment. It is enough that the transaction affords evidence as to the part of the fund on which the assignment was intended to operate. Whether in a given case the agreement constitutes an equitable assignment is dependent upon the intent of the parties, as evidenced by the terms of the agreement, in the light of all the surrounding circumstances. See, also, *Bennett v. Donovan*, 83 App. Div. 95, 82 N. Y. Supp. 506; *Flannery v. Geiger*, 46 Misc. Rep. 619, 92 N. Y. Supp. 785; *Mays v. Sanders*, 90 Tex. 132, 37 S. W. 595. It was held in *Martinez v. Succession of Adolphe Vives*, 32 La. Ann. 305, that the contract of an attorney with his client to receive a contingent fee of 10 per cent. on the amount recovered is a valid contract. An attorney who is entitled to a certain commission on the amount recovered by him, which amount is evidenced by and embraced in a judgment, has a sufficient interest in the judgment to sue for its full revival. Construing a contract between attorney and client similarly worded to this one, the court held in *Hoffman v. Vallejo*, 45 Cal. 564, that it constituted the attorney the equitable owner of the undivided one-half of whatever shall result from the prosecution or compromise of the suit instituted by him to recover the land. If an attorney contracts with a party who claims land to commence a suit to recover the land and to pay the expenses, and receive for his services and expenses one undivided half of what may be recovered, and the undivided one-half of the result of a settlement or compromise of the matter, and the party compromises by having money paid to a third person, who, in consideration of the money, deeds to a fourth person land in trust for the party, such fourth person holds an undivided one-half of the land in trust for the attorney. Considering a claim of like character in *Fairbanks v. Sargent*, 104 N. Y. 108, 9 N. E. 870, 6 L. R.

A. 475, 58 Am. Rep. 490 (opinion by Chief Justice Ruger), the court held that an assignee of such a claim from the owner must necessarily acquire the same interest in it that any other assignee does, and that is, in the absence of other controlling equities, an interest subject to the rule that he who is prior in point of time is prior in right. Such a claim is at common law nonassignable, and its assignee takes, by virtue of an assignment thereof, an equitable interest only, which must be governed by equitable rules for its protection and enforcement. See, also, *Schubert v. Herzberg*, 65 Mo. App. 578, *Williams v. Ingersoll*, 89 N. Y. 508, and *Patton v. Wilson*, 34 Pa. 299, in which last case it was held that an agreement by parol between attorney and client that the former should have \$100 for his services "out of the verdict" in an action for unliquidated damages arising from a personal tort, operated as an equitable assignment of the judgment entered upon the verdict, and was good against an attaching creditor of the client. The court thus answers the objection that, as the claim was for unliquidated damages in an action sounding in tort, it was not capable of assignment before judgment:

"Strictly that is true. But it is true only in respect to the rights of third parties. As between Wolf and Geyer [client and lawyer], an assignment or agreement to assign the whole or part of a future verdict would be binding, and, being founded on sufficient consideration, would be enforced. Such agreements between counsel and client * * * bind the parties, and the attaching creditor of one of the parties succeeds to no higher rights than he possessed." *Bell v. Lake County*, 26 Colo. 192, 141 Pac. 861.

And in *Canty v. Latterner*, 31 Minn. 239, 17 N. W. 385, the court was of opinion that upon its face the contract is to be construed as an equitable assignment of \$100 of the amount there referred to as due the respondent from the railroad company. It is expressed not merely as an obligation to pay upon the contingency named, nor merely to pay out of the money to be collected by the respondent, but that the plaintiff should receive this money from the railroad company out of the amount owing by it to the respondent. It was in effect a constructive appropriation in favor of the plaintiff of so much of the money payable to the respondent, subject only to the condition named, and was hence operative as an assignment, although not an assignment in form. There are very many cases collected in 6 *Corpus Juris*, at page 741 and note 7, to the same effect as those we have cited, but they are too numerous to be inserted here. The annotator of the text says that in each of them there was a contract for a contingent fee, ranging in amount from one-tenth to one-half of the sum recovered; and the court, finding upon examination that the contract was fair and the

fee not excessive, gave effect to it and allowed the attorney to recover. It was held in the case of *The Alice Strong* (D. C.) 57 Fed. 249, that an assignment by the libelant in an admiralty case (who has reasonable assurance that he is entitled to recover a certain amount) of a definite sum to his proctor for professional services, to be paid out of any recovery that might be had, is sufficiently certain and on sufficient consideration to support a lien on the proceeds. The lien of such an assignment has priority over the claim of a judgment creditor in a state court who subsequently files his intervening petition in admiralty after the court has decided that libelant is entitled to recover some amount on his libel.

One reason for the rule thus formulated by the courts is based on the ground that otherwise a party without the means to employ an attorney and pay his fee certain and having a meritorious cause of action or defense would find himself powerless to protect his rights. *Newman v. Freitas*, 129 Cal. 283, 61 Pac. 907, 50 L. R. A. 548; *Andirac v. Richardson*, 125 La. 883, 51 South. 1024.

[3] This brings us to consider the validity of such a contract in another respect. The defendant attacks the same (in which by the way, we have shown that he has no legal or moral interest or right) upon the ground that the relation of attorney and client is a fiduciary one, which raises a legal, but rebuttable, presumption of fraud or of undue influence, which is a species of fraud, and for this position he cites *Lee v. Pearce*, 68 N. C. 76, and we may add *McLeod v. Bullard*, 84 N. C. 515, 532, but, if that principle be conceded to be the law, and we are not casting any doubt upon it, the evidence in this case establishes beyond cavil that the attorneys, who were the interveners, acted in perfect good faith when the contract was made and without fraud or the exercise of any undue influence, and that they took no advantage of the plaintiff in the transaction, and further that the compensation (one-third of the recovery) was just and reasonable. Besides, the allegations of the interveners in their petition are to the effect that there was no fraud or undue influence, and no bad faith or unfair advantage taken by them of the plaintiff when the contract was made, but that, in all respects, the latter was fair and just, and the amount of compensation allowed was reasonable when the nature of the litigation and of the services to be rendered by them are considered, and these allegations were not denied, although the plaintiff and the defendant were duly served with copies of the petition and had full opportunity to be heard if they had any defense to it. It is neither a violation of law nor against good morals that a lawyer, if he believes a client or would-be client has been wronged, and is unable to employ counsel, to bring suit for

the redress thereof, and to undertake the business without any hope or promise of reward or upon a promise of reward contingent upon the result. Indeed, it is rather to be commended. *Stevens v. Sheriff*, 76 Kan. 124, 90 Pac. 799, 11 L. R. A. (N. S.) 1153. A contract for a contingent fee must be made in good faith, without suppression or reserve of fact or of apprehended difficulties, and without undue influence of any sort or degree; and the compensation bargained for must be absolutely just and fair, so that the transaction may be characterized throughout by all good faith to the client. If the contract is shown to have been obtained by fraud, mistake, or undue influence, or if it is so excessive in proportion to the services to be rendered as to be in fact oppressive or extortionate, it will not be upheld. Such a contract cannot be condemned solely because the proportion of the claim to be retained by the attorney was very large, if it was deliberately entered into, was free from fraud, and showed no purpose to obtain undue advantage. Thus the mere fact that the attorney is to receive one-half of the recovery does not render the agreement unconscionable, in the absence of proof that it was induced by fraud, or that the compensation provided for is so excessive as to evince a purpose to obtain an improper or undue advantage, although there is said to be a presumption against the propriety of such a transaction. One very properly may demand a larger compensation if it is to be contingent or not certain. A contingent fee is permitted to attorneys only as a reward for skill and diligence exercised in the prosecution of doubtful and litigated claims, and it is not allowed for the rendition of merely minor services which any layman or inexperienced attorney might perform. 6 *Corpus Juris*, § 316, pp. 740, 741, and notes. The word "unjust or unconscionable," as applied to attorneys' contracts for contingent fees, means nothing more than that the amount of the fee contracted for, standing alone and unexplained, would be sufficient to show that an unfair advantage had been taken of the client, or that a legal fraud had been perpetrated upon him. *McCoy v. Gas Engine Co.*, 135 App. Div. 771, 119 N. Y. Supp. 864.

There is nothing in this case which even suggests that the contract was either unfair, improper, or excessive, or that the interveners did anything, in their professional character, as attorneys, that was not fit for them to do under the facts and circumstances.

[4-7] We need not discuss the question as to whether intervention is the proper method for the attorneys to prosecute their right to the compensation and obtain judgment therefor as they have done. That it is too plain for argument, and it will be found that it is the one which was adopted in the cases we have cited and many others. Under our

Code, it is one of its cardinal rules and of its most commendable provisions that all controversies relating to the same matters should be settled in one action, and the intervention was the most convenient and appropriate method in this case, as one of its objects was to arrest any disposition of the fund to be collected under the judgment which would jeopardize or defeat the interveners' rights, which were about to be greatly prejudiced by the defendant's wrongful conduct, which is particularized and denounced in the petition as an attempt to subject the judgment to defendant's control so that he might oust the interveners of their just and equitable rights. Whether the contract was, in effect, an assignment at law, or in equity, need not be considered. It was not good at common law, as under it choses in action were not assignable, but even then it was valid in equity. Under our law choses in action are assignable. While at common law the rights and benefits of a contract, except in the case of the law merchant and in cases where the crown has an interest, could not be transferred by assignment, a doctrine which Lord Coke attributes to the "wisdom and policy of the founders of our law in discouraging maintenance and litigation, but which Sir Frederick Pollock tells us is better explained as a logical consequence of the archaic view of a contract as creating a strictly personal obligation between the debtor and creditor," the rule in its strictness was soon modified in practical application by the common-law courts themselves and more extensively by the decisions of the courts of equity; and the principles established by these cases have been sanctioned and extended by legislation until now it may be stated as a general rule that, unless expressly prohibited by statute or in contravention of some principle of public policy, all ordinary business contracts are assignable, and that actions for breach of the same can be maintained by the assignee in his own name. *Railroad Co. v. Railroad Co.*, 147 N. C. 368-374, 61 S. E. 185, 23 L. R. A. (N. S.) 223, 125 Am. St. Rep. 550, 15 Ann. Cas. 363. But it makes no difference whether we call the assignment legal or equitable, as in either case the result will be the same.

[8] As we have held that by the term of the contract the interveners acquire an interest of one-third in the judgment, which is what we call "the recovery," the lien of the judgment under our statute (*Consol. Statutes*, § 614) attached pro tanto to the defendant's land from the time the judgment was docketed. This is not, therefore, a simple common-law action to recover for services the amount stipulated to be paid, but is the definite appropriation of a special part of the judgment or "recovery," with its attendant lien, as compensation to the attorneys under the contract. This seems to be a case of first im-

pression in our courts, but we deem the law concerning it to be well settled.

The question is treated at large in Weeks on Attorneys (edition of 1878) §§ 346, 350 and 352.

There may be some conflict in the authorities, but our view is well supported by a large majority of the later decisions in courts of the highest repute.

This case bears no resemblance to Mordecai v. Devereux, 74 N. C. 673, and Roe v. Journigan, 181 N. C. 180, 106 S. E. 680, as there was no contract between attorney and client in those cases and the court was asked to allow compensation regardless of that fact.

Upon the whole case, when considered, in any proper or admissible view, our conclusion is that there was no error in the judgment of the court below, as delivered by Judge Finley upon the report of the referee, and we therefore affirm the same.

Affirmed.

(182 N. C. 374)

THOMAS et al. v. CARTERET COUNTY et al.
(No. 180.)

(Supreme Court of North Carolina. Nov. 9, 1921.)

1. Stipulations ⇨18(9)—For judgment on mortgage subject to certain credits held abandonment of contention that it was conditionally delivered.

In action to have determined the extent of liability on a note and mortgage executed to plaintiffs' nephew and by him turned over to the county whose funds he had misappropriated, plaintiffs' admission in open court that the county was entitled to judgment for the amount misappropriated subject to credit for such amounts as might be found against a surety was at variance with the theory of conditional delivery and an abandonment of plaintiffs' contention that the mortgage was delivered on condition that other securities were to be exhausted before the mortgage took effect.

2. Evidence ⇨444(2)—After delivery oral agreement that other securities should be exhausted before resorting to mortgage could not be ingrafted thereon.

Where there was a valid delivery of a mortgage executed by plaintiff to his nephew and by him turned over to the county whose funds he had misappropriated, and because thereof the Governor was induced to grant an unconditional pardon, an oral agreement that the mortgage should not be resorted to until other securities were exhausted cannot be ingrafted thereon.

Walker, J., dissenting.

Appeal from Superior Court, Carteret County; Horton, Judge.

Action by T. M. Thomas and others against Carteret County and others. From the judg-

ment, plaintiffs and defendant Mace appeal. Modified and affirmed.

See, also, 180 N. C. 109, 104 S. E. 75.

Civil action to determine the extent of plaintiffs' liability on a certain note and mortgage executed and delivered to Thomas Thomas, and by him given as security to the county of Carteret. A brief history of this litigation is set out in the judgment of the superior court, entered at the June term, 1921:

"This cause coming on to be heard before his honor, J. Loyd Horton, judge, and a jury, and it appearing to the court that at the June term, 1920, of said court this cause was tried before his honor G. W. Connor, judge, and a jury, and at said term the following issues, with their answers, were submitted and found by the jury as follows, to wit:

"(1) In what amount, if any, is Thomas Thomas, trustee of the courthouse bond sinking fund, indebted to Carteret county? Answer: \$13,236.49, with interest.

"(2) What sum, if any, is Carteret county entitled to recover of the United States Fidelity & Guaranty Company as surety for Thomas Thomas, treasurer of Carteret county? Answer: Nothing.

"(3) What sum, if any, is Carteret county entitled to recover of W. A. Mace, administrator of Alonzo Thomas, deceased, on the bond of Thomas Thomas, trustee? Answer: \$5,000.

"(4) Were the note and mortgage of T. M. Thomas and wife, Laura, executed to Thomas Thomas and assigned to Carteret county, taken and accepted with the understanding and agreement that the same should be used only after the other securities held by the county for Thomas Thomas, trustee, had been exhausted, as alleged in the complaint? Answer: No.

"(5) What sum, if any, is Carteret county entitled to recover of T. M. Thomas and wife on account of the note for \$13,500 secured by mortgage assigned to said county by Thomas Thomas? (Not answered.)

"And it further appearing to the court that the presiding judge of said court in his discretion set aside the answer to the fourth issue and failed to answer the fifth issue, which he instructed the jury the court would answer after they had answered the other issues, and permitted the plaintiffs to file a reply, and further pleading upon which the following issues were submitted and answered at this, the June term, 1921, of the superior court of Carteret county, before his honor Judge Horton and a jury, as follows, to wit:

"(4) In what amount, if any, is W. A. Mace, administrator, etc., of Alonzo Thomas, indebted to Carteret county on account of the term of said Alonzo Thomas as treasurer of Carteret county, beginning on the first Monday in December, 1914, and ending at the death of said Alonzo Thomas on the 18th day of November, 1915? Answer: \$5,000 and interest.

"(5) What amount, if any, is Carteret county entitled to recover of defendant United States Fidelity & Guaranty Company as surety for said Alonzo Thomas as treasurer of Carteret county for said term, beginning on the first Mon-

day in December, 1914? Answer: \$8,236.49, and interest.

"(6) Were the note and mortgage given to Thomas Thomas by plaintiff given as an accommodation paper to said Thomas Thomas, as alleged by plaintiffs? Answer: Yes.

"(7) Is the defendant Carteret county a holder for value as between it and the plaintiffs of the \$13,500 note and mortgage made by plaintiffs? Answer: Yes.

"(8) Were the note and mortgage of plaintiffs executed to Thomas Thomas and assigned to Carteret county taken and accepted with the understanding and agreement that the same should be used by the county only after the bonds of said Thomas Thomas and of said Alonzo Thomas had been exhausted, as alleged by plaintiffs, and then applied to the balance unpaid due said county on account of the Thomas Thomas trusteeship of the sinking fund and the trusteeship of said Alonzo Thomas? Answer: Yes.

"(9) What sum, if any, is Carteret county entitled to recover of plaintiffs on account of the note for \$13,500 secured by mortgage assigned to said county by Thomas Thomas? A. \$13,236.49, with interest from October 1, 1916, to be credited with \$5,000 and interest on same from June 13, 1921, due by the estate of Alonzo Thomas as surety for Thomas Thomas, trustee of the courthouse bond sinking fund, the last issue having been answered by the court by consent of all parties that the court might answer same after verdict as a matter of law."

"It is now considered and adjudged by the court that the answers to the issues numbered 4 and 5 be, and are on motion of defendants, other than Carteret county, set aside, as a matter of law, for the reason that the jury found at the June term, 1920, by its answer to the first issue that Thomas Thomas, trustee of the courthouse bond fund, received and misappropriated the funds.

"It is further ordered and adjudged by the court that Carteret county recover nothing against United States Fidelity & Guaranty Company as surety, and that said defendant United States Fidelity & Guaranty Company go without day and recover its costs.

"It is further considered and adjudged by the court that Carteret county recover of W. A. Mace, administrator of the estate of Alonzo Thomas, deceased, the sum of \$5,000, with interest from June 13, 1921, as surety on the bond of Thomas Thomas, trustee of the courthouse bond sinking fund, said Mace, administrator, having tendered judgment for said amount in open court, said amount to be credited on the amount due Carteret county by T. M. Thomas and wife, Laura P. Thomas.

"It is further considered and adjudged by the court that Carteret county recover of T. M. Thomas and wife, Laura Thomas, the sum of \$13,236.49, with interest from October 1, 1916, at the rate of 6 per cent. per annum, to be credited with the sum of \$5,000 and interest on same from June 13, 1921, due by Mace, administrator of Alonzo Thomas, deceased, the said Alonzo Thomas having been surety on the bond of Thomas Thomas, trustee of the courthouse bond sinking fund.

"It is further considered and adjudged that the note and mortgage given by T. M. Thomas

and wife, Laura P. Thomas, to Thomas Thomas and assigned by Thomas Thomas to Carteret county, be foreclosed to pay said indebtedness, and that Luther Hamilton and Leslie Davis be and are appointed commissioners to sell the lands described in the mortgage of T. M. Thomas and wife, Laura P. Thomas, to Thomas Thomas, recorded in the office of the register of deeds of Carteret county in Book 22, page 339, after due advertisement and in accordance with the law governing sales of real estate under execution.

"It is ordered that such advertisement shall not be made until 60 days after the adjournment of this court, and then only in the event plaintiffs shall not have fully discharged the liability of this judgment.

"It is further adjudged that defendant Mace, administrator, pay the costs of the action, to be taxed by the clerk.

"J. Loyd Horton, Judge Presiding."

Upon the second trial the following admission was made in open court and entered of record:

"Counsel for plaintiffs having so admitted in open court, the court finds the following facts:

"In this case the plaintiffs, T. M. Thomas and wife, Laura Thomas, agree that, pursuant to the issues found in the trial of this case before Hon. George W. Connor, judge, at the June term, 1920, the defendant, Carteret county, is entitled to a judgment against the plaintiffs, T. M. Thomas and wife, Laura Thomas, in the sum of \$13,236.49, with interest, said judgment to be credited for such amounts as had been or would be found by the jury in the case that the defendant Mace, administrator, and others are indebted to said Carteret county."

His honor set aside the verdict on the fourth and fifth issues, as a matter of law, and rendered the judgment appearing above. Plaintiffs and defendant Mace, administrator, appealed.

Ward & Ward, of New Bern, H. S. Ward, of Washington, N. C., and Luther Hamilton, of Morehead City, for appellants Thomas.

Julius F. Duncan, of Beaufort, for appellant Mace.

D. L. Ward, of New Bern, and Julius F. Duncan, of Beaufort, for appellee United States Fidelity & Guaranty Co.

CLARK, C. J. The case at bar has been tried twice in the superior court, and this is the second appeal here. Former opinion reported in 180 N. C. 109, 104 S. E. 75. It is doubtful if the allegations of the complaint and the wording of the eighth issue, by correct interpretation, amount to a charge and finding that plaintiffs' note and mortgage were not intended to take effect absolutely and unconditionally at the time of their delivery. It was only upon the allegation of a conditional delivery that plaintiffs were permitted to show the "understanding and agreement" upon which the note and mortgage were "taken and accepted." Indeed, on the facts of the present record—the mortgage

having been delivered to the mortgagee and by him in turn assigned to Carteret county—it is not altogether clear or certain that this position was ever open to the plaintiffs. *Buchanan v. Clark*, 164 N. C. 56, 80 S. E. 424; *Huddleston v. Hardy*, 164 N. C. 210, 80 S. E. 158; *Bond v. Wilson*, 129 N. C. 325, 40 S. E. 179; note 16 L. R. A. (N. S.) 941. But, as the point is not raised by any specific exception, we shall not pass upon it now. It is unnecessary for us to do so.

The principle applicable to a conditional delivery has been sanctioned and approved by us in a number of carefully considered decisions; and it is now very generally recognized in this and other jurisdictions. *Farlington v. McNeill*, 174 N. C. 420, 93 S. E. 957; *Bowser v. Tarry*, 156 N. C. 35, 72 S. E. 74; *Gaylord v. Gaylord*, 150 N. C. 222, 63 S. E. 1028; *Hughes v. Crooker*, 148 N. C. 318, 62 S. E. 429, 128 Am. St. Rep. 606; *Aden v. Doub*, 146 N. C. 10, 59 S. E. 162; *Pratt v. Chaffin*, 136 N. C. 350, 48 S. E. 768; *Kelly v. Oliver*, 113 N. C. 442, 18 S. E. 698; and *Ware v. Allen*, 128 U. S. 590, 9 Sup. Ct. 174, 32 L. Ed. 563. It is said in *Anson on Contracts* (Am. Ed.) 318:

"The parties to a written contract may agree that until the happening of a condition, which is not put in writing, the contract is to remain inoperative."

And again in *Wilson v. Powers*, 131 Mass. 539:

"The manual delivery of an instrument may always be proved to have been on a condition which has not been fulfilled, in order to avoid its effect. This is not to show any modification or alteration of the written agreement, but that it never became operative, and that its obligation never commenced."

These excerpts are quoted with approval in *Garrison v. Machine Co.*, 159 N. C. 285, 74 S. E. 821, where the same doctrine is announced by Walker, J., in an elaborate review of the authorities on the subject in hand.

[1] We are of the opinion, however, that the admission made in open court to the effect that the defendant county was entitled to a judgment on the note and mortgage in question (though subject to certain credits) takes these instruments out of the class of conditionally delivered contracts, if, indeed, they were ever entitled to be styled as such. To admit their present validity and binding force for any purpose, in advance of the happening of the contingent event upon which it is alleged they were to take effect, is at variance with the theory of a conditional delivery and brings into operation other principles of law.

"It is * * * fully understood that, although a written instrument purporting to be a definite contract has been signed and delivered, it may be shown by parol evidence that such delivery was on condition that the same was not to be operative as a contract until the happening

of some contingent event, and this on the idea, not that a written contract could be contradicted or varied by parol, but that, until the specified event occurred, the instrument did not become a binding agreement between the parties." *Bowser v. Tarry*, *supra*.

The question is controlled very largely by the intention of the parties. *Waters v. Annuity Co.*, 144 N. C. 670, 57 S. E. 437, 13 L. R. A. (N. S.) 805. But plaintiffs have abandoned this position (if they were ever entitled to take it) by their admission in open court; for it is only upon the strength and validity of the note and mortgage that any judgment at all could be rendered against them and in favor of Carteret county.

[2] A valid delivery and binding contract having once been established or admitted, the plaintiffs may not thereafter be permitted to annex a condition subsequent resting in parol and in direct contradiction to the express terms of their written obligation, for this would infringe upon the well-settled rule that oral evidence will not be admitted to vary or contradict the terms of a written instrument. *Mfg. Co. v. McCormick*, 175 N. C. 277, 95 S. E. 555, L. R. A. 1918F, 572, and cases there cited. This doctrine was well stated by Smith, C. J., in *Ray v. Blackwell*, 94 N. C. 10, as follows:

"It is a rule too firmly established in the law of evidence to need a reference to authority in its support that parol evidence will not be heard to contradict, add to, take from, or in any way vary the terms of a contract put in writing, and all contemporary declarations and understandings are incompetent for such purpose, for the reason that the parties, when they reduced their contract to writing, are presumed to have inserted in it all the provisions by which they intend to be bound"—citing 1 Greenleaf, Ev. § 76; *Etheridge v. Palin*, 72 N. C. 213.

And to like effect are many decisions in our reports, too numerous to be cited here. In *Walker v. Venters*, 148 N. C. 388, 62 S. E. 510, it was said:

"It is true that a contract may be partly in writing and partly oral (except when forbidden by the statute of frauds), and that in such cases the oral part of the agreement may be shown. But this is subject to the well-established rule that a contemporaneous agreement shall not contradict that which is written. The written word abides and is not to be set aside upon the slippery memory of man."

See, also, *Moffitt v. Maness*, 102 N. C. 457, 9 S. E. 399, one of the leading cases on this subject, and *Sykes v. Everett*, 167 N. C. 600, 83 S. E. 585, 4 A. L. R. 751. This last citation contains an interesting and illuminating discussion of a kindred and closely allied subject which supports and is in full accord with our present decision.

Kernodle v. Williams, 153 N. C. 475, 69 S. E. 431, 34 L. R. A. (N. S.) 934, and others

like it have no application either to the law or the facts of this case. That case held:

"Where a contract is not required to be in writing, it may be partly written and partly oral, and in such cases, when the written contract is put in evidence, it is admissible to prove the oral part of it."

But the instrument here in question, a conveyance of land, to be applied to the payment of the defalcation of public funds by the grantor's nephew, is required to be entirely in writing, and no oral agreement or private understanding can years afterwards be written into the contract in order to relieve the grantor of the responsibility he assumed and upon the execution of which he procured the release of his nephew.

In *Gaylord v. Gaylord*, 150 N. C. 222, 63 S. E. 1028, the court held that—

"The doctrine of ingrafting an oral agreement upon a written instrument which is required by the statute of frauds for the conveyance of land cannot be established in favor of the grantor in the deed."

That case has been very often cited since with approval. See citations thereto in *Anno. Ed.*

In *Campbell v. Sigmon*, 170 N. C. 351, 87 S. E. 116, *Ann. Cas.* 1918C, 40, the court held:

"If, notwithstanding the solemn recitals and covenants in a deed, the grantor could show a parol trust in himself, it would virtually do away with the statute of frauds and would be a most prolific source of fraud and litigation. No grantee could rely upon the covenants in his deed"—citing, among other cases, *Gaylord v. Gaylord*, *supra*.

In *Walters v. Walters*, 172 N. C. 330, 90 S. E. 304, the same matter was fully discussed again, and it was held:

"The grantor cannot set up a parol trust in his own favor against the grantees,"

—saying:

"The ruling in *Gaylord v. Gaylord*, 150 N. C. 222, that a parol trust cannot be set up by a grantor as to a conveyance in fee to his grantee is not only upheld by the reasoning and authorities therein cited, but that case has since been upheld and reaffirmed in *Ricks v. Wilson*, 154 N. C. 286, *Jones v. Jones*, 164 N. C. 322, *Cavanaugh v. Jarman*, *Id.* 375, *Trust Co. v. Sterchie*, 169 N. C. 22, *Campbell v. Sigmon*, 170 N. C. 351, and *Walters v. Walters* (when here before) 171 N. C. 313."

In very recent cases, *Allen v. Gooding*, 173 N. C. 96, 91 S. E. 694, and *Chilton v. Smith*, 180 N. C. 472, 105 S. E. 1, *Gaylord v. Gaylord* has been again cited with approval. In the latter case the court overruled a previous decision of this court, *Fuller v. Jenkins*, 180 N. C. 554, 41 S. E. 706, which had mistakenly held that a deed absolute on its face could be converted into a mortgage because of an oral agreement between the parties at the

time that it should operate as a mortgage, and said that it "stands alone and is expressly overruled."

If a negro or some poor white man is convicted of stealing a side of meat for his starving family, the doors of the state's prison usually lie open before him, but Thomas Thomas having been convicted of appropriating thousands of dollars intrusted to his care for safe-keeping and sentenced to the state penitentiary, it was made to appear to the Governor of the state, who has the unrestricted power of pardon, that it was more advisable to secure the return of this money to the taxpayers of Carteret county than that the criminal should be punished, and upon assurance that by this instrument his uncle had insured the payment of this fund to the taxpayers the pardon was granted. That was the consideration for this deed, and, according to the custom, this reason was given out to the world as the ground for the pardon. There is no provision in that deed that the grantor therein, who on the faith thereof procured the release of his nephew from the sentence of the law, should be "exempted from payment if some one else could be sued to recover the sum embezzled." There could be no oral agreement in favor of the grantor that, notwithstanding, in fact the public must collect the money, if they could, out of other people. On the written agreement that out of the land conveyed the county treasury would be reimbursed, the pardon was given and the convict released. The state performed its part of the contract. The agreement, on the other hand, was unequivocal that the property conveyed in the deed should be applied to reimburse the county and protect the people of the county from raising additional taxes to make good the loss their treasury had sustained by the defalcation. Upon the facts in the present record, the mortgage was delivered to the mortgagee and by him assigned to Carteret county in consideration of his pardon, and the conveyance was as unconditional as the pardon which he received.

The admission, having been made in open court in this case to the effect that the defendant county was entitled to a judgment on the note and mortgage in question, takes this instrument out of the class of conditional and conditionally delivered contracts, if indeed it had ever been entitled to be so styled. There was no reservation in the conveyance now sought to be set aside that it was "not to be valid if any one else could be sued for the money." It will not be charged by any one that the Governor in granting the pardon ever understood that this was a part of the instrument executed by the plaintiff. It was absolutely represented to him as an unconditional security to the county that the funds would be replaced by sale of the property

conveyed, and in open court in this case it was admitted that the county was entitled to judgment on the note and mortgage.

Instead of that, these funds, which were taken out of the public treasury 8 to 10 years ago, are still withheld, and we are asked by the grantor to hold that there must be a long weary chase, taking the time of the courts at great additional expense to the county, to ascertain whether or not there was some private unwritten agreement with some one by which other people should first be sued to recover the money which the grantor contracted to pay if his nephew were released.

The pardon was unconditional, based upon the security of this conveyance of the unconditional payment of the money. The property of the citizens of Carteret county may be advertised for the payment of the enhanced taxes caused by the defalcation, but the property pledged for the repayment of that sum is still unsold, and the only visible result so far has been the added cost of the courts in investigating the plea of an oral understanding that the property of the grantor is to be exempted from liability, if some one else can be found who can be sued. The public burdens are increased by protracted litigation in the metaphysical round of legal technicalities in the effort by learned counsel to—

"distinguish, and divide

A hair 'twixt south and southwest side,"

with the ultimate result possible that, if any one ever pays anything, there will be little, if any, of it that will get into the treasury for the benefit of the people who have lost it.

Applying these principles, his honor might well have excluded all the evidence offered on the second trial and rendered judgment on the verdict as returned and left undisturbed at the June term, 1920. But, as the same result has been accomplished, though somewhat irregularly, by the judgment as entered, we have concluded to let it stand, as it is a matter of public interest to all the people of Carteret county that this litigation should be disposed of as speedily as possible. It is their money which has been misused and misappropriated, if not embezzled; and up to the present time nothing has been refunded or paid back. The note and mortgage in question were given to make good this shortage and to save the county harmless from the defalcations of one of its officers. These transactions occurred in the year 1916. The plaintiffs' obligation matured on February 7, 1917. Nothing further seems to have been done until this suit was instituted on February 3, 1919, to require the commissioners to proceed with the collection of the prior securities in exoneration of plaintiffs' undertaking. Plaintiffs also allege

that the county authorities have been negligent in this respect, and they have sought to be relieved from any further liability by reason of such delay and inaction. It would seem that this surreptitiously taken money, to say the least, should have been made good long ago. Public funds belong in the public treasury; and we are unable to find any warrant of law for such indulgences as are disclosed by the present record.

This opinion will be certified to the superior court of Carteret county, to the end that the judgment entered at the June term, 1921, may be modified so as to provide for a report and confirmation of the sale as required by statute; and, as thus amended and changed, the judgment will be affirmed.

Modified and affirmed.

STACY, J., not sitting.

WALKER, J. (dissenting). As much as I deprecate it, I am constrained to dissent from the opinion and impending judgment of this court, as I think that upon the issues found by the jury including the two (Nos. 4 and 5 of the second series of issues) which were set aside by Judge Horton for error in law, and which should be reinstated, as there was no error in law or in fact, there should be a judgment against Mace, administrator of Alonzo Thomas, for \$5,000, and against the United States Fidelity Company of Baltimore for \$8,500, and only if there is any balance due after applying these sums as credits on the whole amount due the county should there be any judgment against the county. A brief history of this case will demonstrate what a grave injustice we are about to inflict upon the plaintiffs, who have unquestionably the highest and strongest equity in this case as against all of the other parties.

The county of Carteret was about to lose a large sum of money (\$13,500) by the defalcation of Thomas Thomas, as special agent of the courthouse fund and as treasurer of the county, and also by the defalcation of Alonzo Thomas, as treasurer of the county. Alonzo was surety on the bond of Thomas Thomas, and hence the judgment against Mace, his administrator, and the United States Fidelity Company of Baltimore was surety on the bond of Alonzo Thomas as treasurer of the county. When the debt to the county had been incurred by the said defalcation, the plaintiffs Thomas M. Thomas and his wife executed their note with a mortgage or deed of trust on their land to secure it, and payable to Thomas Thomas, for the purpose of having it deposited by him with the county to secure the debt he owed the county, with the contemporaneous understanding and express stipulation that the note and mortgage should not take ef-

fect until the county had exhausted the securities it already had for said debt, which securities consisted at the time of the bond of Thomas Thomas on which Alonzo Thomas was security for \$5,000 and the bond given by Alonzo Thomas himself as treasurer of the county, on which the United States Fidelity Company was surety, for \$12,000. No other securities were intended than those just mentioned; in other words, the county was required to exhaust the bonds of Thomas Thomas as agent and as treasurer, and that of Alonzo Thomas as treasurer, before the note and mortgage of the plaintiffs handed to Thomas Thomas with the understanding that it should be deposited with the county, but upon the contingency that it should not become effective or resorted to as security for Thomas Thomas' defalcations of all kinds until other securities were first exhausted.

The authorities are very numerous to the effect that a note and mortgage or contract may be made to depend upon a contingency or condition, and that it is a full defense to an action upon the note that the contingency has not happened or the condition not performed. It makes no difference what the contingency or condition is, so that it is lawful and has some relation to the contract, or perhaps, even if it does not, but is purely collateral. *Kelly v. Oliver*, 113 N. C. 442, 18 S. E. 698, which has often been approved as a good illustration of the principle. It is also held that such a contingency or condition stipulated for at the time of the execution of the contract, bond, or deed does not contradict or vary the terms of the latter, and is merely a contemporaneous agreement postponing its legal operation. It is said in *Kelly v. Oliver*, supra, to be competent for the defendant (plaintiffs here) to show that, although he signed and delivered the instrument, it was not to go into effect as to him (or them) until a certain condition was performed, and that this does not violate the rule as to contradicting or varying a writing, but has only the effect of a purely collateral undertaking postponing the effectiveness of the written contract, etc., until the happening of the contingency or the compliance with the condition, citing *Penniman v. Alexander*, 111 N. C. 427, 16 S. E. 408, which, in its turn, cites *Kerchner v. McRae*, 80 N. C. 219; *Braswell v. Pope*, 82 N. C. 57; *Woodfin v. Sluder*, 61 N. C. 200. The learned reporter thus headnotes the case of *Penniman v. Alexander*, supra:

"The maker of a promissory note, or other similar instrument, if sued by the payee, may show as between them a collateral agreement putting the payment upon a contingency, and it is competent also for a defendant sued as acceptor of such instrument to show in defense the conditions of his acceptance."

And to the same effect is *Aden v. Doub*, 146 N. C. 10, 59 S. E. 162, where we held:

"The position taken by the plaintiff that the evidence tended to contradict a written instrument, and, besides, a negotiable instrument, is clearly without any support in law. In the first place, the written agreement was made at the very time the note was given, as a part of the same transaction [and the plaintiff had notice of the condition on which it was delivered]. This does not bring the case within the rule of evidence by which it is forbidden to vary or contradict a written instrument, nor within that other rule protecting an innocent purchaser for value of a negotiable instrument. It is not a correct proposition in law, as stated in the plaintiff's prayer for instructions, that a negotiable instrument is of such high dignity as a medium of exchange that the parties cannot annex any lawful condition to its payment at the time it is given, when the action to recover it is between the original parties to it," or the holder of the note is fixed with notice of the agreement, for he is not then a bona fide purchaser.

The case of *Penniman v. Alexander*, supra, was reaffirmed in 115 N. C. 555, 20 S. E. 210. The question is fully discussed, as to this and other features of this case, in *Evans v. Freeman*, 142 N. C. 61, 54 S. E. 847, where we said that—

"Applying the rule we have laid down, it has been adjudged competent to show by oral evidence a collateral agreement as to how an instrument for the payment of money should in fact be paid, though the instrument is necessarily in writing and the promise it contains is to pay so many dollars. In support of the proposition, as thus stated, we may refer specially to the comparatively recent decisions."

Hughes v. Crooker, 148 N. C. 318, 62 S. E. 429, 128 Am. St. Rep. 606 (opinion by Connor, J.), held that, when a promissory note is given in pursuance of the terms of a written contract, evidence can be introduced of a contemporaneous oral agreement, made as a part thereof, to the effect that the note and contract were executed and given upon a condition which has not been performed. This does not vary by parol the terms of the written instrument, but postpones its operation until the happening of the contingency. I could cite additional authorities in this and other jurisdictions to the same effect, and almost without number, but will add only a few in the court: *Garrison v. Machine Co.*, 159 N. C. 285, 289, 290, 74 S. E. 821; *Sykes v. Everett*, 167 N. C. 600, 83 S. E. 535, 4 A. L. R. 751; *Bressee v. Crumpton*, 121 N. C. 122 (opinion by Clark, J.), 28 S. E. 351; *Gazzam v. Insurance Co.*, 155 N. C. 330, 71 S. E. 434, Ann. Cas. 19120, 362; *Bowser v. Tarry*, 156 N. C. 35, at pages 38, 39, 72 S. E. 74; *Pratt v. Chaffin*, 136 N. C. 350, 48 S. E. 768; *Mercantile Co. v. Parker*, 163 N. C. 277, 79 S. E. 606. No case states the principle more strongly or clearly than *Bowser v. Tarry*, su-

pra (opinion by Justice Hoke), and he adds that "it is now very generally recognized."

But I am not bound to sustain that proposition, in order to show that the plaintiff cannot be proceeded against until the county fulfills its part of the agreement so solemnly entered into by it.

My second contention is this, and I think that there can be no question as to its correctness if our own decisions are of force or value as authorities or precedents: Whether or not the condition which was annexed contemporaneously with the delivery of the notes to the county affects the operation or validity of the contract is not essential to the protection of the plaintiffs from the injustice of making them pay what others owe. We may waive or pretermitt this view, and yet they are still without any liability unless and until the county has shown its compliance with the condition, for, if the condition was annexed by parol as a collateral part of the contract, not in writing, and not intended to be, or, to be more accurate, if it is the other part of the contract (and does not contradict the written part), the county is just as much bound to perform the condition before suing the plaintiffs as if it affected the operation, going into effect, validity, or enforceability of the contract. Mr. Clark, in his treatise on Contracts (2d Ed.), at page 85, says:

"Where a contract does not fall within the statute, the parties may at their option put their agreement in writing, or may contract orally, or put some of the terms in writing and arrange others orally. In the latter case, although that which is written cannot be aided by parol evidence, yet the terms arranged orally may be proved by parol, in which case they supplement the writing, and the whole constitutes one entire contract."

Commenting upon the quoted passage, we substantially said in *Evans v. Freeman*, supra, that in such a case there is no violation of the familiar and elementary rule we have before mentioned, because in the sense of that rule the written contract is neither contradicted, added to, nor varied; but, leaving it in full force and operation as it has been expressed by the parties in the writing, the other part of the contract is permitted to be shown in order to round it out and present it in its completeness, the same as if all of it had been committed to writing. The oral evidence tends to insert by parol the complement of the written terms so as to present the whole of it as the parties intended it should be.

All the cases hold, and there are many of them, that in so doing there is no contradiction of the written terms, but they can co-exist in perfect harmony. I have already referred to some of that class of cases. Justice Hoke states the general proposition well in *Typewriter Co. v. Hardware Co.*, 148 N.

C. 97, 55 S. E. 417, and, citing *Broom on Parol Evidence*, § 117, he says that parol evidence is admissible to show an agreement or method of discharging the contract other than that specified in the bond. He discusses the matter fully and assigns the reason for the rule, citing *Woodson v. Beck*, 151 N. C. 144, 65 S. E. 751, 31 L. R. A. (N. S.) 235, and *Walker v. Venters*, 148 N. C. 388, 62 S. E. 510 (relied on in the opinion of the court in this case), as necessarily excepted from the operation of the principle by the peculiar terms of the contracts upon which those suits were brought. I also refer to *Cobb v. Clegg*, 137 N. C. 153, 49 S. E. 80, where the subject is fully discussed. If we should not follow the principle stated, we might shake the validity of many transactions in our banks which have been recognized as entirely within the law, for deposits of collaterals to secure debts are conducted in the same way and accompanied by similar parol agreements to the one in this case. No one has ever doubted their legality. As pointed out in *Evans v. Freeman*, supra, and *Typewriter Co. v. Hardware Co.*, supra, the promise, by note or otherwise, to pay so many dollars at a specified time, is not contradicted by, nor does it conflict with, oral terms as to how the money should be paid, or by showing that something was to be done by the other party before the money should be forthcoming. But there is a more recent case which fully and completely covers our case and upon similar facts. *Kernodle v. Williams*, 153 N. C., at pages 476, and 477, 69 S. E. 431, 34 L. R. A. (N. S.) 934, where the Chief Justice says:

"While it is true that a contemporaneous parol agreement is not competent to vary, alter, or contradict a written agreement, still, when a contract is not required to be in writing, it may be partly written and partly oral, and in such cases, when the written contract is put in evidence, it is admissible to prove the oral part thereof. *Nissen v. Mining Co.*, 104 N. C. 310. This is not varying, altering, or contradicting the written instrument, but merely showing forth the entire contract that was made."

He then instances the conditions of a mortgage and a penal bond, and says:

"So also with a penal bond, which is generally in a large sum, with a condition annexed by which it is of no effect unless a certain event happens, and even then the obligor is usually called on to pay a much smaller sum. There are many other instances which might be given of a like nature."

Referring to the special facts of his case, the Chief Justice puts our case in principle when he says further:

"In the present case the contract, as alleged by the defendants and found to be true by the jury, in its entirety, was that the plaintiff gave his daughter \$500 absolutely, and took her

note for the other \$915, upon which certain payments were to be made (which are admitted to have been made), and the balance was given conditionally that it was to be accounted for with the father's executor, i. e., to be required only if needed for the payment of the debts of the estate. Such an agreement is not a contradiction of the terms of the bond, for the full amount would be paid, if necessary, upon the happening of the conditions stipulated for. Agreements of this nature have often been held valid."

But he goes on and refers to our cases as decisive of the question, such as *Penniman v. Alexander*, supra, *Evans v. Freeman*, supra, and *Typewriter Co. v. Hardware Co.*, supra. He continues:

"In *Evans v. Freeman* [supra], it is said that, if an agreement is partly in writing and partly oral, evidence is competent 'for the purpose of establishing the unwritten part of the contract, or even of showing the collateral agreement made contemporaneously with the execution of the writing.' The court adds that this has been repeatedly held by this court, and 'it has been adjudged competent to show by oral evidence a collateral agreement as to how an instrument for the payment of money should, in fact, be paid, though the instrument is necessarily in writing, and the promise it contains is to pay so many dollars.' To same purport, *Typewriter Co. v. Hardware Co.* [supra]."

And finally he collates the law in this wise:

"The subject is thus summed up by Browne on Parol Ev. 252, who, quoting the last-named case [Brook v. Lattimer, 44 Kan. 431] and many others, says, that parol evidence is competent between the original parties to show that the consideration was illegal, or to show the real consideration and purpose, or to show that it was fraudulent, or to show an additional collateral consideration, giving many instances, among them the most common being to show that a note given by a child to a parent, though absolute in terms, was by parol agreement to be deemed an advancement."

Justice Manning dissented in that case, but at page 485 admits the correctness of the principle we have stated, but says it is confined to a certain class of cases, and "it will be discovered, I think, that none of these written instruments were based upon a present consideration or that the maker executed them as evidence of an existing liability, but for accommodation of the payee and without consideration." The learned justice largely bases his dissent upon the ground that in that case the oral evidence would not only contradict the written part of the contract, but destroy the bond. But that would not be the case here, as, if the county prosecuted the defaulting parties and their sureties with proper diligence and failed to recover, it would have complied with the condition (or contingency), and the bond and mortgage would immediately come into full operation as a security for the county (as

said by the Chief Justice in the *Kernodle Case*), for the latter, even under the entire contract, written and parol, was only a guarantor for collection, and subject only to the obligation of such a guarantor. So it comes to this, that in the *Kernodle Case* the court was practically unanimous as to the question we have here for decision. Other authorities are *Wilson v. Powers*, 131 Mass. 539; *Pym v. Campbell*, 6 El. & Bl. 88; 1 *Elliott on Ev.* § 575. So that I say finally, as to this part of the case, that in either of the views presented by me the judgment of the court below and the opinion of this court about to be promulgated, in which it is affirmed with slight modification, are erroneous, and fly in the face of every well-considered case of this court upon the subject.

Now let us look at this case from another viewpoint, and this concerns the larger equity involved. The jury, by their verdict at June term, 1920, found as follows:

First. That Thomas Thomas, trustee of the sinking fund, misappropriated \$13,236.39, and is indebted to the county in that amount.

Second. That the United States Fidelity & Guaranty Company, as surety of Thomas Thomas, as treasurer of the county, owed nothing.

Third. That Mace, administrator of Alonzo Thomas, as surety for Thomas Thomas, trustee, etc., is indebted to the county in the sum of \$5,000.

Fourth. That the note and mortgage of T. M. Thomas and wife, Laura, delivered to Thomas Thomas and assigned to the county, were not taken and accepted by the latter with the agreement that they should be used only after the other securities held by the county for Thomas Thomas, trustee, were exhausted, as alleged in the complaint. (This part of the verdict set aside by Judge Connor.

Fifth. The fifth issue as to the indebtedness of T. M. Thomas and wife to the county on the note for \$13,500 was not answered.

The court at June term, 1920, gave no judgment, but merely set aside the answer to the fourth issue and allowed the plaintiffs to amend generally, and it will be seen now that the issues submitted by Judge Horton at June term, 1921, are different from those submitted by Judge Connor at June term, 1920. They are as follows:

"(4) In what amount, if any, is W. A. Mace, administrator, etc., of Alonzo Thomas, indebted to Carteret county on account of the term of said Alonzo Thomas as treasurer of Carteret county beginning on the first Monday in December, 1914, and ending at the death of said Alonzo Thomas on the 18th day of November, 1915? Answer: \$5,000 and interest.

"(5) What amount, if any, is Carteret county entitled to recover of defendant United States Fidelity & Guaranty Company as surety for said Alonzo Thomas as treasurer of

Carteret county for said term, beginning on the first Monday in December, 1914? Answer: \$8,236.49, and interest.

"(6) Were the note and mortgage given to Thomas Thomas by plaintiff given as an accommodation paper to said Thomas Thomas, as alleged by plaintiffs? Answer: Yes.

"(7) Is the defendant Carteret county a holder for value as between it and the plaintiffs of the \$13,500 note and mortgage made by plaintiffs? Answer: Yes. (But it had notice of the condition because it agreed to it at the time.)

"(8) Was the note and mortgage of plaintiffs executed to Thomas Thomas and assigned to Carteret county taken and accepted with the understanding and agreement that the same should be used by the county only after the bonds of said Thomas Thomas and of said Alonzo Thomas had been exhausted, as alleged by plaintiffs, and then applied to the unpaid balance due said county on account of the Thomas Thomas trusteeship of the sinking fund and the treasurer'ship of said Alonzo Thomas? Answer: Yes.

"(9) What sum, if any, is Carteret county entitled to recover of plaintiffs on account of the note for \$13,500, secured by mortgage assigned to said county by Thomas Thomas? Answer: \$13,234.49, with interest from October 1, 1910, to be credited with \$5,000 and interest on same from June 15, 1921, due by the estate of Alonzo Thomas as surety for Thomas Thomas, trustee of the courthouse bond sinking fund, the last issue having been answered by the court by consent of parties that the court might answer same after verdict as a matter of law."

The court then entered the following as a part of its judgment:

"It is now considered and adjudged by the court that the answers to the issues numbered 4 and 5 be, and are on motion of defendants, other than Carteret county, set aside as a matter of law, for the reason that the jury found at the June term, 1920, by its answer to the first issue that Thomas Thomas, trustee of courthouse bond fund, received and misappropriated the funds. It is further ordered and adjudged by the court, that Carteret county recover nothing against the United States Fidelity & Guaranty Company as surety, and that said defendant United States Fidelity & Guaranty Company go without day and recover its costs."

Judgment was then given against Mace, administrator of Alonzo Thomas, for \$5,000 and the costs, a judgment against the plaintiffs for \$13,236.49, less the \$5,000 adjudged against Mace, administrator, and the mortgage of the plaintiffs assigned to the county was ordered to be foreclosed, and the land therein described sold to pay the said debt of plaintiffs to the county.

It will be observed that Judge Horton set aside the fourth and fifth issues of June term, 1921, as matter of law because the jury at June term, 1920, had found in answer to the first issue that Thomas Thomas, trustee

of the courthouse fund, had received and misappropriated the same.

How the fourth and fifth issues of June term, 1921, could be set aside, as matter of law, because of the finding on the first issue, I fail to perceive. Nobody doubted that Thomas Thomas, as trustee of the courthouse fund, had defaulted and was indebted to the county in the sum of \$13,236.49, but this did not prevent Alonzo Thomas, as treasurer of the county, from being indebted also to the county, if, as treasurer, he had received the funds from Thomas Thomas, no matter where they came from, so that he received them by virtue or by color of his office. Having received them in that way, he became responsible for them to the county, and it appears from the evidence in the record and the finding of the jury that Thomas Thomas, as trustee, and the same as treasurer, and also Alonzo Thomas, as treasurer, had jointly and by their indiscriminate use and misuse of the county funds in their hands, made themselves liable for the same. It makes no difference from whence the money came, or how they juggled with these funds, so that they received them "by virtue of" or "by color of" their several offices, the two terms having very different meanings. Judge Reade has said:

"The defendants insist that 'by virtue' and 'under color' mean the same thing. They mean very different things. For instance, the proper fees are received by virtue of the office; extortion is under color of the office. Any rightful act in office is by virtue of the office. A wrongful act in office may be under color of the office. Color in law means not the thing itself, but only an appearance thereof; as color of title means only the appearance of title." Broughton v. Haywood, 61 N. O. at page 384.

If the position of the United States Fidelity Company is correct, then the county could not have recovered money belonging to it, as its courthouse fund, if Thomas Thomas, the original defaulter, who was insolvent, had paid it over to either Thomas Thomas, treasurer, or Alonzo Thomas, treasurer. But that is not the law, as Broughton v. Haywood, supra, shows, and it is upon the principle as therein stated that the sureties of the two defaulters were charged with liability by the jury, and really also by the referee. They were manipulating the county's money, as if it belonged to them, for their own benefit and advantage, playing fast and loose with the county finances, whereas the proper place, as said in the opinion of the court in this case, for the county's money to be, was in the county treasury, and but for the malfeasance of these two officers, who forget that they were fiduciaries, it would have been there long ago, but it should not get there, and the county, as shown by its answer, does not want it to get there, by a gross injustice to the plaintiffs, who, as a

mere gratuity, helped to secure it to the county, upon its sacred promise that it would not call on the plaintiffs, by suing on the note or foreclosing the mortgage, until it had exhausted all other securities held by it in law or in equity, and it has expressly asked that such be not done. The good people of Carteret county would prefer that the treasury be empty than to subject the note and mortgage to the payment of the amount due by the default of its officers, in violation of its agreement not to fall back upon the note, and it expresses itself as ready and willing to comply with its part of the agreement. It would not have received this security but for this promise on its part, and which it is asking now that it may be permitted to keep and perform.

The plaintiffs are volunteers, while the United States Fidelity Company, though professing to be a benefactor to our people, has come into this state to ask for the patronage of its citizens, for a consideration and a good one, which it has been receiving from them for years and filling its coffers, and now is asking to transfer its obligation, purchased for a consideration by the defaulting officers, to the shoulders of the plaintiffs, who acted gratuitously to help the county out of its difficulty and financial embarrassment. Which of the two is entitled to the first consideration of this court, or any court as far as that is concerned? The law is with the plaintiffs, and the highest and strongest equity, which appeals to a court of conscience for its aid in executing justice. Judge Connor very properly set aside the answer to the original fourth issue, as being against the clear weight of the evidence. The eighth of the new issues, relating to the same question, that is, the manner in which the note and mortgage were held by the county, was answered in favor of plaintiffs that the bonds of the two Thomases should be first exhausted before plaintiffs should be compelled to pay anything, and only used to pay any balance due after such bonds were exhausted. The jury further find that the note and mortgage were strictly accommodation papers. There was no conflict between the answer to the first issue and the answers to the new fourth and fifth issues. They related to different matters, and were not in any way inconsistent, but can well stand together. His honor's order setting them aside was not only error in law, but also error in fact, and I have already demonstrated that this is true, by showing that both Thomas Thomas, as trustee, and Alonzo Thomas, as surety, could be indebted to the county at one and the same time, and, even if there was error in law, he could only order a new trial as to those issues, and not vacate them and stop there, if it was competent at all for the judge to render a judgment upon two verdicts returned before different judges and especially

after there had been a general order to replead. Such procedure might produce great confusion if followed as a precedent. But I contend that, if we take both verdicts into consideration, the answers to the fourth and fifth issues should be reinstated, and judgment thereon rendered for the county. This is the safest, shortest, and swiftest method by which the county can be restored to its own, and has the great advantage of enabling the county to discharge its legal, equitable, and moral duty to the plaintiffs by redeeming the promise upon the faith of which it obtained their note and mortgage. It is asking that it be allowed to do so, and why not let it do so, and make the United States Fidelity & Guaranty Company pay its share of the liability, which it assumed for a valuable consideration.

Reverting now to a more intimate and particular discussion of the issues and evidence to support them, Judge Horton did not set aside the third and fourth issues because they were against the weight of the testimony, and he let the other issues stand unchallenged, and especially the eighth, which found the agreement made contemporaneously with the delivery of the note and mortgage to be as alleged by plaintiffs. Judge Connor also believed there was evidence to support the plaintiffs' contention, and he set aside the fourth of the first set of issues as being against the clear weight of the testimony. The fourth issue of that set corresponds somewhat with the eighth issue of the second set, though the latter is broader and more comprehensive. So we have the concurrent opinions of Judges Connor and Horton to the effect that there was evidence to be considered by the jury on the material issues. In this contention I will refer to *Palmer v. Lowder*, 167 N. C. 331, at page 333, 83 S. E. 464, 466, where the Chief Justice says:

"While parol evidence is not admissible to vary or contradict a written agreement, yet, when the agreement is not one which the statute requires to be in writing, it is competent to show by parol that only part of the agreement was in writing and what was the rest of the agreement. * * * Indeed, no proposition of law can be better settled."

He cites many cases, including *Kernodle v. Williams*, supra, *Nissen v. Mining Co.*, 104 N. C. 309, 10 S. E. 512, and *Colgate v. Latta*, 115 N. C. 138, 20 S. E. 388, 26 L. R. A. 321, and says *Abbott's Trial Ev.* p. 294, thus states the same principle:

"A written instrument, although it be a contract within the meaning of the rule on this point, does not exclude evidence tending to show the actual transaction, where it appears that the instrument was not intended to be a complete and final settlement of the whole transaction, and the object of the evidence is simply to establish a separate oral agreement in the matter as to which the instrument is

silent and which is not contrary to its terms nor to their legal effect."

This passage from Abbott's book is quoted with approval in *Bule v. Kennedy*, 164 N. C. at page 298, 80 S. E. 445. Judge Allen states the rule very aptly in *Brown v. Mitchell*, 168 N. C. 312, 84 S. E. 404, Ann. Cas. 1917B, 933, and actually sustained the introduction of a brand-new stipulation into a written contract, citing *Wilson v. Scarboro*, 163 N. C. 384, 79 S. E. 811, and other cases already mentioned by me, and he further held the consideration of the contract to be amply sufficient. See, also, *Potato Co. v. Jenette*, 172 N. C. 1, 89 S. E. 791.

The contention in the court's opinion by the Chief Justice that Kernodle's Case has no application here is based upon a total misconception both as to what that case decides and as to what is involved in this case. This is not an attempt to reform a written instrument, contradict, or vary it. Judge Pearson with his usual legal acumen, accuracy, and vigor of perception, makes it very clear in *Shelton v. Shelton*, 68 N. C. 292, 294, 295, that the rule of evidence as to altering a written instrument by parol is not at all violated or infringed. Besides, the deed of mortgage was not the only paper deposited as collateral, but the note was the principal thing, and the deed would go with it, if it had not been deposited, as an incident to it. *Hyman v. Devereux*, 63 N. C. 624. Nor is the deposit of a collateral required to be in writing. The deposit of a note as collateral is generally by parol, and the commercial world will be amazed to know that this proposition is even disputed. But a complete answer to the contention is that this kind of transaction is not required to be evidenced by a writing, as the statute of frauds has nothing to do with it, and the court travels far afield to support its untenable position when it advances such a reason. Nor has the doctrine of trusts any bearing whatever on the question. It is not a parol or oral trust, and this excludes from the case all that is said about *Gaylord v. Gaylord*, 150 N. C. 222, 63 S. E. 1028, *Campbell v. Sigmon*, 170 N. C. 351, 87 S. E. 116, Ann. Cas. 1918C, 40, *Walters v. Walters*, 172 N. C. 330, 90 S. E. 304, and the other cases cited in this connection. This is distinctly and only the deposit of collaterals—that is, the note secured by the mortgage—upon a contingency or a condition which may lie in parol, and is not required to be in writing. *Colebrook on Collateral Securities*, pp. 376 and 377, thus states the well-known rule of law and the commercial custom and practice:

"Parol testimony is received to establish the fact that the transfer of certificates was intended as collateral security only, although absolute in terms. This principle was applied to a stock transaction, where the assignment

of title was absolute, the rule excluding parol testimony to vary or contradict a written instrument having reference only to the language used therein, and not forbidding inquiry into the object of the parties in executing and receiving the same"—citing many cases in the notes in support of the text, and among them *McMahon v. Macy*, 51 N. Y. 155; *Lathrop v. Kneeland*, 46 Barb. (N. Y.) 432; *Jones v. Portsmouth R. R. Co.*, 32 N. H. 544; *Pittsburg R. R. Co. v. Stewart*, 41 Pa. 54; *Tonica R. R. Co. v. Stein*, 21 Ill. 96.

The contingency or condition is that the county shall first exhaust its other securities before resorting to the notes and mortgage, a transaction, not unusual, as our reports will clearly and fully show. See *Michie's Digest*, title "Contracts," and *Kelly v. Oliver*, supra, *Evans v. Freeman*, supra, and *Hughes v. Crooker*, supra, to which we add *Hinton v. M. R. F. Life Ass'n*, 135 N. C. 314, 326, 47 S. E. 474, 478, 65 L. R. A. 161, 102 Am. St. Rep. 545, where Justice Connor said:

"The testimony was competent. It is said, however, that to permit the testimony to be introduced violates the rule excluding parol evidence to contradict a written instrument. The proposed testimony in no manner contradicted the terms of the policy. It was offered to prove an agreement collateral to the policy."

See, also, *Blair v. Security Bank*, 103 Va. 762, 50 S. E. 262, where the court held it competent to prove that a paper delivered to the payee, or to any other person who is the holder thereof, on agreement that it was not to take effect except in a certain contingency or on condition, the latter must first happen or be performed before the holder can sue or recover on it. And this, we add, is true in all cases, except where the writing itself is contradicted or varied, which is not the case here, and even not as much so as in *Cobb v. Clegg*, supra, and some of the other cases we have mentioned. See, also, *Hicks v. Critcher*, 61 N. C. 353.

I wish it to be clearly understood that I do not challenge the correctness of *Gaylord v. Gaylord* and the other numerous cases supposed to be like it, because I am not required to do so to establish my contention, as they bear no likeness to this case, and are not pertinent authorities. I have only adverted to these matters because they are set forth in the opinion of the court as the grounds upon which it attempts to support what I consider to be a very unfortunate ruling. It is all beside the real merits of the case and the law involved in its proper decision, because, in any view, the plaintiffs are entitled to have the judgment against Mace, administrator, and the United States Fidelity Company entered upon the verdict. The eighth issue establishes their right, and has not been reversed or impaired in its force.

nor have any of the other issues essential to the enforcement of plaintiffs' right. The county says in its answer:

"Said Carteret county and M. Leslie Davis, treasurer, join with the plaintiffs in asking the court to fix liability upon the estate of Alonzo Thomas and upon the United States Fidelity & Guaranty Company in such amounts as the evidence and law in this case will fix them with, on account of the default and embezzlement of the said Thomas Thomas as hereinbefore set out, and asks the court, if such liability is fixed in any amount against the estate of Alonzo Thomas or the United States Fidelity Company, that said amounts, as fixed, be paid in exoneration upon the said \$13,500 note executed by the said T. M. Thomas and wife and indorsed for value by Thomas Thomas to Carteret county; and the said Carteret county and M. Leslie Davis, treasurer of Carteret county, do not in any way or manner waive any of their rights hereby against the plaintiffs in this action."

Even where a contract is required by the statute of frauds to be written, if it is admitted in the pleadings, the statute is thereby waived, and proof by parol will answer instead of a writing, and so also with the rule as to oral evidence to prove the entire contract, part of which is in writing. The cases already cited show this conclusively. Nor is this an effort to convert a deed absolute on its face into a mortgage, and nothing like it. There is not even a suggestion in the mortgage as to the conviction of Thomas Thomas of embezzlement, nor as to his pardon and the conditions of it. Nobody expected anything to be said in the mortgage about T. M. Thomas' nephew being exempted if some one else paid the debt or was sued for it, as it was not intended to be in there, but to take the form of a solemn collateral promise of the county (which admits it) that its other securities should be first exhausted, nor is there anything akin to a Pickwickian promise, which is purely imaginary and rather far-fetched, but, on the contrary, it is a promise expressly made by the county, and which it is anxious to perform in spirit and in letter, if the court will only give it a chance to do so. There is nothing wrong in this, at least the county does not think so, and refuses to assent to such a suggestion by asking now to perform the condition. It makes no difference how long litigation is protracted. It was not the fault of the plaintiffs, but of the United States Fidelity Company, who, if any one, has prolonged the litigation, but, if anybody has done so, it surely is not the plaintiffs.

Counsel and parties will be surprised to find that they are accused of protracting litigation unnecessarily by trying to defend and protect their clients' rights, and of invoking the invective of Samuel Butler in this couplet from *Hudibras*,

"He could distinguish, and divide
A hair 'twixt south and southwest side."

This was intended for a particular class of reformers, and not for the lawyers. That famous poem was conceived and written to satirize a certain officer who lived in the time of the Commonwealth, and who was enforcing too drastically the observance of laws by Parliament for the suppression of the innocent sports and amusements of the people, and it did not apply to the weightier matters of the law. If there is any excuse for the reference, a more appropriate one would be Dickens' satire of Lord Eldon, the Chancellor, in his Bleak House, but even the noble lord, while a little slow, preserved and protected equitable rights, though he was called the great procrastinator. People who believe in the rights of others as well as their own are of the mind that nothing is ever finally decided until it is decided right, but after all is said the county has the money owing to her within her grasp if she is only allowed to take it, as we have before shown. Thomas' pardon has nothing to do with this case, which concerns only the enforcement of a clearly worded and admitted contract with the equities of all kinds on the plaintiffs' side.

There is no agreement in the record that militates at all against my views, but the one that is there accords fully with them, and itself recognizes and submits to the enforcement of the condition upon which the papers were delivered to the county, and it does not rely on any such agreement to defeat the plaintiffs' action. The agreement expressly provides that the plaintiffs are only to pay what is left of the debt after applying as credits the amounts due from Mace, administrator, and the fidelity company, which does not appear in the opinion of the court. But the cases of *Kelly v. Oliver*, supra, as to the condition upon which the note and mortgage were taken by the county, and *Kernodle v. Williams*, supra, as to the admissibility of parol evidence to show the unwritten part of the agreement, are conclusive as to plaintiffs' equity. Those cases have been approved frequently since they were decided.

In conclusion I call attention to the manifest error in setting aside the fourth and fifth issues. This error was a clear misapprehension of the nature of the issues with which they were supposed to be in conflict.

The plaintiffs are not attacking or criticizing the issues and answers thereto as they now appear in the record, but the action on the two set aside by the judge and the answer to the ninth by him, which as a matter of law depends upon the ones set aside. His honor was evidently misled by the second issue of 1920, which was on another bond and

cause of action set out in the original complaint against another principal with the same surety company for a different term and a different office. It had no reference to the cause of action set out in issues 4 and 5, June term, 1921, against another treasurer, Alonzo Thomas, on other bonds, with the same surety, introduced in the action by the further pleadings filed by permission of the court after June term, 1920, under the order at that term. There is no inconsistency between the two causes of action and the issues, though the surety involved is the same company. His honor also seemed to be under the impression that two different men and their sureties could not be liable for the same defalcation, which is, of course, erroneous.

Whatever may be said, the outstanding fact remains that the defendant in its answer admits the contemporaneous agreement to exhaust other securities, and asks of the court that, whatever may be done, that agreement should not be violated. The case is exceedingly plain, and there is but one conclusion to be drawn from it, not that the people will be taxed one cent more, as stated in the court's opinion, but that the county, which is asking equitable relief, is itself willing to do full equity in the premises. Nothing that can be said pro and con as to the facts or the law can overcome the force of its admission and its willingness to abide by it.

The county should have a judgment on the issues as returned by the jury, but the court refuses its request that the plaintiffs, if they are required to pay, be subrogated equitably to its rights, as against the fidelity company.

While the county was not the original payee named in the note and mortgage, it took both with notice of the stipulation touching the contingency or condition as to exhausting the securities, and in truth it was a party to that stipulation. So that it was not an innocent purchaser, and does not pretend that it is.

While I really believe and confidently insist that the judgment should be as I have indicated, it should, in any event, be so modified as to provide that the plaintiffs, if they are required to give up their note and mortgage and pay this debt to that extent, should be equitably subrogated to all the rights of the county as against the United States Fidelity & Guaranty Company, with the verdict on the third and fourth issues restored, and that is what it asks should be done.

It is hard, very hard measure, that the plaintiffs should be made to carry this heavy indebtedness and the really responsible party should be allowed to go free, when the eighth issue and the answer to it now stand unreversed and unimpaired, and alone establish that the note and mortgage were given upon a contingency which had not happened or a condition which has not been performed.

(117 S. C. 423)

BRANNON v. HARRIS et al. (No. 10685.)

(Supreme Court of South Carolina. Aug. 1, 1921.)

1. Principal and surety \S 115(2)—Failure to record mortgage security notes does not release surety.

Where surety on a note indorsed without understanding that it was to be secured by a mortgage, without inquiring as to whether security was taken, or whether it was in proper shape or recorded, and exercised no vigilance for his own protection, as by requesting that the mortgage be recorded, he is not released from liability because of loss in the value of the security caused by the failure of the obligee to record the mortgage.

2. Principal and surety \S 121—To release surety the act committed or omitted by the obligee must be enjoined on him by equity and required of him by the surety.

To effect the discharge of a surety, the act complained of on the part of the creditor must be of a positive character or an omission to perform some act, when required by the surety, which equity enjoined upon him and the omission of which proved injurious to the surety. (Per Cothran, J.)

Appeal from Common Pleas Circuit Court of Union County; W. H. Townsend, Judge.

Action by A. B. Brannon against G. B. Harris and L. E. Garner. From judgment for plaintiff, defendant L. E. Garner appeals. Affirmed.

J. Clough Wallace and John K. Hamblin, both of Union, for appellant.

Barron, Barron & Barron, of Union, for respondent.

WATTS, J. [1] This is an appeal from judgment entered upon a directed verdict in favor of plaintiff by his honor Judge Townsend. At the close of the evidence a motion was made by both parties for a directed verdict in their favor—that of the plaintiff for full amount against both defendants; that of defendants for full amount against Harris and against Garner for \$79.72. His honor directed a verdict against both defendants for the sum of \$564.89. Defendant Garner appeals on the following exceptions:

"(1) His honor erred in holding that it was necessary for the indorser and accommodation surety, L. E. Garner, to request or demand of the plaintiff that he have the mortgage recorded before he could claim credit for any loss or damage to the security from plaintiff's neglect to have the said mortgage recorded, and in not holding that the failure to have the mortgage recorded under such request or demand would have absolutely discharged the surety from all liability on the note.

"(2) His honor erred in not holding that under the law the surety accommodation indorser, L. E. Garner, was entitled to credit

(109 S.E.)

on the note evidencing the debt sued on for all loss or damage caused by the plaintiff's neglecting to have the said mortgage recorded, resulting in the deterioration and depreciation of the security held for the payment of said debt, and in not directing the verdict as moved by defendant's counsel.

"(3) His honor erred in directing the verdict against both defendants for the full amount due on the debt evidenced by said note."

It will be seen that Harris had practically no defense and does not appeal. Garner's defense is that plaintiff should have recorded his security, and, if he had done so, he would have had first mortgage over the mules, instead of second mortgage. The evidence shows that, when the trade was closed between Brannon and Harris, Garner was not present. Harris took mortgage on his own initiative, without suggestion from any one. Garner does not suggest that the security was to be taken for the protection of himself, and that the taking in any manner influenced him in indorsing the note, but says that the matter was not mentioned between Brannon and himself, but that he knew Brannon had taken the security. The evidence shows conclusively that Brannon took the mortgage for his own protection. Garner did not suggest it at the time it was taken, knew nothing about it until later; indorsed the note with no understanding that such security was to be taken, or that he was to be benefited thereby. He simply assumed that plaintiff would do what he could to secure the note. He made no inquiry as to whether security was taken, whether it was in proper shape, whether it was recorded or not. He simply did nothing to protect his indorsement, and by his carelessness he cannot now be relieved from paying the debt he obligated himself to pay when he indorsed the note sued upon. He exercised no vigilance at all for his protection.

All exceptions are overruled, and judgment affirmed.

GARY, C. J., and FRASER, J., concur.

COTHRAN, J. (concurring). [2] The point in this case is whether or not a surety is discharged in full or pro tanto by reason of loss resulting from the failure of the creditor to record a mortgage which the principal debtor had executed to the creditor as security for the debt. The question, in both aspects, is absolutely foreclosed by the cases below cited, which declare that, in order to effect the discharge of the surety, the act complained of on the part of the creditor must be of a positive character, or an omission to do so when required by the surety, which equity enjoined upon him, and the omission of which proved injurious to the surety. *Lang v. Brevard*, 3 Strob. Eq. 59;

Hampton v. Levy, 1 McCord. Eq. 107; *Smith v. Tunno*, 1 McCord. Eq. 443, 16 Am. Dec. 617; *Jackson v. Patrick*, 10 S. C. 197; *Rosborough v. McAlilly*, 10 S. C. 235; *Hellams v. Abercrombie*, 15 S. C. 110, 40 Am. Rep. 684; *Gardner v. Gardner*, 23 S. C. 593; *Greenville v. Ormand*, 51 S. C. 129, 28 S. E. 147; *Fales v. Browning*, 68 S. C. 13, 46 S. E. 545; *Bank v. McMillan*, 78 S. C. 561, 57 S. E. 630.

I therefore concur in the judgment announced in the opinion of Mr. Justice WATTS.

(118 S. C. 48)

BEHRMANN v. ATLANTIC COAST LINE R. CO. (No. 10748.)

(Supreme Court of South Carolina. Nov. 4, 1921.)

Carriers \Rightarrow 113—Carrier held not liable for loss of cotton stolen from platform prior to issuance of bill of lading.

A carrier, having posted notice that it would not be liable for goods left on platform until issuance of bill of lading, was not liable for loss of bale of cotton placed on platform by shipper, but stolen prior to issuance of bill of lading, notwithstanding shipper's custom of placing cotton on platform when purchased without obtaining bill of lading until the close of the business day, when bill of lading for the full day's purchases would be issued.

Gary, C. J., and Watts, J., dissenting.

Appeal from Common Pleas Circuit Court of Berkeley County; Ernest Moore, Judge.

Action by S. Behrmann against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Rutledge, Hyde & Mann, of Charleston, and Winter & Winter, of Monck's Corner, for appellant.

John O. Edwards, of Monck's Corner, for respondent.

FRASER, J. The agreed statement of facts set out in the case is as follows:

"This is an action by S. Behrmann, plaintiff, against Atlantic Coast Line Railroad Company, defendant, for the value of one bale of cotton, alleged to have been delivered by plaintiff to defendant at Monck's Corner, S. C., on or about November 20, 1915, for shipment to Charleston, S. C., and not accounted for to plaintiff. The action was tried before Magistrate Altman, at Monck's Corner, January 25, 1917, and resulted in a verdict for plaintiff; whereupon the defendant appealed to the circuit court, Judge Ernest Moore presiding. Judge Moore having affirmed the judgment of the magistrate, notice of appeal to the Supreme Court was given, and the case now comes up on appeal, on the following agreed statement of facts:

"At the trial in the magistrate's court it was

shown that the plaintiff was in the habit of buying cotton from the farmers, changing the marks, and shipping en bloc. On the day in question this particular bale of cotton was placed on defendant's platform at Monck's Corner by B. F. Murray, who notified plaintiff. Plaintiff paid Murray for the cotton and changed the mark, but did not notify defendant's agent that the cotton was on the platform. During the day plaintiff bought other cotton—a total of 16 bales that day. Late in the afternoon, plaintiff applied to defendant's agent for a bill of lading for the 16 bales. The agent agreed to give him a bill of lading for 15 bales, all that he could find on the platform, but said he knew nothing about the 16th bale, and declined to give a bill of lading for it. No trace of the missing bale has ever been found.

"It was shown on behalf of defendant that there had been a prior suit between the same parties for a missing bale of cotton, for which defendant had been required to pay. Defendant posted a notice at its depot, which plaintiff admits having seen, and to which he admits his attention was particularly directed at the former trial, to the effect that the railroad would not be liable for goods or freight of any kind left on its platform until after the shipper had received a bill of lading. Although this notice had been displayed for a long time, it was shown that plaintiff and one or two other shippers had been in the habit of placing cotton on the platform as it was purchased, and of getting a bill of lading for the full day's purchases just before closing time.

"Defendant contended at the trial, and in the circuit court, that it could not be held responsible for cotton or other property placed on its platform, unless it has issued a bill of lading, or at least had been notified and had accepted the property for shipment. Plaintiff claimed that, since the custom had been for merchants to leave cotton on the platform until the close of the business day, and then get a bill of lading for the entire amount, defendant was estopped from disclaiming responsibility for cotton placed on its platform, even though a bill of lading had not been issued, and the agent had not been notified.

"The case comes before this court on the same questions that were raised in the magistrate's court and in the circuit court."

This case is very nearly the same as the case of *Copeland v. Railway*, 76 S. C. 476, 57 S. E. 535. The differences are fatal to the respondent's view. The *Copeland Case* was a "fire case," but it was not tried on that theory, but on the theory that the cotton had been delivered to the railway as a common carrier. In that case there was no notice limiting liability. The respondent claims that, although in this case there was a notice, it had been disregarded, and it was a question of fact as to whether it had been waived or not. In this the respondent is in error. The notice did not forbid the placing of cotton on the platform, but limited the liability to the time of the giving of a bill of lading. There was no evidence that this was disregarded. If the cotton had been burned, the custom might have been con-

strued as consent to the placing of the cotton on the right of way. The cotton was not burned, but stolen. The railway is liable for things burned on, but not for things stolen from, the right of way. The difference is fatal to the respondent's case. The judgment in the *Copeland Case* was affirmed on the scintilla doctrine. There is another difference, and that is that the unburned cotton was taken by the railway and sold for its own account. That was evidence from which a ratification might have been inferred. There are no such facts in this case.

Making allowances for the differences in the two cases, the *Copeland Case* is conclusive of this case, and the judgment appealed from is reversed.

COTHRAN, J. I concur in the opinion rendered by Mr. Justice FRASER. The action, as the agreed case shows, was for the value of a bale of cotton, alleged to have been delivered by the plaintiff to the defendant, for shipment, and not accounted for by the defendant. It is therefore distinctly an action against the railroad company as a common carrier, and not as a warehouseman. The onus was upon the plaintiff, therefore, to show facts sufficient, at least prima facie, to establish the relation of the railroad company to him to have been that of a common carrier. The undisputed facts are as follows:

The plaintiff is a cotton buyer at Monck's Corner; he was in the habit of buying cotton from farmers who brought it into town in wagons; after a sale was consummated the farmer would have the cotton weighed and placed upon the depot platform, after which it was settled for by the plaintiff at his place of business; it was the custom of the plaintiff and other buyers to leave the cotton thus placed on the platform until the close of the business day, and then get a bill of lading for the entire lot purchased and placed during the day, the railroad company receiving no specific notice of such placing; there had been a prior suit between the same parties for a bale of cotton that had been so placed but could not be found, and the defendant was required to pay for it; the defendant posted a notice at its depot, which plaintiff admits having seen, and to which he admits his attention was particularly directed at the former trial, to the effect that the railroad would not be liable for goods or freight of any kind left on its platform until after the shipper had received a bill of lading. For the purpose evidently of counteracting the effect of this notice, this statement appears in the case:

"Although this notice had been displayed for a long time, it was shown that plaintiff and one or two other shippers had been in the habit of placing cotton on the platform as it was pur-

chased, and of getting a bill of lading for the full day's purchases just before closing time."

During the day of the particular occurrence, the plaintiff bought a bale of cotton from a farmer by the name of Murray. Murray placed the bale on the platform and notified the plaintiff, not the defendant. The plaintiff paid Murray for the cotton and changed the marks, but did not notify the defendant that the cotton was on the platform. During the day he bought 15 other bales which were similarly placed. After the close of business, the plaintiff applied to the railroad agent for a bill of lading for the Murray bale and the other 15 bales which he had bought during the day. The Murray bale could not be found, and the agent declined to issue a bill of lading for more than the 15 bales then on the platform. No trace of the missing bale has ever appeared, and there is not the slightest explanation in the evidence as to the cause of its disappearance. It was not burnt, but whether stolen from the platform or shipped in error to another point does not appear.

The plaintiff sued in the magistrate's court for the value of the lost bale, and recovered a judgment; on appeal to the circuit court the magistrate's judgment was affirmed, and from that order the defendant has appealed.

The facts are conceded. There are no issues of fact in the case, and therefore the rule that this court in a law case has no power to review the findings of fact below is without applicability. The conclusions to be drawn from these admitted facts are legal, as to which this court has ample power of review, *Whitney v. R. Co.*, 38 S. C. 365, 17 S. E. 147, 37 Am. St. Rep. 767, where it is held:

"While it may be admitted that a question of delivery is a mixed question of law and fact, yet there was no conflict of testimony here. Matters of law may be passed upon by the court."

The question of law for determination is: Do these facts tend to establish the relations of common carrier on the part of the railroad company? If they do not, as I shall endeavor to demonstrate, the judgment should be reversed. There is no allegation and no effort on the part of the plaintiff to establish the relation of warehouseman, but he has chosen to attempt the establishment of the relation of common carrier, a relation which generates a liability so drastic that relief can be had only upon the ground that the loss occurred by act of God or the public enemy. It is but fair, therefore, that in making that choice the plaintiff must take it with its concomitant conditions; that the burden is upon him to establish, at least prima facie, the existence of that relation.

He has attempted to do this by allegation and proof that the cotton was delivered to

the railroad company for shipment. These are the elements of the relation, and of course, if he has established them, he is entitled to his verdict.

It is pertinent to inquire, therefore, what are the essential elements of delivery, and then to compare the facts of this case with them. In my opinion the authorities fully sustain the following proposition:

In order to charge the carrier with the practically absolute liability of a common carrier as compared with the limited liability of a warehouseman, the burden is upon the owner of the goods to establish: (1) That there has been a complete delivery of the goods to the carrier, actual or constructive; (2) that the delivery has been made for shipment, with full shipping directions; (3) that the goods have been accepted by the carrier for immediate shipment or at such time as the convenience of the carrier may suggest; (4) that the goods have gone into exclusive possession of the carrier and that nothing further is to be done with or to them by the owner.

The rule is thus clearly stated in 1 Hutch. Carr. (3d Ed.) § 105:

"The delivery must be complete. The duties and obligations of the common carrier with respect to the goods commence with their delivery to him; and this delivery must be complete, so as to put upon him the exclusive duty of seeing to their safety. The law will not divide the duty or obligations between the carrier and the owner of the goods. It must rest entirely upon the one or the other; and until it has become imposed upon the carrier by a delivery and acceptance, he cannot be held responsible for them."

The same author says, at section 112:

"The delivery must be to the carrier or his agent for immediate transportation; for if the goods are delivered to him to be stored for a certain time or until the happening of a certain event, or until something further is done to prepare them for transportation, or until further orders are received from the owner, the carrier becomes a mere depository or bailee until the appointed time has expired, or the other contingency happened, upon which the carriage is to commence, or until further orders have been given, as the case may be; for nothing could be more unjust than to permit the owner of the goods to impose upon a mere depository or warehouseman, whether he has yet become related to the goods as carrier or not, the extremely hazardous responsibility of the common carrier, so long as it might suit his interest or convenience to do so."

"The general and well-settled rule is that the liability of the common carrier commences wherever and as soon as the goods have been delivered to and accepted by him solely for transportation, although they may not be put immediately in itinere, but are at first, for his (the carrier's) own convenience and preparatory to the voyage or journey for which they are intended, temporarily deposited in his wharf or storeroom. In such cases, the deposit is a

mere accessory to the carriage, and does not postpone his liability as common carrier to the time when they shall be actually put in motion towards their place of destination." 1 Hutch. Carr. § 113.

"To effect a delivery to the carrier there must be, either actually or in legal effect, a complete surrender to him of possession and custody, and, as a consequence, all control over the goods must be abandoned by the owner until the purpose of the bailment has been accomplished; and until this has been done it cannot be said that the carrier has assumed any responsibility for them as a carrier." 1 Hutch. (3d Ed.) § 119.

In *Missouri R. Co. v. McFadden*, 154 U. S. 155, 14 Sup. Ct. 990, 38 L. Ed. 944, the railroad company had actually issued a bill of lading for the cotton, but as a matter of fact it was in the possession of a compress company for subsequent delivery to the railroad company, and was destroyed by fire before actual delivery. The court held:

"The liability of a carrier begins when the goods are delivered to him [the carrier] or his proper servant authorized to receive them for carriage."

The quotation from *Hutchinson* set forth above is approved by the court, adding, "This doctrine is sanctioned by a unanimous course of English and American decisions," citing a large number of them, and stating, "Indeed, the citations might be multiplied indefinitely."

In *Watts v. Railroad Co.*, 106 Mass. 466, it is held:

"The question arising in this case relates to their liability in respect to goods received at the depot to be carried. In respect to such goods, their liability as carriers commences as soon as the duty of immediate transportation arises, and not while they are delayed for the convenience of the owner."

In *Turner v. Railroad Co.*, 86 Conn. 71, 84 Atl. 298, Ann. Cas. 1913D, 637, it is held (quoting from syllabus):

"The liability of a common carrier of goods commences upon complete delivery of the goods for immediate transportation, and until that time it does not hold the goods in the capacity of a common carrier."

The opinion states:

"The law is well settled that, until the goods to be carried are delivered for immediate transportation, the receiver does not hold them in the capacity of common carrier. His liability in that capacity commences upon the complete delivery of the goods for immediate transportation."

In a note to this case it is stated:

"The responsibility of a common carrier for goods entrusted to him commences when there has been a complete delivery for the purpose of immediate transportation. If part only of the goods is delivered and such part is lost or injured while awaiting the delivery of the re-

mainder, the liability of the carrier is that of a warehouseman only. The liability as insurer commences only when the duty of immediate transportation arises. *Missouri Pac. R. Co. v. Riggs*, 10 Kan. App. 578, mem., 62 Pac. 712; *Dunnington v. Louisville, etc., R. Co.*, 153 Ky. 388, 155 S. W. 750; *Watts v. Boston, etc., R. Corp.*, 106 Mass. 466; *Burrowes v. Chicago, etc., R. Co.*, 87 Neb. 142, 126 N. W. 1064, 34 L. R. A. (N. S.) 223; *Fisher v. Lake Shore, etc., R. Co.*, 9 Ohio Cir. Dec. 413, 17 Ohio Cir. Ct. 491; *Union Steamship Co. v. Drysdale*, 32 Can. Sup. Ct. 379. See, also, *Barron v. Eldredge*, 100 Mass. 455, 1 Am. Rep. 128; *London, etc., F. Ins. Co. v. Rome, etc., R. Co.*, 144 N. Y. 200, 39 N. E. 79, 43 Am. St. Rep. 752; *Stewart v. Gracy*, 93 Tenn. 314, 27 S. W. 664; *Gulf, etc., R. Co. v. Insurance Co. of North America (Tex.)* 28 S. W. 237."

In *Bainbridge Co. v. Railroad Co.*, 8 Ga. App. 677, 70 S. E. 154, the car had been placed upon a side track and loaded and a bill of lading had been issued the carrier, and the shipper had, however, expressly agreed that the shipment should not be deemed delivered to the carrier until it had actually taken possession of it. The court held that the relation of common carrier had not been created.

In *Wilson v. Railroad Co.*, 82 Ga. 386, 9 S. E. 1076, it is held that wood piled up along a railroad track, to be loaded by the owner when he could get the cars, is not completely delivered to the company.

In *Railroad Co. v. Byrne*, 100 Fed. 359, 40 C. C. A. 402, it is held that, where a carrier has constructed pens or yards in order to facilitate the loading of stock, the mere placing the stock in such pens will not be sufficient to impose upon the carrier the duties and liabilities of a common carrier.

In *Mente v. I. C. R. Co.*, 7 Orleans App. 154, it is held that, while it is true that the custody of a carrier begins as soon as the goods are delivered by the shipper at the place appointed by the carrier for their reception, and before they are actually placed in the cars, still this custody is not that of a common carrier but that of a warehouseman, unless the goods are so delivered to the carrier that it may immediately, and without awaiting any further action on the part of the shipper, commence its service of actual transportation.

In *Anderson v. Railroad Co. (Miss.)* 38 South. 661, the cotton was placed on a station platform built for cotton for shipment. According to custom the shipper requested a car from the nearest station, but the conductor failed to comply with the request. The court held that, as no bill of lading had been issued, no actual delivery of the cotton made, and nothing to establish an implied acceptance of the shipment, the relation of common carrier had not been established.

In *Busnight v. Railroad Co.*, 111 N. C. 592, 16 S. E. 323, it is said:

"Taking the facts most strongly in favor of the plaintiff, he asked of the defendant's freight agent a car to load with lumber to go to Philadelphia. The agent pointed out to the plaintiff a car which he might use for the desired purpose. The plaintiff loaded the car with lumber, and finished on the night of the 24th of December, but did not notify defendant's agent that the car was ready for shipment, nor of the name of the consignee. Treating the loading of the car upon defendant's track as a delivery to defendant and an acceptance, it was not yet ready for transportation, for the defendant had not been notified of its readiness, nor to whom it was to be shipped. It was necessary for the defendant to await further orders before shipment. Where goods are delivered to a common carrier to await further orders from the shipper before shipment, the former, while they are so in his custody, is only liable as warehousemen. *O'Neill v. New York, C. & H. R. Co.*, 60 N. Y. 138; *Wells v. Wilmington & W. R. Co.*, 51 N. C. (8 Jones) 47, 72 Am. Dec. 556; *Angell, Carr.* 129. He is only responsible as carrier where goods are delivered to and accepted by him in the usual course of business for immediate transportation."

In *Railroad Co. v. Lumber Co.*, 170 Ala. 627, 54 South. 205, Ann. Cas. 1912D, 965, it is held that where a carrier, at the request of a shipper, in pursuance of its usual practice, placed a car on a side track to be loaded with lumber, but failed to move it upon request of the shipper, in the absence of shipping instructions, no responsibility as a carrier arose.

In *Nelson v. Railroad Co.*, 157 Ky. 256, 162 S. W. 1129, the carrier had placed a car upon a side track; the car was loaded by the shipper; the carrier was notified of the loading and requested to move it; nothing was said about the shipment of the car or to whom it was to go. The court held that the relation of common carrier had not been established.

In *Dunnington v. Railroad Co.*, 153 Ky. 388, 155 S. W. 750, a car had been placed by the carrier on a side track to be loaded by the shipper; it was partly loaded; no bill of lading was issued and no notice given to the carrier; the court held that, although the carrier placed the car on the siding to be loaded by the shipper and to be moved after being loaded, there was no evidence that it was the custom of the carrier to take charge of a car until notified that it had been loaded, nor of a custom to treat freight thus partly loaded as delivered to and accepted by the carrier; and that accordingly the relation of common carrier had not been established.

In *Barron v. Eldredge*, 100 Mass. 458, 1 Am. Rep. 126, it is held:

"The responsibility of a common carrier, for goods intrusted to him commences when there has been a complete delivery for the purpose of immediate transportation. * * * The delivery must be for immediate transportation, and, of course, it cannot be complete if anything re-

mains to be done by the shipper before the goods can be sent on their way."

In *Wilson v. Railroad Co.*, 82 Ga. 386, 9 S. E. 1076, the court approved the charge of the trial judge which was stated to have been:

"The court charged the jury, in substance, that delivery is complete when, actually or in legal effect, the possession is surrendered to the carrier, and the owner abandons all control over the goods until the carriage is completed, and that not until this has been done does the responsibility of the carrier commence, either for loss or detention. Also, that if deposit along the line was made for the convenience of the owner in delivering at some future time, and if the carrier did not assume possession and custody to the exclusion of the owner, the wood was not accepted for shipment, and the carrier's responsibility would not begin until something more was done to accomplish the bailment. Also, that if plaintiff's vendors deposited the wood in this way, and continued to exercise acts inconsistent with its exclusive possession and custody by the company as a common carrier, the bailment would not begin until there was a complete surrender by the plaintiff to the carrier for shipment. Under the facts in evidence, and according to the authorities, these instructions were correct. *Hutch. Carr.* §§ 82-99, inclusive; 2 *Ror. R. R.* 1279 et seq. We think it clearly appears that under the system which both parties had in contemplation it was expected that, before delivery was consummated, the owner would either load the cars himself, or have it done by the company at his expense, after special request. Delivery on board the cars, according to that system, would terminate the plaintiff's possession, and be the inception of possession by the carrier."

In *Dixon v. R. Co.*, 110 Ga. 173, 35 S. E. 369, the syllabus by the court is:

"The relation of shipper and carrier does not begin between the owner of goods and a railway company, though the former may have delivered the goods to the latter, if after such delivery anything required, either by law or the contract, remains to be done by the shipper, and in such case the rights and liability of the company are those only of a warehouseman."

The opinion declares:

"While the company, therefore, retained this property on board its cars at its depot, on account of the failure of the shipper to comply with the conditions precedent to its shipment, it occupied, as to him, the position of a warehouseman."

In a note to *L. R. A.* 1916C, 612, the author states the rule thus:

"As a general rule the responsibility of a common carrier for goods received by it begins as soon as the same are delivered and ready for immediate transportation. But, on the contrary, if the goods when so deposited are not ready for immediate transportation, and the carrier cannot make arrangements for their carriage to the place of destination until something further is done, or some further direction is given

or communication made concerning them by the owner, the deposit must be considered to be in the meantime for his convenience and accommodation, and the receiver, until some change takes place, will be responsible only as a warehouseman. The party bringing the goods must first do whatever is essential to enable the carrier to commence, or to make needful preparations for commencing, the service required of it before it can be made liable or subjected to responsibility in that capacity."

In *Railroad Co. v. Lowery* (Tex. Civ. App.) 155 S. W. 992, it is held that, in order to constitute a delivery, complete control of the goods must be given to the carrier; that is to say, the owner must not retain any manner of control over the goods, and if any one else retains such control it must be as the agent of the carrier and not as the agent of the shipper.

The case of *Whitney v. Railroad Co.*, 38 S. C. 265, 17 S. E. 147, 37 Am. St. Rep. 767, is one of questioned delivery to the consignee after the carriage had terminated. The car containing the cotton had been placed on a spur track built for the manufacturing company; the bill of lading had been surrendered; the freight had been paid; the seals had been broken by the manufacturing company and the cotton partly unloaded. The plaintiff contended that it had not been delivered. The court held otherwise, and applied the same test to delivery by the carrier as should be applied to delivery to it, viz. the possession and control of the property. It is the converse of the case at bar, but settled by the same principle.

In *Brown v. Railroad Co.*, 19 S. C. 39, it is assumed to be the law that no liability as common carrier attaches until the goods shall have come into possession of the carrier and under its control.

In *Railroad Co. v. Byrne*, 100 Fed. 359, 40 C. C. A. 402, it is held that a railway company which permits stock to be placed in the pens which it has prepared by the side of its tracks to facilitate loading and unloading does not thereby receive the stock for shipment, or take possession or assume charge of it as a common carrier; that the limit of its liability is that of a warehouseman, to exercise ordinary care in the construction and maintenance of its pens.

In 10 C. J. 226, it is said:

"It is well settled that, where the carrier is directed by the shipper to do that which is incompatible with its common-law duty as carrier, as, for instance, not to forward the goods until further orders, there is no such delivery and acceptance as will render the carrier liable as such. Under these circumstances it is liable only as an ordinary bailee, so long as such special instructions are operative."

In 10 C. J. 225, it is said:

"Delivery cannot be complete if anything remains to be done by the shipper before the goods can be sent on their way."

In *Stapleton v. Railroad Co.*, 133 Mich. 187, 94 N. W. 739, it is held that, if the goods are merely placed in the carrier's depot for the shipper's convenience, and are not ready for shipment until the shipper has done something further to them, the carrier is not liable as a common carrier but only as a warehouseman.

In *Missouri P. Co. v. Riggs*, 10 Kan. App. 578, 62 Pac. 712, it is held that, where goods are delivered to a carrier to be shipped, but are not to be shipped until other goods which are to be shipped with them are delivered, the liability of the carrier in the meantime is only that of a warehouseman. The court declares:

"Where goods are received by the carrier to be forwarded in the usual course of business, the liability of a common carrier attaches immediately; but where the goods are not to be shipped in the regular course of business, but are to be retained at the depot at the shipper's instance, the liability is that of a warehouseman only. The rule, broadly stated, is that if, after the delivery of the goods for shipment, anything remains to be done by the shipper, the liability of the carrier as an insurer does not attach, and it is responsible only as a warehouseman."

In *Railroad Co. v. Powers*, 73 Neb. 816, 103 N. W. 678, it is held that where the stock, while in the carrier's pens or yards, awaiting transportation, is subject to the right of the shipper to remove it when necessary for food and water, the carrier's liability will be no greater than that of an ordinary bailee, and that he will be liable only where he has failed to exercise ordinary care. The syllabus by the court states:

"When a shipper surrenders the entire custody of his goods to a common carrier for immediate transportation, and the carrier so accepts them, the liability of the carrier at once attaches."

"Such liability does not attach until the goods are unconditionally delivered by the shipper and accepted by the carrier."

In *Grand Co. v. Ullman*, 89 Ill. 244, it is held in substance, that, where goods are delivered to a railroad company for transportation at its earliest convenience, nothing further remaining to be done in reference to them by the owner, the company is liable as a common carrier for their loss.

The doctrine of constructive delivery without notice to the carrier is well recognized; it may exist by an express agreement that a deposit of goods at a particular place shall be a valid delivery, or by a well-known and established custom to receive the goods in that way. Such an agreement, either expressed or implied, must necessarily go to the extent that such deposit shall be accepted as a delivery for transportation; it surely cannot exist in the face of an express notice of which the owner has knowledge, that it shall

not be so accepted without the issuance of a bill of lading.

In *O'Bannon v. Exp. Co.*, 51 Ala. 481, it is held that, to render a carrier liable as a common carrier for the loss of goods, there must have been an actual delivery of the goods to him, or a constructive delivery, with notice to him of an intention thereby to place them in his care and custody. Merely placing them in such a position that he could easily have taken them, but without calling his attention to them, is not sufficient.

In *Southwestern R. Co. v. Webb*, 48 Ala. 585, it is held that, in an action against a railroad company for failure to deliver cotton received by it for transportation, the railroad company is not liable as a common carrier for cotton stolen or lost after deposit by the owner upon a station platform, unless it be shown that the company or its agents had notice of the deposit and received the cotton for transportation as a common carrier.

The case of *Copeland v. Railroad Co.*, 76 S. C. 476, 57 S. E. 535, is, in my opinion one of an entirely different character, and has little, if any, application to the facts of the case at bar. While the question does not seem to have been raised in the case, as a matter of fact it was a case of liability, independently of the relation of common carrier, under what is known as the Fire Statute (section 3226 of Civ. Code 1912); an absolute liability upon destruction of property by fire which originates upon the right of way of a railroad company; the only exception being where the property has been placed upon the right of way unlawfully or without the consent of the railroad company. It was not contended by the company that the cotton had been placed on the platform without its consent; on the contrary, the custom had long existed with their consent. The judgment is easily sustainable, therefore, under the statute.

But, considered as an action not under the statute, but against the railroad company as a common carrier, as it in fact appears to have been considered by the court, the facts are clearly distinguishable from those of the case at bar in the following particulars: (1) The cotton was deposited on the platform "marked ready for shipment"; in the case at bar that fact does not appear; in fact it was not marked for shipment at all, and was not ready for shipment until other cotton making a carload had been purchased. (2) The agent there gave the owner no notice that cotton left on the platform under such circumstances was at the owner's risk; here the agent, with the instinct of a burnt child, posted a notice, which the plaintiff admits he saw and which was particularly called to his attention before the loss, that "the railroad would not be liable for goods or freight of any kind left on its platform until after

the shipper had received a bill of lading."

(3) There was evidence that after the fire the salvage of the cotton was sold by the railroad company, from which it might have been inferred that they acknowledged responsibility for the cotton; no such circumstance appears here.

The charge of the circuit judge, approved by this court, exactly fits the facts of this case:

"If it was not the custom of the defendant company in dealing with Mr. Copeland to allow him to put cotton on their platform for the purpose of shipping it and make themselves liable for it, unless he called for a bill of lading and notified them that it was there for shipment, then, under those circumstances, he would not be entitled to recover."

And again:

"Whenever a railroad company permits any one to put cotton on their platform for the purpose of shipping without objection on their part, and does anything to lead the parties putting the cotton there to believe that they had accepted it for the purpose of shipping it, and it is afterwards destroyed while in their possession, under those circumstances then the company would be liable."

How it is possible to conclude that the railroad company induced the owner to believe that they had accepted the cotton placed upon the platform, even without objection, for shipment, in the face of the notice referred to? A man must be endowed with a feeble brain indeed to believe that the railroad company accepted the cotton for shipment when he placed it upon the platform without their knowledge when he was told specifically that they did not intend to accept it until a bill of lading had been issued. In my opinion the testimony does not tend to establish a single one of the elements essential to the relation of common carrier.

It is not pretended that there was a complete delivery of the 16 bales of cotton at the time the lost bale was placed upon the platform. If the shipment included only that particular bale it is not claimed that it was actually delivered to the railroad company; the contention is that it was constructively delivered by placing it on the platform without notice to the company, and in the face of an express declaration and notice to the plaintiff that it would not be considered as delivered or accepted until the bill of lading had been issued. It was placed there by the plaintiff for his convenience until the remainder of the carload could be assembled. In the light of the notice he received, it must be assumed that in doing so he undertook to shoulder the risk of loss.

The so-called delivery was not for immediate shipment, as the plaintiff admits that the shipment was not to go forward until the carload had been made up; the cotton was not marked with any shipping direc-

tions, and none given to the carrier. The cotton had not gone into the exclusive possession of the carrier, which is absolutely essential to the relation. The plaintiff had full control of it and could the next minute have moved it off of the platform. That there was something further to be done by the owner to the shipment is admitted by his statement that the Murray bale was to remain on the platform until the remainder of the carload was completed.

No notice of the placing of the cotton on the platform was given to the agent, which is necessary to constitute a constructive delivery, unless the custom of the company justified his failure to do so, of which there is no evidence. On the contrary, if he had given such notice it could not have constituted constructive delivery, which is a question of intention, in view of the positive notice repelling any such implication.

BELSER, A. A. J. (concurring). This is an action to recover for a bale of cotton lost from the defendant's platform at Monck's Corner, S. C. The facts appear in the agreed statement, and are undisputed, the bale was deposited on the platform during the day, and a bill of lading for this bale and 15 other bales, which had also been deposited on the platform by or for the plaintiff, was applied for late in the afternoon. The bale in question was then missing, and has never been discovered. No notice was given to defendant's agent when the bale was left on the platform, and there was no evidence to show how long the bale remained on the platform before its removal, or that it was ever brought to the knowledge of defendant's agent that it was there prior to the application for the bill of lading and discovery of the loss. Plaintiff, who was a cotton buyer, was in the habit of buying cotton during the day, having the cotton bought placed on the platform, and getting a bill of lading en bloc at the close of the business day. The defendant, having had previous trouble with the plaintiff about the similar loss of a bale of cotton, had posted a notice to the effect that it would not be responsible for property left on the platform unless a bill of lading had been issued for same; and this notice had been brought to the personal attention of the plaintiff.

The plaintiff based his right to recover on the ground that the deposit of the bale on the platform amounted to delivery to the carrier for shipment, rendering the carrier liable as insurer; there was no claim that the cotton had been deposited with the carrier as warehouseman, or any proof of its negligence in that capacity. The issue therefore narrows to the consideration of the question whether or not there was evidence establishing, or tending to establish, a delivery of the cotton to the carrier for shipment.

The essential elements of delivery to the carrier for shipment were lacking. These elements include (1) complete surrender of the goods into the custody of the carrier, with instructions to the carrier for their shipment, and (2) the acceptance, actual or implied, of the goods by the carrier for shipment. 5 Ency. L. (2d Ed.) 181; 4 R. C. L. 167; 1 Hutch. Carr. §§ 105, 113, 119. Mere deposit upon an open railroad platform cannot per se be regarded as a delivery into the exclusive possession of the railroad. No notice was given the defendant's agent that the bale was delivered ready for shipment, and in fact it was not ready for shipment when deposited; for it is conceded that the bale of cotton was placed on the platform by the plaintiff to await the collection of the day's purchases before shipment. These facts warrant no other inference than that the cotton was placed on the platform by the shipper for his convenience and remained in his control at least for the purpose of completing the lot to be shipped. Since no notice had been given the agent that the bale had been placed there for shipment, there was nothing to invoke the custody of the carrier or prevent the shipper from removing the bale of cotton at will. Moreover, in the absence of shipping instructions, it is impossible to see how there could have been an acceptance of the bale for shipment; neither the shipper, the assignee, the route, or destination was known to the carrier. Even the subject of the shipment—the existence of the bale of cotton on the platform—was unknown. How, then, could there be any meeting of minds or contract of carriage, actual or implied, which is necessary to initiate the relation of shipper and carrier?

The facts in this case do not show a constructive delivery to the carrier by deposit of the bale on the platform pursuant to an agreement or custom between the shipper and carrier to deliver in that manner, as in the case of *Copeland v. Railway Co.*, 76 S. C. 476, 57 S. E. 535. In the *Copeland* case the cotton was placed on the platform marked ready for shipment; it remained there for sufficient time (not having been destroyed until some hour of the night following the day of delivery) to warrant the inference that the carrier knew it was there; and the custom by the carrier to accept shipment in this manner without objection was shown. This court held that the evidence to sustain the judgment against the carrier was "weak," but under the *scintilla* doctrine was properly submitted to the jury, whose verdict concluded the issue. In the case at bar the material facts are different, and clearly distinguish the cases. For aught that the evidence here discloses, the bale in question may have been removed immediately after having been placed on the platform. The posted notice—actual knowledge of which had been

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brought to the attention of the plaintiff—that the railroad company would not be responsible for goods left on the platform unless a bill of lading was obtained prevents the inference of a custom or tacit agreement to accept such deposit as delivery for shipment.

That the plaintiff, notwithstanding this notice, was in the habit of placing cotton on the platform as bought, and getting a bill of lading at the end of the business day, does not show a disregard or waiver of the notice by the railroad in dealing with the plaintiff. On the contrary, this course of dealing was perfectly consistent with the notice given, and the railroad company had the right to assume that cotton placed by the plaintiff on the platform remained at his risk until a bill of lading was applied for. If such notice is to be held ineffective, and in the face of it a mere deposit on the platform to render the carrier liable, then the railroad, if it desires to escape unknown and unknowable responsibility, would be without recourse save to fence off its platform from the public or place a guard about it.

I therefore concur in the opinion of Mr. Justice FRASER.

GARY, C. J. (dissenting). This is an action to recover the value of a bale of cotton, which was tried before a magistrate, and resulted in a verdict in favor of the plaintiff, whereupon the defendant appealed to the circuit court, which affirmed the judgment of the magistrate, and the defendant again appealed to this court. The facts are thus stated in the record:

"At the trial in the magistrate's court it was shown that the plaintiff was in the habit of buying cotton from the farmers, changing the marks, and shipping en bloc. On the day in question, this particular bale of cotton was placed on defendant's platform at Monck's Corner by B. F. Murray, who notified plaintiff. Plaintiff paid Murray for the cotton and changed the mark, but did not notify defendant's agent that the cotton was on the platform. During the day, plaintiff bought other cotton—a total of 16 bales that day. Late in the afternoon, plaintiff applied to defendant's agent for a bill of lading for the 16 bales. The agent agreed to give him a bill of lading for 15 bales, all that he could find on the platform, but said he knew nothing about the sixteenth bale, and declined to give a bill of lading for it. No trace of the missing bale has ever been found.

"It was shown on behalf of defendant that there had been a prior suit between the same parties for a missing bale of cotton, for which defendant had been required to pay. Defendant posted a notice at its depot, which plaintiff admits having seen, and to which he admits his attention was particularly directed at the former trial, to the effect that the railroad would not be liable for goods or freight of any kind left on its platform, until after the shipper had received a bill of lading. Although this notice had been displayed for a long time, it was

shown that plaintiff and one or two other shippers had been in the habit of placing cotton on the platform as it was purchased, and of getting a bill of lading for the full day's purchases just before closing time. (Italics added.)

"Defendant contended at the trial, and in the circuit court, that it could not be held responsible for cotton or other property placed on its platform, unless it had issued a bill of lading, or at least had been notified and had accepted the property for shipment. Plaintiff claimed that, since the custom had been for merchants to leave cotton on the platform until the close of the business day, and then get a bill of lading for the entire amount, defendant was estopped from disclaiming responsibility for cotton placed on its platform, even though a bill of lading had not been issued, and the agent had not been notified.

"The case comes before this court on the same questions that were raised in the magistrate's court, and in the circuit court."

The following are the exceptions:

"First. His honor erred in holding that defendant was responsible for cotton placed on its platform, without a bill of lading having been issued, or defendant's agent being notified; whereas he should have held that defendant's responsibility could not begin until after the cotton had been actually delivered for shipment.

"Second. His honor erred in not holding that, when plaintiff, with full notice that defendant declined to assume responsibility for property for which a bill of lading had not been issued, placed his cotton on the platform, without obtaining a bill of lading or notifying defendant's agent, any loss sustained was the result of his own negligence, and defendant could not be held liable therefor.

"Third. His honor erred in not holding that, inasmuch as only 15 bales could be accounted for at the time when plaintiff applied for a bill of lading, the legal presumption was that the other bale had been removed by some other than the defendant, and that defendant was not responsible for its disappearance."

The law is well settled that findings of fact by the circuit court, on appeal from a magistrate's decision, are not reviewable by this court. *Gossett v. Gladden*, 112 S. C. 144, 99 S. E. 752; *Dingle v. Railway*, 112 S. C. 390, 99 S. E. 828. Therefore, if there was any testimony sustaining the judgment rendered by the circuit court, it cannot be reversed by this court on the ground that it was not sustained by the testimony.

If the first sentence which we have italicized stood alone, it might be successfully contended that there was not such a delivery of the bale of cotton, as rendered the defendant liable for its loss. But the first must be considered, in connection with the second italicized sentence.

In the case of *Copeland v. Railway*, 76 S. C. 476, 57 S. E. 535, this court, in discussing the question whether there was error on the part of the circuit judge in refusing the motion for nonsuit, said:

"It is contended especially that there was no evidence to show that the cotton was ever delivered to defendant in any way to create the relation of shipper and carrier or entail liability for its safekeeping. * * * The plaintiff testified that the cotton was delivered to defendant on its platform, marked ready for shipment, before 5 o'clock on October 13, 1903; that no notice or shipping directions were given defendant's agent that day, and no receipt or bill of lading was taken; that the 8 bales was a part of a lot of 25 bales he had agreed to ship the Orangeburg Manufacturing Company, and he was waiting to procure the remainder of the lot before actual shipment, and that in such cases he generally got a receipt from the agent when he had completed the number sold; that he did not act differently with this lot of cotton from what he did when he delivered other cotton; * * * that the agent never gave him personal notice that cotton left on the platform under such circumstances was at the owner's risk. * * * While the testimony tending to show liability of the defendant may be weak, we cannot say the case was improperly submitted to the jury. Whether the defendant had any notice that the cotton was delivered for shipment was left to be inferred by the jury from all the circumstances of the case, the publicity of the delivery on the platform, the opportunity for observation, and the course of dealing with the plaintiff in like cases." (Italics added.)

His honor the circuit judge in that case charged the jury as follows:

"It does not make any difference if they did have a custom with other people that it was to be put there before a certain hour and bills of lading given for it, yet, if in their dealing with Mr. Copeland, it was their custom and usage to allow him to put cotton on their platform for the purpose of shipping it, and they afterwards shipped it and gave him a bill whenever he called on them for it, if it was burned while in their custody and care, the railroad would be liable. * * * I charge you further, as a matter of law, for the purpose of having this case settled in the event they want to carry it to the Supreme Court, that whenever the railroad company permits any one to put cotton on their platform for the purpose of shipping without objection on their part, and does anything to lead the parties putting the cotton there to believe that they had accepted it for the purpose of shipping it, and it is afterwards destroyed while in their possession, under those circumstances then the company would be liable."

The foregoing charge was held by this court to be free from error.

Under the custom and usage that existed between the plaintiff and defendant, the defendant's agent knew that the plaintiff intended to place cotton on its platform during the day, for the purpose of shipment, and that it was not necessary for the plaintiff to get a bill of lading when each bale purchased during the day was placed on the platform, but that he would get the bill of lading for the full day's purchases just before closing time.

There is not a particle of testimony tending to show that after the cotton was placed on the platform the plaintiff was in any manner responsible for its loss. He complied in every respect with the custom and usage that prevailed between him and the defendant, and it would be against justice and equity to allow the defendant to take advantage of its own wrong in failing to exercise due care in the protection of the cotton after it had been delivered to the railroad company in the manner contemplated by the custom and usage that existed between these parties.

We concur in the opinion of Mr. Justice FRASER that the Copeland Case is conclusive of this case, but we cannot agree with him that there are differences in the two cases that render necessary a reversal of the judgment rendered by the circuit court.

For these reasons, I dissent.

WATTS, J., concurs.

(117 S. C. 480)

SHANNON v. FREEMAN et al. (No. 10737.)

(Supreme Court of South Carolina. Oct. 10, 1921.)

1. Specific performance §101—Failure to make formal tender held not to defeat remedy.

Where a trustee, though without authority to delegate her duties, recognized a sale made by an agent selected by her son-in-law and signed a contract prepared and presented by the son-in-law, and the purchaser, who was ready, willing, and anxious to perform, notified the son-in-law of his readiness to close the contract, and relied on his promise to furnish a deed, and later his statement that he would forward the deed to the trustee for her signature, she having left the state, the purchaser's failure to tender the purchase price to the trustee held not to defeat specific performance.

2. Vendor and purchaser §73—Purchaser not required to go to another state to make tender.

Where a contract for the sale of land in South Carolina was made in that state and between citizens of such state, it evidently contemplated consummation by payment of the purchase price and delivery of the deed in South Carolina, and the purchaser could not reasonably be required to go to Louisiana, where the vendor had gone temporarily, to tender the purchase price.

3. Contracts §300(3)—One preventing performance or tender cannot take advantage of delay.

One who has himself prevented performance or tender of performance of a contract at the time set cannot take advantage of the delay.

(109 S.E.)

4. Specific performance \Leftrightarrow 101—Failure to make tender excused, though fact that it would have been unavailing became apparent after time for tender.

Where a tender of the purchase price under a contract for the sale of land would have been refused by the vendor, the purchaser was not barred of his right to specific performance by reason of his failure to make tender, though it did not become apparent that a tender would have been unavailing until after the tender should have been made.

5. Vendor and purchaser \Leftrightarrow 186—Vendors, not ready and willing to perform, cannot take advantage of purchaser's laches in making tender.

Vendors who were not themselves ready, desirous, prompt, and eager to perform the contract, were in no position to take advantage of any delay or laches attributable to the purchaser in making a tender.

6. Specific performance \Leftrightarrow 121(8)—Evidence held to show selling price full and fair.

In a suit for specific performance, defended on the ground, among others, that the price was inadequate, evidence held to show that it was a full and fair price for the land.

7. Specific performance \Leftrightarrow 49(2)—Enhancement of price after sale will not justify refusal of relief.

In a suit for specific performance, the question of adequacy of price must be considered as of the date of the contract, and any subsequent enhancement of value does not justify refusal of specific performance.

8. Specific performance \Leftrightarrow 12—Not denied because trustee did not require cash payment required under trust, where purchaser willing to pay cash.

Though a conveyance in trust to sell the land at public or private sale provided that at least one-third of the price must be paid in cash, where a contract of sale by the trustee, not requiring payment of one-third in cash, also allowed the purchaser to pay all cash, and in his suit for specific performance he offers to do so, specific performance will not be denied.

9. Specific performance \Leftrightarrow 12—Will not be granted when breach of trust will be caused.

A court of equity should not grant a decree of specific performance when such decree will produce or result in a breach of trust.

10. Trusts \Leftrightarrow 191(3)—Contract to sell held a "sale" within conveyance authorizing trustee to sell.

A valid written contract for the sale of land, made upon payment of a substantial part of the consideration, constituted a "sale" within a deed conveying the land to a trustee in trust to sell, as against the objection that it was only a contract to sell and not a sale.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Sale.]

11. Trusts \Leftrightarrow 191(3)—Power to sell held to include power to enter into contract to sell.

Under a deed conveying land to a trustee in trust to sell the land, even though a sale

was not made until the deed was delivered and the purchase money paid, the power to sell necessarily included the power to take such steps as were reasonably necessary to effect a sale, including power to enter into a contract to sell.

12. Specific performance \Leftrightarrow 65—Purchaser, contracting to sell to another, held entitled to specific performance.

Where a purchaser of land had contracted to sell it to a third person, to whom he would be liable in case of his inability to perform, he was entitled to specific performance of the vendors' contract, where the decree asked for would not work hardship upon the vendors.

13. Specific performance \Leftrightarrow 130—Interest on price denied where defaulting vendors remained in possession, though property did not produce income.

In a purchaser's suit for specific performance, the decree will not require payment of interest on the purchase price where the delay in performance was due to the default of the vendors, one of whom has remained in possession, refusing to deliver possession to the purchaser, though the land is vacant and probably has not produced any income.

Appeal from Common Pleas Circuit Court of Greenville County; J. W. DeVore, Judge.

Suit by W. H. Shannon against Alice E. Freeman, individually and as trustee, and others. From a decree for plaintiff, defendants appeal. Affirmed.

The master's report was as follows:

The master, to whom this case was referred to take the testimony and to hear and determine all issues of fact and law and report the same to the court, respectfully reports that he has had several references herein, and has taken the testimony which is reported herewith.

This is an action by the purchaser against the seller for specific performance of a contract of sale of real estate. The complaint alleges that on December 2, 1919, the plaintiff and the defendant Alice E. Freeman, as trustee, entered into a contract whereby plaintiff agreed to buy for the price of \$10,000, and said defendant, as trustee, agreed to sell, a certain lot of land in Greenville, S. C.; that said defendant held said land as trustee for herself and her four children, the other defendants herein; that in a deed conveying to her the said lot of land the said trustee was authorized to sell at private sale provided $\frac{1}{2}$ of the price was paid in cash; that the plaintiff has at all times been, and is now, ready and willing to comply, and either to pay the full amount of the purchase price in cash, or to pay $\frac{1}{2}$ cash and secure the balance by purchase-money mortgage, but that the defendant Alice E. Freeman at the time fixed for the performance refused and still refuses to convey.

The defendant Lidia M. Schwartz filed a separate answer. The other defendants filed a joint answer. The defenses set up by one or the other of these answers and argued before

me may be stated as follows: (1) A general denial; (2) that the price was grossly inadequate; (3) that the contract is void, in that it provides for a cash payment of less than $\frac{1}{2}$ of the price, while the trustee had power to sell only upon payment of at least $\frac{1}{2}$ of the price; and (4) that the contract is void, in that the trustees had power only to sell outright, and not to contract to sell.

The master finds the following to be the facts in this case:

The allegations of the complaint are substantially true, being sustained by undisputed testimony. The defendants formerly owned certain real estate in the city of Greenville. This was sold in 1913, and in part payment they took the property in question. By a contract entered into at that time between all the defendants it was agreed that for their mutual convenience in selling and conveying the property in question title should be taken in the name of Alice E. Freeman, as trustee, who should sell it and divide the proceeds among all the defendants. Accordingly, the deed was made, conveying this property to her "in trust to sell said land at public or private sale to such person or persons as she may deem advisable for cash or upon such other terms as may seem proper, provided at least $\frac{1}{2}$ cash is paid thereon."

On December 2, 1919, Alice E. Freeman, as trustee, entered into a contract with the plaintiff, which provided that, "Said Freeman as trustee has bargained and sold and will convey or have such conveyance as may be necessary to give good title to said Shannon to all that lot of land," described by metes and bounds. "The purchase price for said lot is \$10,000, of which \$500 is paid at the signing and sealing of these presents, and the remainder to be paid as follows: \$2,000 January 15, 1920, and the balance in one, two and three years at 7 per cent. or with privilege to pay all the amount at any time." It further provided that time is of the essence, and that should Shannon fail to make payment at the time stated, the money paid up to such failure should be retained by Mrs. Freeman as liquidated damages, and that upon payment of the \$2,000 referred to deed should be executed and delivered to Shannon. At the time of the signing of this contract Shannon paid to Mrs. Freeman the sum of \$500.

On November 14, 1919, prior to the execution of the above contract Schwartz (the husband of the defendant, Lidia M. Schwartz, and son-in-law of Alice E. Freeman), purporting to act as agent, had listed this property with W. R. Tabor, a real estate agent or broker, authorizing him to sell it for \$10,000 net; that is, he was to collect his commission from the purchaser in addition to this sum. Tabor, having found a purchaser in the person of the plaintiff, prepared in duplicate the above-described contract in accordance with terms designated by Schwartz. Both copies were executed by Shannon and delivered to Schwartz, who presented them to Mrs. Freeman for her signature. Mrs. Freeman signed both, and Schwartz returned one copy to Shannon. On the day this contract was signed, Mrs. Freeman left Greenville for a visit to her daughter in Baton Rouge, La. She did not return until January 28, 1920, eight days after the date

fixed by contract for the payment of the money and delivery of the deed.

Neither Shannon nor Tabor had any conversation with Mrs. Freeman with reference to this contract either before or after execution; all their dealings being had through Schwartz.

After making the contract with Mrs. Freeman, Shannon determined to sell the property, and accordingly placed it in Tabor's hands. About the latter part of December or early part of January, Tabor made the sale to Mr. Pete Hodges, who was acting for his wife, Eva S. Hodges, for the price of \$12,500.

Some time prior to January 15, the date fixed for delivery of the deed and payment of the money, Shannon notified Schwartz that he was ready to close the matter, at the same time telling him about the resale to Mrs. Hodges, and suggesting that deed should be made either to Mrs. Hodges or to him. Schwartz stated that it would be satisfactory to make the deed direct to Mrs. Hodges, and that he would attend to it. Accordingly Schwartz had his attorney, Jas. H. Price, prepare a deed conveying the land to Mrs. Hodges. This deed Schwartz undertook to execute under a written power of attorney from Mrs. Freeman. Oscar Hodges, Esq., who at the time was examining the title and representing Mrs. Hodges in the transaction, refused to accept a deed signed by Schwartz. At the same time he advised that, in view of the provisions in the deed to Mrs. Freeman, at least $\frac{1}{2}$ of the price should be paid in cash. Accordingly a check for $\frac{1}{2}$ was left with Mr. Hodges, who thereupon prepared a new deed, as well as a note and mortgage to be signed by Mrs. Hodges. This deed Schwartz forwarded to Mrs. Freeman in Baton Rouge, La. On January 13th, Shannon wrote Mrs. Freeman at her Greenville address, giving formal notice that he was ready to close the matter. On January 23, Mrs. Freeman returned to Greenville, bringing with her the deed which had been prepared, but which she had not signed. It was not until after her return that the parties in Greenville had any intimation that she would not convey. It seems that upon her return she learned that Shannon was making a profit in the sale to Mrs. Hodges. Thereupon Shannon was informed by Schwartz that Mrs. Freeman was not satisfied with the price. Shannon offered to pay the full amount in cash, but was informed that Mrs. Freeman would not convey for \$10,000. Subsequently Mr. McSwain, as attorney for Mrs. Freeman, tendered back to Shannon the \$500 which he had paid and which Mrs. Freeman had retained.

[1] The case was exhaustively argued by counsel for both sides and the master has given careful consideration to the questions of law and fact suggested by the argument. In addition to the points indicated by the answers, counsel for defendants relied largely upon the fact that the plaintiff had made no tender of the purchase price. The master is of the opinion that the defendants are not in a position to take advantage of this and to defeat plaintiff's right to specific performance upon this ground.

[2] The master is satisfied from the testimony, and finds as a matter of fact, that the plaintiff was at all times ready, willing and anxious to perform, and that he exercised due

diligence in the matter. He had dealt with Mrs. Freeman only through Schwartz. In ample time he notified Schwartz of his readiness to close. Schwartz agreed to furnish the deed promptly. When Shannon relied upon this, he did no more than any reasonably prudent business man would have done. It is perhaps true that Mrs. Freeman, being a trustee, could not delegate her duties to Schwartz, nor give him a valid power of attorney to represent her, but it is equally true that all the parties to this transaction did, in fact, think that Schwartz did have authority to represent Mrs. Freeman in this matter. Mrs. Freeman had dealt through Schwartz; she had recognized the sale made by the agent selected and authorized by Schwartz; she had signed the contract prepared in accordance with Schwartz's dictation and presented to her by Schwartz, and by Schwartz she had returned the signed contract to Shannon. She had executed a power of attorney, purporting to authorize Schwartz to act for her, which the parties themselves evidently thought to be valid as is shown by the fact that Schwartz had his attorney prepare a deed, which he signed pursuant to this power of attorney and delivered to Mr. Oscar Hodges for approval. When Shannon learned that Schwartz did not in fact have power to execute the deed, and that Mrs. Freeman was without the state, he did all that could reasonably have been required of him. He relied upon Schwartz's statement that he would forward the deed to Mrs. Freeman for her signature. At the same time he mailed a letter to Mrs. Freeman at her home address, notifying her that he was ready to comply. A legal tender within the time limited was prevented by the act of Mrs. Freeman in going to Louisiana, immediately upon signing the contract and remaining there until after the time for performance. The contract was made in this state, between citizens of this state, and related to land in this state. It evidently contemplated consummation by payment of the purchase price and delivery of the deed in this state. Shannon could not reasonably be required to go to Louisiana to make a tender. Counsel for the defendants suggested that Shannon should have mailed to Mrs. Freeman in Louisiana the consideration or cash portion thereof with executed note and mortgage for the balance. But the master has hesitation in finding that no reasonably prudent business man would have forwarded this to Mrs. Freeman before she had executed the deed.

[3] One who has himself prevented performance or tender of performance at the time set cannot take advantage of the delay. 35 Cyc. 716; 26 A. & E. Enc. (2d Ed.) 72, 73; Cheney v. Libby, 134 U. S. 68, at 78, et seq., 10 Sup. Ct. 498, 33 L. Ed. 818.

[4] Moreover, Mrs. Freeman herself states, and I find as a matter of fact, that if tender had been made within the time specified, she would not have accepted it, and that at no time after she learned of the resale to Mrs. Hodges would she have conveyed for the price of \$10,000.

Where a vendor repudiates the contract, or where it is evident from all the circumstances that tender would have been unavailing, a court of equity will not hold a vendee

barred of his right to specific performance by reason of his failure to make tender. 38 Cyc. 135, 136; 26 A. & E. Enc. (2d Ed.) 117, 118; 28 A. & E. Enc. (2d Ed.) 6; 25 R. C. L. 321; 26 R. C. L. 624; Pomeroy, Eq. Jurisp., § 1408; Wright v. Young, 6 Wis. 127, 70 Am. Dec. 453.

Counsel for defendants suggest that this rule does not apply unless it was apparent at the time that tender would have been unavailing, and that in this case this was not apparent until later. The master does not so understand the rule. The basis for the rule is that equity will not require the doing of a useless thing, nor foreclose the rights of the party for failure to do something which in view of all the facts the court finds would have been useless.

[5] Moreover, as the Supreme Court of this state said, in *Fanning v. Bogacki*, 111 S. C. 376, at 381, 98 S. E. 137, 138: "The party who desires to maintain an objection founded upon the other's laches must show himself to have been 'ready, desirous, prompt, and eager.'" The master finds as a matter of fact that at no time have defendants shown themselves to have been ready, desirous, prompt, and eager. They are not in a position to take advantage of any delay or laches if there were any attributable to the plaintiff.

[6,7] The objection based upon alleged inadequacy of price is not sustained by the testimony. The testimony of reliable real estate men who are familiar with the values of, and have handled large numbers of sales of property in this vicinity, shows beyond question that \$10,000 is not an inadequate price for this property; in fact, it appears that relatively this is a much better price than was realized by any of the owners of adjacent property who sold about the same time. It is true that Shannon, some three or four weeks after his purchase, resold the property at a profit. But the profit made by Shannon may well be accounted for by the unprecedented boom in real estate, resulting in great activity and great increase in prices of Greenville real estate during December, January, and February past. The question of adequacy of price must be considered as of the date of the contract, and the subsequent enhancement in value would not justify refusal of specific performance. 26 A. & E. Enc. (2d Ed.) 27; 3 Elliott on Contracts, § 2286.

It may be added that this boom came to an end long before the reference in this case. If the present market value were an issue, I would have to hold that the present market value is no greater than the market value on December 2, 1919.

Mrs. Freeman and her daughter, Mrs. Kirchner, both testified that they considered the price inadequate. But their statements are not entitled to much weight in view of all the evidence. At the first reference, Mrs. Freeman very clearly sought to give the impression that she had not listed this property for sale within recent years, and had not been anxious to sell it, though at a later reference she admitted on cross-examination that she had listed it, but could not remember the price. Mrs. Kirchner testified that both she and her husband were opposed to a sale at \$10,000 and that her husband had never made

any effort to sell it. Yet it developed that in 1919 Mrs. Kirchner's husband took the matter up with Dr. Long of the firm of Long & Ables, real estate agents, carried him to the Kirchner home, where Mrs. Freeman was then living, and Mrs. Freeman there gave Dr. Long a written listing or option at the price of \$8,000, less commissions, and while the matter remained in Dr. Long's hands both Mrs. Freeman and Kirchner were active in efforts to procure a sale at this price.

Though the sale to Shannon was made on December 2d, and Mrs. Freeman had the contract before her and discussed it with her children, neither Shannon nor Tabor, nor even her son-in-law, Schwartz, had any intimation that the price was not entirely satisfactory until approximately two months later, after Mrs. Freeman returned to Greenville and learned that Shannon had sold it at a profit. The objection of defendants on this ground does not commend itself to the master.

The master finds as a matter of fact that the sum of \$10,000 was, on the date of the sale, December 2, 1919, and is now, a full and fair price for the land, and that the defendants will not suffer hardship by reason of a decree for specific performance.

[8] Defendants further contend that specific performance of the contract should not be decreed because Mrs. Freeman has power to convey only upon payment in cash of at least $\frac{1}{3}$ of the purchase price, while the contract calls for a smaller cash payment. This would be a sound objection if plaintiff had asked for a decree requiring Mrs. Freeman to convey upon payment of only \$2,500 in cash, but the contract also allowed payment of all cash, and plaintiff has come into court offering to pay the entire purchase price in cash, and asking for a decree requiring Mrs. Freeman to convey only upon such payment.

[9] It is unquestionably true that a court of equity should not grant a decree of specific performance when such decree will produce or result in a breach of trust for the same reason that it will not grant a decree which will impose undue hardship upon any person. But no such decree is asked for in this case. The decree here sought will be in strict conformity, both with the terms of the contract and with the terms of the deed under which Mrs. Freeman holds.

[10] As a further objection to specific performance, it is urged that this is not a sale, but a contract to sell, and that, while Mrs. Freeman had power to sell, she did not have power to contract to sell. This involves a too narrow construction of the language of the deed. The master is of the opinion that the transaction of December 2, 1919, was a sale within the meaning of the language used in the deed. Shannon paid a substantial part of the consideration, \$500, and a valid written contract was entered into. In sales of real estate, it may be said that the sale within the usual and ordinary meaning of the contract is made when a valid contract is entered into in the case of private sales, or when the land is knocked down to the highest bidder in the case of public sales, though almost invariably it is necessary that some time elapse for examination of title and preparation of papers between the making of the sale and the de-

livery of the deed and payment of the purchase price.

[11] Even if it could be said that a sale is not made until the deed is delivered and the purchase money paid, still the power to sell must necessarily include the power to take such steps as are reasonably necessary to effectuate a sale, including the power to enter into an agreement and to execute and deliver a deed. 31 Cyc. 1077; *Demaret v. Ray*, 29 Barb. (N. Y.) 563.

[12] In general it may be said that the objections of defendants are more of form than of substance. Mrs. Freeman held title in her name as trustee, merely for the mutual convenience of all the defendants in selling and conveying this property. She made a fair sale at a full price. The purchaser has acted fairly and with due diligence. Relying on his contract with Mrs. Freeman, he has entered into a contract with Mrs. Hodges. Should he be unable to convey to Mrs. Hodges, he would be liable for such damages as she might prove; certainly he would be liable to be subjected to suit for failure to perform his contract. He is entitled to specific performance of the contract in question, and the decree asked for will not work hardship upon any of the parties.

As was well said by Sir John Romilly, M. R., in *Parkin v. Thorold*, 16 Beavan, 59: "Courts of equity make a distinction in all cases between that which is a matter of substance and that which is matter of form; and, if it find that by insisting on the form the substance will be defeated, it holds it to be inequitable to allow a person to insist on such form and thereby defeat the substance."

[13] Should the plaintiff be required to account to the defendants for interest? This question was not argued before the master, but the master is of the opinion that the purchaser is not liable for interest. The master finds that the delay in the performance has been due to the default of the defendants; that the defendant Mrs. Freeman, as trustee for herself and the other defendants, has remained in possession of the land, refusing to deliver possession to plaintiff, and retaining for herself and the other defendants such benefits or profits as go with the possession of this land. As the land is vacant, it may be, and very probably is, the case that there has been no income therefrom. But of this defendants cannot complain. Such benefit, if any, as grows out of possession of this land they have retained over the protest of plaintiff. Where the delay in performance is imputable to the vendor, he is not entitled to interest. *Hart v. Brand*, 1 A. K. Marsh. (Ky.) 159, 10 Am. Dec. 715; *Stevenson v. Maxwell*, 2 Sandf. Ch. (N. Y.) 273; *Cheney v. Libby*, 134 U. S. 68, 10 Sup. Ct. 498, 33 L. Ed. 818; 22 Cyc. 1554, 1557; 16 A. & E., Enc. (2d Ed.) 1064; 15 R. C. L. 83.

The master therefore recommends that a decree do issue, ordering that the defendant Alice E. Freeman do execute a good and sufficient deed, conveying to D. H. Shannon the land described in the complaint; that said deed be delivered to plaintiff upon payment by plaintiff to the master of the sum of \$9,500 (being the purchase price, less the sum of \$500 already paid), and that out of said sum so

paid the master do pay the costs of this action, and do pay over the balance to Alice E. Freeman, as trustee, for distribution among the defendants in accordance with their rights.

Bonham & Price and J. J. McSwain, all of Greenville, for appellants.

Haynsworth & Haynsworth, of Greenville, for respondent.

COTHRAN, J. This court is entirely satisfied with the very able report of the master, confirmed by the circuit judge, and the decree is accordingly affirmed.

GARY, C. J., and WATTS and FRASER, JJ., concur.

(118 S. C. 1)

HARRIS v. SIMS et al., State Board of Dental Examiners. (No. 10754.)

(Supreme Court of South Carolina. Nov. 17, 1921.)

Physicians and surgeons \S 11(2)—Dentist may advertise painless extraction of teeth.

An advertisement reading, "Take out teeth absolutely painless," is not a violation of Acts 1915, p. 218, providing for revocation of license of dentist who advertises "to practice dentistry without pain," since teeth may be extracted without pain, and this is not negated by fact that pain may follow the operation.

Fraser, J., and Gary, C. J., dissenting.

Appeal from Common Pleas Circuit Court of Richland County; W. H. Townsend, Judge.

Certiorari by J. M. Harris against B. F. Sims and others, members of the State Board of Dental Examiners, to review proceedings had before them. From a decree dismissing his petition, the former appeals. Reversed.

Benet, Shand & McGowan and Moffatt & Marion, all of Columbia, for appellant.

Samuel M. Wolfe, Atty. Gen., for respondents.

COTHRAN, J. Of the many grounds upon which the state board revoked the petitioner's license to practice dentistry, the only one sustained by the circuit judge was the fact that the petition advertised his ability to extract teeth without pain. This the circuit judge held was a violation of the statute (Acts 1915, p. 218), which in effect prohibits an advertisement "To practice dentistry without pain." The correctness of his conclusion upon this point is practically the only issue in this appeal.

The practice of dentistry includes numerous separate and distinct branches and operations. Some of the branches are conducted without pain, and some of the operations, in a branch that is fraught with pain, may be

performed without pain. To lay claim "to practice dentistry without pain" is universally inclusive in its character, embracing all branches and all operations, and comes within the inhibition of the statute. To profess to conduct a certain branch of dentistry, or a certain operation in a branch without pain, is not only not within the inhibition of the statute, but is susceptible of absolute demonstration as a fact. It may not be a matter of which the court may take judicial cognizance, but it is a fact, which a judicial utterance cannot make otherwise, that in the advance of the science the process of extracting teeth is daily accomplished without pain or consciousness of the fact. The fact that pain may follow the operation does not at all negate the fact that the extraction was painless.

The judgment in my opinion should be reversed.

WATTS, J., concurs.

PURDY, A. A. J. (concurring). The board of dental examiners revoked the license of the petitioner. On appeal to the circuit court, his honor Judge Townsend affirmed their act, and the petitioner appealed to this court. The question on appeal has narrowed down to the inquiry as to whether advertising to practice dentistry without pain is in violation of the statute, and is a sufficient cause to sustain a revocation of the license.

It will be noted that the prohibition is not against the use of narcotics or drugs which would prevent pain in extracting teeth, but the prohibition is against advertising that teeth may be painlessly extracted, so that, for the purpose of construing this act, it is not unlawful to use the means which would bring about such result. The title of the act is:

"An act to regulate the practice of dentistry in South Carolina and to provide for the revocation of the licenses of dentists in certain cases."

Throughout the body of the act, with the exception of the clause, "or advertising to practice dentistry without pain," practically every clause is preceded or followed by a statement showing that there must be fraud in the doing of the act prohibited. The clause quoted, and now particularly before the court, stands alone.

The argument of the case before the court, and the idea conveyed by the decree of his honor Judge Townsend, both tend to give the construction to the act that there must be some element of fraud in the act complained of, or that the act must be done with intent to deceive the public, and I think that this is the proper construction to give it. If this construction be taken away from the act, and if this construction be not intended in the

clause cited and now being construed, then the case would assume a more serious aspect as touching the constitutionality of the act in this respect. It is an act to regulate the practice of dentistry. It cannot be denied that this is within the purview of the Legislature. The Legislature has the power to classify all persons engaged in a like calling or undertaking, and to declare that they shall be subject to certain rules and regulations operating upon that class. But, as has been well said by the counsel for the appellant in the argument before the court, while admitting the power to regulate, the Legislature has not the power, under the guise of regulating, "to impair the fundamentals of life, liberty, and property."

To prohibit advertising to practice dentistry without pain where it is an admitted fact that such can be done would be beyond the power of the Legislature, if we eliminate from it the element of fraud or deceit. I prefer, however, not to base my judgment upon this ground, but upon the ground that the act contemplated that the advertisement must contain a statement calculated to practice fraud or deceit upon the public or upon the patients of the dentist, and that the advertisement of the appellant in this case does not violate the spirit of the act, although, taking the clause in question by itself, and permitting the mere advertisement of the truth to be a ground upon which to revoke the license, such might be done; yet it is the spirit and intent of the act, and not the letter of it, that should govern, and I am therefore of the opinion that the judgment should be reversed.

Reversed.

FRASER, J. I dissent. This is an appeal from a decree of Judge Townsend in certiorari proceedings to review the records and proceedings of the Board of Dental Examiners for this state, in the matter of revocation of the license of Dr. J. E. Harris. Judge Townsend dismissed the petition.

The statute of this state (Acts 1915, p. 218) provides for the revocation of the license of a dentist who advertises "to practice dentistry without pain." The appellant does not deny that his advertisement read, "Take out teeth absolutely painless."

I. The first exception assigns error in holding that the advertisement was forbidden by the statute. It is claimed that taking out teeth is only one department of dentistry. The whole is forbidden and, of course, includes "taking out teeth," absolutely painlessly. Exception should be overruled.

II. The second assignment of error relates to a statement concerning one Dr. Smathers. His honor held that the Smathers incident was insufficient, and, even if error, it cannot

affect this case. This exception should be overruled.

III. The third exception attacks the constitutionality of the act. It is not denied that the Legislature has the right to make rules for the conduct of those who practice law, medicine, dentistry, etc. The wisdom of the law is not for the courts. The Legislature has its committees whose duty it is to investigate these matters. The courts are not presumed to know the effect of those methods used to prevent the pain of taking out teeth. It may be that the pain of taking out teeth may last for a minute, but the pain-destroying process may last for life. This court cannot assume that the Legislature acted arbitrarily. Pain-destroying remedies frequently destroy life, as well as pain. There are some things in this statute that are broad—it may be too broad, and uncertain—but, unfortunately for the appellant, he violated that part that is neither broad nor uncertain. This exception should not be sustained.

IV. The last exception is that the main grounds for the revocation of this license were for causes held insufficient by his honor. One good reason for revoking a license is enough. It makes no difference how many insufficient reasons there are. One good reason revokes the license. This exception should be overruled.

I think the judgment should be affirmed.

GARY, C. J., concurs.

(27 Ga. App. 534)

RAGAN v. NEWTON. (No. 12258.)

(Court of Appeals of Georgia, Division No. 2.
Nov. 1, 1921.)

(Syllabus by the Court.)

1. Sales \S 116—Refusal of valid tender does not justify rescission of contract.

Suit in a justice's court was brought on a promissory note for \$78 principal, "payable as follows: Money or war savings stamps—\$39, Nov. 15, 1918, without interest—\$39, Nov. 15, 1919, with interest at the rate of 6 per cent. per annum from date." On appeal in the superior court the defendant testified: That on the day the note was due, he tendered plaintiff in full payment 20 war savings stamps, the par or maturity value of which was \$5 each, a total of \$100, and the surrender value of which on the day of tender "was sufficient to pay in full the said note and about \$6 or \$7 more"; that plaintiff refused to accept such stamps, for the reason assigned that he "would be forced to pay defendant the \$6 or \$7 as the difference in value of said stamps and the note"; that defendant did not demand this difference, but stated to plaintiff that it might be paid when the stamps were turned in and cashed; that plaintiff kept the stamps 10 or

(109 S.E.)

15 days, considering whether he would accept them under such conditions, and then refused to do so and returned them to defendant, whereupon defendant demanded a rescission of the contract, tendered back the sewing machine for which the note was given, and demanded his note, because of plaintiff's refusal to perform his covenant in declining the tender. On cross-examination, however, defendant admitted that he had disposed of the stamps before plaintiff filed suit. There was nothing in the pleadings or evidence showing that the previous tender of the stamps was continued, or that there was any renewed tender of money or stamps when the case was pending or tried. The court on motion directed a verdict for plaintiff for the \$78 principal, interest at 6 per cent. from July 31, 1918, and costs of suit. The record shows that afterward the court on its own motion, during the trial term, modified the judgment so as to throw the costs against the plaintiff. Defendant excepted. Plaintiff filed no cross-bill, but, in the brief of counsel, objects to the shifting of costs from defendant to himself. *Held*:

A refusal of even a valid and continuing tender by a creditor does not relieve the debtor of all liability, such as would justify a rescission of his obligation to pay, but its effect, even when properly made and continued, is merely to protect the debtor from future interest and costs. Civ. Code 1910, § 4322; *Gray v. Angier*, 62 Ga. 596. The plaintiff was therefore entitled to a judgment for the principal sum called for by the note; and the only question raised by the plea was whether, under the evidence, the defendant had been relieved from the payment of interest and costs.

2. Appeal and error ¶270(4)—**Tender** ¶18, 24—Debtor must keep money or property in readiness to pay and bring it into court; tender did not defeat recovery of interest where property tendered subsequently used by debtor; error as to costs not reviewable when no exception taken.

In order for a tender to have this effect, it must be continuing, and the debtor must at all times keep the amount of money or property tendered in readiness so as to pay whenever the creditor will receive. Using the money or property tendered after refusal by the creditor to receive it, whereby the continuity of the tender is broken, destroys this necessary attribute of a legal tender. *Ansley v. Anderson*, 35 Ga. 18; *Toomey v. Read*, 133 Ga. 855, 856(4), 67 S. E. 100; *Fannin v. Thomason*, 50 Ga. 614, 617; *Gray v. Angier*, supra. When a plea of tender is filed, the defendant "should bring the thing tendered into court, or aver his readiness to do so." *Mason v. Croom*, 24 Ga. 211(5). The evidence for defendant having failed to show such a tender as would meet the requirements of the legal rule, the court did not err in directing the verdict, including interest, for the plaintiff. There being no exception taken by the plaintiff relative to the subsequent shifting of the costs against him, that question cannot be considered.

Error from Superior Court, Newton County; John B. Hutcheson, Judge.

Action by J. L. Newton against J. E. Ragan. Judgment for plaintiff, and defendant brings error. Affirmed.

Jno. J. Avret, of Social Circle, for plaintiff in error.

H. L. Graves, of Covington, for defendant in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(27 Ga. App. 531)

ADAMS v. OVERLAND-MADISON CO.
et al. (No. 12252.)

(Court of Appeals of Georgia, Division No. 2.
Nov. 1, 1921.)

(Syllabus by the Court.)

1. Corporations ¶10, 28(2), 34(8), 507(6)—Judgment ¶141—Default properly set aside on showing that corporate name was merely trade-name and person served not defendant's agent; corporation not created when charter not accepted nor franchises used; use by individual of corporate name held not to create corporation de facto or by estoppel; evidence held to warrant finding that person served was not agent in charge of business.

Where a petition alleged that a named defendant was a corporation, and a default verdict and judgment were taken against it as such, and thereafter an individual filed a verified petition in the nature of a motion to vacate and set aside such verdict and judgment, upon the ground that the name in which defendant was sued and verdict and judgment taken was not in fact that of a corporation, but was only the trade-name of petitioner, who owned the business as an individual, and that no such corporation existed, and upon the further ground that the judgment was void, in that no service had been perfected, because the person served by the sheriff as the agent of defendant in charge of the business was not such an agent, and where the petition as amended set up a traverse of the sheriff's return of service, and duly made the sheriff a party thereto, and the petition was filed at the same term of court at which judgment was rendered, and showed proper diligence by petitioner and his counsel after knowledge of the judgment, and a meritorious defense to the original suit, and where in a hearing of both parties, after rule nisi served upon the plaintiff, the allegations of the petition were fully supported by evidence, it was not error for the court to set aside the original verdict and judgment and to reinstate the case.

(a) Although in the trial of such issues there was evidence that petitioner and others had filed in the superior court an application for charter as a corporation, which was granted, the evidence was undisputed, and demanded a finding that such charter had never been accepted by the incorporators, and that, as there

had never been a user of the corporate franchise, there was in fact no such corporation. *Brooke v. Day*, 129 Ga. 696, 59 S. E. 769; *Franklin Bridge Co. v. Wood*, 14 Ga. 86. Nor was there, under the evidence, any corporation de facto or by estoppel (*Stewart Paper Co. v. Rau*, 92 Ga. 511, 17 S. E. 748), since there was neither allegation nor proof of any holding out to the public as a corporation, other than the mere employment by the individual owner of such trade-name, nor was there allegation or proof of any loss or injury thereby to plaintiff.

(b) The evidence as to service showing that the person served had been merely a helper of the movant, and that during his absence, when the service was made, that person had only carried the keys and looked after the gasoline and other sales of the garage and collected, but without any authority to sell cars or other authority, a finding for the movant was authorized, if not demanded, that the person served was not an agent in charge of the business or one upon whom service could be made which would bind the movant. *Welman v. Polhill*, R. M. Charlton, 235; *Smith v. Southern Ry. Co.*, 132 Ga. 57, 62, 63 S. E. 801.

2. Corporations ¶522—Judges ¶53—Judgment ¶139—Judgment against corporation held not a nullity, though charter never accepted or franchise used; disqualification of judge held waived when not raised by either party; statute vesting discretion in judge to open defaults has no application after final judgment.

The refusal to sanction the writ cannot, however, be sustained upon the grounds argued: (1) That the original judgment rendered by the trial judge was a nullity, because defendant was not chartered as a corporation, or, if so chartered, because the evidence showed that the trial judge was a stockholder and disqualified from presiding, or (2) that even if such judgment was not a nullity for either of these reasons, the right to open such default was, under section 5656 of Civil Code 1910, left to the discretion of the trial judge, since the evidence showed that a charter was in fact granted to defendant as a corporation; nor does the record show that the question of disqualification had ever been raised by either party at any time, and, even if the fact that the judge had been one of the original applicants for the charter could of itself be taken as sufficient to establish the fact that he was a stockholder at the time the case was tried, any such disqualification must be accounted as impliedly waived (*Meeks v. Guckenheimer*, 102 Ga. 710, 29 S. E. 486; *Beall v. Sinsquefield*, 73 Ga. 48; *Shuford v. Shuford*, 141 Ga. 407(3), 81 S. E. 115; *Berry v. State*, 117 Ga. 15, 43 S. E. 438); nor does the act of 1895 (Civ. Code 1910, § 5656), vesting discretionary powers in the trial judge to open defaults, have application where there has been a final judg-

ment (*Mathews v. Bishop*, 106 Ga. 564(1), 32 S. E. 631; *O'Connell v. Friedman*, 118 Ga. 831, 832, 45 S. E. 668; *Tenn. Oil & Gas Co. v. American Art Works*, 10 Ga. App. 45, 48, 72 S. E. 517); yet, as the setting aside of the verdict and judgment was fully authorized under the procedure taken, and as the evidence offered in support thereof indisputably shows that there had never been any acceptance of the charter or any use of the corporate franchise, and, moreover, since in any event the evidence authorized the finding that no legal service had been perfected, the judge of the superior court did not err in refusing to sanction the petition. *Little v. City of Jefferson*, 9 Ga. App. 878(1), 72 S. E. 436; *Gillespie v. Farkas*, 19 Ga. App. 158, 91 S. E. 244; *Barksdale v. Security Inv. Co.*, 120 Ga. 388, 47 S. E. 943; *Mathews v. City of Thomaston*, 21 Ga. App. 496(2), 94 S. E. 631; 5 Enc. Proceed. 655, 656, and notes.

3. Appeal and error ¶222—Absence of brief of evidence on motion immaterial, when no question raised by the parties.

While a motion to set aside a verdict, based on matters not appearing on the face of the record, is in effect a motion for a new trial, and is subject to all the rules of law governing such motions, so as to require a brief of the evidence (*James v. Douglasville Banking Co.*, 26 Ga. App. 509, 106 S. E. 595; *Ga. Ry. & Electric Co. v. Hamer*, 1 Ga. App. 673, 58 S. E. 54), yet where the judge has finally passed on the merits of such a motion and the parties have raised no question as to the filing or approval of the brief of evidence, but have acquiesced in his entertaining the motion at that time, no such question can be entertained by the reviewing court, especially where the evidence in the original trial is immaterial to the questions presented by the motion. *Marietta Fertilizer Co. v. Gary*, 22 Ga. App. 604(2), 96 S. E. 711; *Goodwyn v. Hightower*, 30 Ga. 249(1); *Cook v. Childers*, 94 Ga. 718(1), 19 S. E. 819; *Pilgrim Health Ins. Co. v. Gray*, 16 Ga. App. 692(2), 85 S. E. 970; *Park's Civ. Code*, 6090(a); *Springer v. Owen*, 145 Ga. 730, 89 S. E. 780.

Error from Superior Court, Morgan County; J. B. Park, Judge.

Action by W. H. Adams against the Overland-Madison Company and others. A judgment for plaintiff was set aside, and he brings error. Affirmed.

M. C. Few, of Madison, for plaintiff in error.

Johnson & Foster, of Madison, for defendants in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(27 Ga. App. 687)

(109 S.E.)

NORRIS v. STATE. (No. 12613.)(Court of Appeals of Georgia, Division No. 1.
Nov. 18, 1921.)*(Syllabus by the Court.)*

Criminal law \S 1172(8)—Indictment and information \S 191(8)—Indictment for assault with intent to rape warrants conviction for assault and battery; error in defining battery harmless when defendant convicted of assault with intent to rape.

Under an indictment for an assault with intent to rape, which also charges a battery upon the person of the female in question, a verdict can lawfully be returned either for an assault with intent to rape or for a mere assault and battery. Where, under such an indictment, one is convicted of the graver offense, an error in the charge of the court upon the subject of an assault and battery does not necessarily require another trial of the case.

Luke, J., dissenting.

Error from Superior Court, Clarke County; Blanton Fortson, Judge.

J. M. Norris was convicted of assault with intent to rape, and he brings error. Affirmed.

T. W. Rucker, of Athens, for plaintiff in error.

W. O. Dean, Sol. Gen., of Monroe, for the State.

BROYLES, C. J. The defendant was convicted of the offense of an assault with intent to rape, under an indictment thereof which also charged a battery. The court correctly and fully charged the law of an assault with intent to rape, but, while instructing the jury that if they did not find the defendant guilty of that charge they should consider whether he was guilty of the offense of an assault and battery, inadvertently charged them that—

"Any touching of the person of another in anger or in lust or in any other unlawful way is a battery within the meaning of the law."

This charge was error, for the mere touching of another in lust would not be a battery unless the touching was without the consent of the person touched. Plaintiff in error in his motion for a new trial claims that this error was prejudicial to him because he had admitted in his statement to the jury that he had touched the person of the female in question for the purpose of having sexual intercourse with her, but said that she had freely consented to the same, and that this error in the charge misled the jury and caused them to believe that even under his statement he was guilty of the offense of an assault with intent to rape. We cannot agree with this contention, for it is obvious that this erroneous portion of the charge was mis-

leading to the jury upon the subject of an assault and battery only, and not upon the subject of an assault with intent to rape. It is evident that the jury believed the evidence for the state, which demanded a verdict of an assault with intent to rape, and rejected the defendant's statement, which showed only fornication and adultery, for if they had believed the statement in preference to the evidence for the state, then, under the erroneous charge of the court upon the subject of an assault and battery, they would necessarily have returned a verdict for a mere assault and battery, and not for an assault with intent to rape.

No other error of law is complained of, and the evidence amply authorized, if it did not demand, the verdict returned.

Judgment affirmed.

BLOODWORTH, J., concurs.

LUKE, J. (dissenting). I cannot agree in the judgment of affirmance in this case. In my opinion, the excerpt from the charge of the court, of which complaint is made, was harmful error, and, the evidence not demanding the defendant's conviction, I think a new trial should result.

(27 Ga. App. 535)

FORD v. SERENADO MFG. CO. (No. 12268.)(Court of Appeals of Georgia, Division No. 2.
Nov. 1, 1921.)*(Syllabus by the Court.)*

1. Pleading \S 205(2), 256—When plea sufficient to support amendment stated; plea held sufficient to prevent dismissal on general demurrer.

In a suit on a written contract for the purchase price of goods sold thereunder, a plea which is in effect no more than the general issue, when attacked at the appearance term by general demurrer or motion to strike, is not sufficient to support an amendment (Simmons Furniture Co. v. Reynolds, 135 Ga. 595, 69 S. E. 913; Millen Hotel Co. v. First Nat. Bank of Millen, 20 Ga. App. 701[3], 93 S. E. 253; Smith v. First Nat. Bank of Marietta, 115 Ga. 608, 41 S. E. 983); but if the original plea and answer sets up any valid defense, though imperfectly pleaded, it will authorize a properly pleaded amendment (Atlanta Suburban Land Corp. v. Austin, 122 Ga. 374[3], 378, 379, 50 S. E. 124; Nat. Duck Mills v. Catlin, 10 Ga. App. 240[1], 73 S. E. 418; Hicks v. Hamilton, 3 Ga. App. 112[2], 59 S. E. 331). The defense set up in the ninth paragraph, that the plaintiff had failed to furnish certain specially printed folders as provided in the written contract, may be taken as a plea of partial failure of consideration, and as such was sufficient to save the original plea and answer from dismissal on general demurrer. Civ. Code 1910, §§ 4250,

4137; *Grier v. Enterprise Stone Co.*, 126 Ga. 17, 54 S. E. 808. Such defense, as originally made, and as amended so as to allege the value of the goods in question, raised an issue for the jury.

2. Pleading \S 36(3), 256, 263—Plea of non est factum held too indefinite to authorize amendment; amended plea of non est factum held entitled to allowance even after the first term; admission of signing of contract prevails over denial.

That part of the original answer which was in the nature of a plea of non est factum merely denied that the contract between the parties was "the same as the copy attached to the petition," without specifying the particulars in which the same had been modified. It was therefore too vague and indefinite to furnish within itself even the basis for an amendment (*Mozley v. Reagan*, 109 Ga. 182[1], 183, 34 S. E. 310; *Caudell v. Nabstedt*, 22 Ga. App. 694, 695, 97 S. E. 99); yet since the defense already referred to furnished enough to amend by, and the amendment setting up this defense distinctly shows that the contract as executed was the same as that sued upon, except that the exhibit marked "Schedule B," setting forth the prices at which plaintiff was to furnish the machines, was not attached, and that the goods sued for had not been ordered under "Schedule B," such sworn amendment would have raised an issue for the jury, and should have been allowed upon being sworn to, even after the first term (*Patton v. Bank of La Fayette*, 124 Ga. 965[1], 53 S. E. 664, 5 L. R. A. [N. S.] 592, 4 Ann. Cas. 639; *Tucker v. Carson*, 110 Ga. 908, 910, 36 S. E. 217; *Norton v. Scruggs*, 108 Ga. 802[2], 34 S. E. 166), were it not for the fact that by another portion of the amended plea (treated in paragraph 4 of this syllabus) the defendant, by solemn admission in *judicio*, in effect admits the signing of the contract as sued on. In such a case the admission and not the denial must prevail. *City of Moultrie v. Schofield's Sons Co.*, 6 Ga. App. 464, 468, 65 S. E. 315; *Williams Mfg. Co. v. Warner Sugar Refining Co.*, 125 Ga. 408, 411, 54 S. E. 95.

3. Evidence \S 434(11)—Defense held insufficient to raise issue of fraud so as to modify terms of contract.

Neither the original nor the amended ground of defense by which it was sought to set up fraud, in that the plaintiff had failed to comply with an oral contemporaneous promise of its agent to alter the terms of the contract as signed, by substituting other merchandise for that specified in the agreement, was sufficient to raise an issue of fraud, so as to modify the express terms of the written contract. *Tinsley v. Gullett Gin Co.*, 21 Ga. App. 512(2), 94 S. E. 892; *Ozmore v. Coram*, 133 Ga. 250(1), 65 S. E. 448; *Bond & Maxwell v. Perrin*, 145 Ga. 200, 88 S. E. 954; *Southern Fertilizer Co. v. Harrell*, 17 Ga. App. 642, 87 S. E. 911; *Chewning v. Tucker*, 17 Ga. App. 768(1), 88 S. E. 593.

4. Principal and agent \S 41—Bayer's right to recover consideration under guaranty of sales held limited by terms of contract.

In the answer as amended the defendant alleges that, although the plaintiff had guaranteed by the contract that the defendant would be able to sell a specified number of machines within a stated period, it had nevertheless, after the execution of the contract, notified him in writing that the prices the defendant was to pay for the machines had been materially increased above the prices set forth by the contract, and the defendant says that for this reason he has been damaged in a stated sum represented by the difference in such prices for the specified number of machines, because it would be impossible for him to make the sales contemplated and guaranteed under the terms of the contract, on account of such increase. The prices which under the contract the defendant was to pay for the machines are scheduled in the exhibit marked "Schedule B," referred to in paragraph 2 of this syllabus. Paragraph 6 of the original contract provides: "In consideration of our (my) fair and reasonable effort in promoting the sale of the Serenado, in accordance with your 'Methods and Directions,' and the performance 'by us (me) of our (my) part of the agreement as specified herein, you agree that if we (I) have not disposed of at least twenty-six (26) Serenado model 49 talking machines, or other models of equal value, within fifteen months of the date of this agreement, you will at our (my) request, refund the face value of this agreement, two hundred fifty (\$250.00) dollars, with interest at 6 per cent. per annum from the time of your approval of this agreement, provided that we (I) return the sample Model 49 by express prepaid, properly boxed and in reasonably good condition." Held, whatever, if any, might be the rights of the defendant to recover the \$250 consideration paid by him to the plaintiff, upon showing a compliance on his own part with the conditions and terms of such guaranty, his claim, if any, must be limited to and measured by the quoted paragraph of the contract, which the defendant by his pleading has not sought to do.

Error from City Court of Macon; Will Gunn, Judge.

Action by the Serenado Manufacturing Company against J. W. Ford. Judgment for plaintiff, and defendant brings error. Reversed.

Walter De Fore and Jas. C. Estes, both of Macon, for plaintiff in error.

O. H. Hall, of Macon, for defendant in error.

JENKINS, P. J. Judgment reversed.

STEPHENS and HILL, JJ., concur.

(27 Ga. App. 533)

**ANDERSON v. INTERNATIONAL HAR-
VESTER CO. (No. 12255.)**(Court of Appeals of Georgia, Division No. 2.
Nov. 1, 1921.)*(Syllabus by the Court.)*

Evidence ¶441(11)—**Sales** ¶89, 267, 428
—Oral warranty available in suit on purchase-money note not specifying terms of agreement; purchase money-notes held to waive all warranties and merge all representations and warranties; purchase-money note cannot be altered by subsequent promises or representations without consideration; vendor's promise made upon renewal of purchase-money note not enforceable if terms of note thereby varied.

Under the rule stated in *Fryor v. Ludden & Bates*, 134 Ga. 288, 67 S. E. 654, 28 L. R. A. (N. S.) 267, a plea setting up a breach of an oral warranty can be maintained in a suit on a purchase-money note, which, though reciting the consideration, fails to integrate within itself the terms of the sale agreement; but where the note sued on recites that, "in consideration of such renewal and extension of time of payment, I hereby expressly waive all claims arising out of the purchase of said property and all defenses, statutory or otherwise, to the payment hereof," this provision of the agreement must be taken as a waiver of any express or implied warranties relative to the subject-matter of the sale, with the effect that all previous and contemporaneous representations and warranties are merged into and controlled by the written instrument; nor could the terms of such a writing be altered by subsequent representations or promises, unless supported by a consideration. Thus, while it is true that, unless the instrument should expressly or by implication provide otherwise, a vendor is bound by his promise made at the time a purchase-money note is renewed, whereby he agrees to remedy existing defects, or to warrant a then undelivered portion of the purchased property (*Atlanta City Street Ry. Co. v. American Car Co.*, 103 Ga. 254, 29 S. E. 925; *Lockett v. Rawlins*, 13 Ga. App. 52, 78 S. E. 780), still, under the rule stated, such promises and warranties cannot be enforced, if, in order to do so, it is thereby necessary to add to or vary any of the terms of the agreement, such as are covered by and embodied in the written instrument. *Bond v. Perrin*, 145 Ga. 200(6), 88 S. E. 954; *Case Threshing Machine Co. v. Broach*, 137 Ga. 602(1), 73 S. E. 1063. The trial judge did not err, therefore, in excluding the testimony offered by defendant, or in directing a verdict in the plaintiff's favor.

Error from Superior Court, Ben Hill County; O. T. Gower, Judge.

Action by the International Harvester Company against J. W. Anderson. Judgment for plaintiff, and defendant brings error. Affirmed.

D. B. Nicholson and Eldridge Cutts, both of Fitzgerald, for plaintiff in error.

Wall, Grantham & Kassewitz and Clayton Jay, all of Fitzgerald, for defendant in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(27 Ga. App. 552)

HOLMES v. REVILLE. (No. 12318.)(Court of Appeals of Georgia, Division No. 2.
Nov. 1, 1921.)*(Syllabus by the Court.)*

Judgment ¶358—Judgment including interest not unauthorized by pleadings because petition and exhibit does not give sufficient data for computation.

Suit was brought for a stated sum, "besides interest" on an open account, a copy of which as an exhibit was attached to the petition. The case being in default, and there being no demand for a jury, the city court judge, sitting without a jury, rendered a judgment for the plaintiff for the principal amount claimed, besides a stated sum as "interest to date of judgment," and future interest at the rate of 7 per cent., the finding and judgment reciting that it was based "upon the evidence submitted." At a later term, and more than six months thereafter, the defendant filed a petition in the nature of a motion to set aside this judgment, upon the grounds, (1) that, although the petition claimed a principal sum "besides interest," and attached an exhibit showing the items of principal, it failed to show the dates of the account or any data upon which interest could have been computed, and that the judgment for interest was therefore unauthorized by the pleadings; and (2) that, although the finding and judgment recited that it was based "upon the evidence submitted," no evidence had in fact been offered by the plaintiff. The record shows that the original petition and process were personally served on the defendant. The motion as amended alleges that, while the movant had employed counsel to represent him in filing defenses at the first term, none were in fact filed. No legal cause for such failure, or for the failure to move to set aside the judgment at the term when it was rendered, was shown, save that the "petitioner did not know that such judgment had been rendered until within the last few days." At the hearing of the motion it was shown that no evidence other than the pleadings was offered by the plaintiff at the time when the judgment in question was taken. *Held:*

When pleadings are so defective that no legal judgment can be rendered, the judgment will be arrested or set aside. Civ. Code 1910, §§ 5957, 5959. But a judgment cannot be arrested or set aside for any defect in the pleadings or the record that may be aided by verdict, or is amendable as matter of form. Civ. Code 1910, § 5960; *Strickland v. Citizens' Nat. Bank*, 15 Ga. App. 464, 83 S. E. 853. The mere failure in the instant case to include in the petition or exhibit the dates or other data upon which interest might be computed, being an amendable

defect, did not render the judgment unauthorized by the pleadings. Civ. Code 1910, § 5936; *Wilson v. Stricker*, 66 Ga. 575(1); *Davis v. Bray*, 119 Ga. 220, 46 S. E. 90.

2. Judgment \S 336, 338—Motion to set aside judgment on verdict or finding for want of evidence is governed by rules governing motions for new trials; motion to set aside judgment for want of evidence properly overruled when excuse for failure to file defense, etc., not shown.

Where a judgment is based upon a verdict or finding on facts, as the verdict or finding must be set aside before a motion to set aside the judgment can be granted for any cause not apparent on the face of the record or pleadings (*Ayer v. James*, 120 Ga. 578, 580, 48 S. E. 154), a motion to set aside the judgment, based solely upon matters of evidence, such as, as in the instant case, the want of evidence as to the amount of interest due, is tantamount to a motion for a new trial on the general ground that the verdict or finding is contrary to evidence and without evidence to support it, and thus is controlled by the rules of law governing such motions. *James v. Douglasville Banking Co.*, 26 Ga. App. 509, 106 S. E. 595; *Ga. Ry. & Electric Co. v. Hamer*, 1 Ga. App. 673, 58 S. E. 54; *Garfield Oil Mills Co. v. Stephens*, 16 Ga. App. 655, 659, 85 S. E. 983. The second ground of the motion being thus limited, in that it wholly fails to show any legal ground or excuse for the failure to file defenses, or to file a motion to set aside the finding and judgment or a motion for new trial at the term when the judgment was rendered, the court properly overruled the same.

Error from City Court of Athens; J. D. Bradwell, Judge.

Action by D. J. Reville against E. J. Holmes. Petition to set aside a judgment by default for plaintiff denied, and defendant brings error. Affirmed.

Geo. C. Thomas and John J. Strickland, both of Athens, for plaintiff in error.

Austin Bell and Howell Cobb, both of Athens, for defendant in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(131 Va. 769)

LYNCH v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Nov. 17, 1921.)

1. Intoxicating liquors \S 146(1)—Ability to complete sale unnecessary to convict for offering.

The ability, at the time of an offer to sell ardent spirits, to complete the sale in accordance with the offer, is not an essential element of the offense of offering ardent spirits for sale under Prohibition Act 1918, § 3.

2. Intoxicating liquors \S 146(1)—Offer to sell must not be joke.

To constitute the offense of offering ardent spirits for sale, under Prohibition Act 1918, § 3, the offer must be, at least apparently, an actual offer to sell such spirits, and not a joke.

3. Intoxicating liquors \S 238(5)—Offer to sell 50 gallons of whisky not impossible of performance as matter of law.

An offer to sell 50 gallons of whisky cannot be said, as a matter of law, to be an offer to do something so utterly impossible of performance that it cannot reasonably be taken seriously and relied on as an actual offer, in violation of Prohibition Act 1918, § 3.

4. Intoxicating liquors \S 236(1)—Evidence held to sustain conviction for offering to sell ardent spirits.

In a prosecution for offering ardent spirits for sale, in violation of Prohibition Act of 1918, § 3, evidence held to warrant a finding that the offer in question was an actual offer, and was not intended as a joke.

5. Intoxicating liquors \S 146(1)—Mere "offer" to sell ardent spirits an offense.

A mere verbal offer to sell whisky is an offense, under Prohibition Act 1918, § 3; the word "offer" in such statute not having the meaning of "attempt."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Offer.]

Error to Corporation Court of Radford.

Zelgler Lynch was convicted of offering ardent spirits for sale, and brings error. Affirmed.

In this case there was a trial by jury and a verdict finding the accused guilty of offering ardent spirits for sale, contrary to the statute (section 3 of the Prohibition Act of 1918, Acts 1918, p. 578), and fixing the punishment of the accused in accordance with another section of the same act. Whereupon the accused moved the court to set aside the verdict as contrary to the law and the evidence. This motion the court overruled, entered judgment, and sentenced the accused in accordance with the verdict of the jury.

The sole assignment of error is that the court erred in refusing to set aside the verdict of the jury as contrary to the law and the evidence; the position taken in argument for the accused being that the verdict is not supported by the evidence, because the evidence does not show that the accused, at the time he offered the whisky for sale, had the ability to complete the sale in accordance with his offer.

The evidence for the commonwealth consists of the testimony of two witnesses, one of whom testified that he overheard the accused talking to one O. J. Dudley, when the two were in a certain garage together, and that the "accused offered to sell Dudley 50

gallons of whisky if he wanted that much"; and the other testified as follows:

"I am connected with the ——— garage. * * * Accused came to the garage on Sunday. * * * I had C. J. Dudley working for me. I was sitting in the office, and heard loud talking and swearing; * * * heard * * * [the] accused offer to sell Dudley whisky. He [the accused] said, 'I will sell you [Dudley] as much as 50 gallons if you want that much, and bring it to you any time you want it.' I did not infer that he [the accused] had any at that time; said he would get it for him."

The accused testified that he did not offer to sell any whisky. That if he offered to sell Dudley any whisky he was joking, as he (the accused) did not have any whisky at the time and did not know where he could get any.

The case was submitted to the jury upon a single instruction asked for by the accused which, in substance, submitted to the jury for their decision the question of whether or not they believed from the evidence that the commonwealth had proved beyond a reasonable doubt that the accused made the offer to sell as much as 50 gallons of whisky and did so, not as a joke, but, with the intention "to carry out" such offer.

Harless & Calhoun, of Christianburg, for plaintiff in error.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazile, Second Asst. Atty. Gen., for the Commonwealth.

SIMS, J. (after stating the facts as above). The sole question presented for our decision by the assignment of error in this case is as follows:

[1] 1. Is the ability, at the time an offer to sell ardent spirits is made, to complete the sale in accordance with the offer, an essential element of the statutory offense of offering ardent spirits for sale?

The question must be answered in the negative.

It is elementary that an actual offer to sell anything is in itself an implied representation on the part of the person making the offer that he either has at the time, or undertakes to subsequently acquire, the ability to complete the sale in accordance with the offer. The offer to sell, therefore, is complete the moment it is made, and in no way depends for its existence upon the present or future ability of the person making the offer to complete the sale in accordance with the offer. The actual lack of such ability does not afford any ground of defense to the person making the offer in a prosecution under the statute aforesaid, any more that it would in a civil action against him for damages for deceit, or for breach of contract, by one who may have accepted the offer in

reliance upon the implied representation or undertaking aforesaid. In neither case would the lack of such ability to complete the sale alter the fact that the offer to sell was made. An offer to sell is one thing. A completed sale is another and different thing.

[2-4] Of course, to constitute the offense, the offer must have been, at least apparently, an actual offer to sell the whisky, and not a joke. Abstractly speaking, an offer to do something may be so utterly impossible of performance that it cannot reasonably be taken seriously and relied on as an actual offer. We cannot say, however, that the offer to sell 50 gallons of whisky is per se of that character. And the verdict of the jury, under the instruction given, concluded against the accused the fact that the offer in question was an actual offer, intended by him as such, and not as a joke.

[5] As laid down in the authorities cited for the accused (23 R. C. L. § 61, pp. 1243, 1244, and First Nat. Bank v. Turnbull, 73 Va. [32 Grat.] 695, 34 Am. Rep. 791), the actual or potential existence of the thing sold is an essential element of a sale. But that is true only at law, and then only of completed sales. As held in the case just cited, a valid equitable assignment may be made of things not in actual or potential existence at the time of the assignment; and, as stated in the section of R. C. L. just mentioned, while "a mere possibility or contingency not founded on a right or coupled with an interest cannot be the subject of a *present sale*, * * * it may often be of an *executory contract to sell*." (Italics supplied.) An actual offer to sell is an overt act (in the instant case a verbal act), which is merely the first action taken in the attempt to make an executory contract of sale, or a sale, and which, unless frustrated by unexpected extraneous circumstances, will result either in an executory contract of sale or in a sale. It is this first overt act which the statute creates into an offense. The language of the statute, so far as material to be quoted here, is as follows:

"It shall be unlawful for any person in this state to * * * sell * * * or * * * offer * * * for sale * * * ardent spirits. * * *"

It is not alone the actual completed sale of ardent spirits which falls within the condemnation of the statute. It also forbids the taking even of the first step towards the making of the sale.

It is true that the word "offer" may have the meaning of "attempt." It is so stated by Webster. But that authority also defines the word "offer" to mean: "To present in words; to proffer; to make a proposal to," giving as an example a quotation from 2 Samuel xxiv: 12, "I offer thee three things." See, to same effect, 8 Bou. Law Dictionary (8d

Ed.) p. 2399. So that it is plain that the offer condemned by the statute may consist in the verbal offer which was made in the instant case according to the testimony for the commonwealth. Therefore, although there was a conflict in the testimony on the subject, that conflict involved the credibility of the witnesses, and since, in the conflicting testimony, there was testimony before the jury sufficient to support their finding to that effect, we must consider that the accused did commit the overt act of making the "proffer," the "proposal," the "offer," and, in that sense, the "attempt" to sell the ardent spirits, which, as aforesaid, is the offense created by the statute.

Such an "attempt" falls precisely within the definition of an attempt given in Hicks' Case, 86 Va. 223, 9 S. E. 1024, 19 Am. St. Rep. 891 (a prosecution for an attempt to poison), relied on in argument for the accused. The following is said in that case of an attempt, quoted from Wharton's Cr. Law (9th Ed.):

"An attempt is an intended apparent unfinished crime.' Therefore the act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation."

And again, quoting from Wharton's Cr. Law, § 181:

"To make the act an indictable attempt * * * it must be a cause as distinguished from a condition, and it must go so far that it must result in the crime unless frustrated by extraneous circumstances."

In Wharton's Cr. Law (11th Ed.) § 224, it is said that—

An attempt, to be indictable and punishable, "need not be capable of success; * * * it being clear that apparent adaptation may constitute the attempt. * * * It is enough if there is a possibility. * * *"

Berkeley's Case, 88 Va. 1017, 14 S. E. 916, also relied on in argument for the accused, was a prosecution for an assault. It is true that the opinion of the court in that case quotes with approval extracts from Davis Cr. Law and Russell on Crimes, in which the statement is made that "to constitute an assault there must be present ability to inflict an injury," yet, as indicated in the very extracts quoted, this statement is subject to the qualification that if the threatened conduct is such that it puts the person assailed in such apparent peril as to create in him the reasonable belief that he is in peril, the assault will be complete, although it may be that the person making the assault did not in truth have the present ability to inflict the threatened injury. As said in Bish. New Cr. Law (8th Ed.) § 32, on the subject of what constitutes an assault:

"There is no need for the party assailed to be put in actual peril, if only a well-founded apprehension is created. For his suffering is the same in the one case as in the other, and the breach of the public peace is the same. To illustrate: * * * If, within shooting distance, one menacingly points at another with a gun, apparently loaded, yet not in fact, he commits an assault the same as if it were loaded."

Thereupon Mr. Bishop proceeds to lay down what is undoubtedly the correct rule on the subject, in the following words:

"There must be some power, actual or apparent, of doing bodily harm; but apparent power is sufficient. In the instance we are referring to, the person assaulted is really put in fear. * * * It has been said that the gun must be within shooting distance; but plainly if it is not, yet seems to be so to the person assaulted, or danger otherwise appears imminent, it will be sufficient."

It appears from the opinion in Berkeley's Case that the prosecutor himself testified that the accused "did not attempt to strike" him. Hence it affirmatively appeared that the prosecutor was never put in any apparent peril or apprehension of bodily harm. And the court correctly held, under those circumstances, that the charge of the assault was not sustained by the evidence. Plainly, therefore, the case does not hold, as is claimed for the accused in the case before us, that to constitute an attempt the overt act must in all cases be accompanied with the present ability on the part of the actor to accomplish the actual thing attempted. And we find nothing in the holding in Berkeley's Case in conflict with our conclusions reached above.

The case will therefore be affirmed.

(131 Va. 547)

MULLINS v. SUTHERLAND et al.

(Supreme Court of Appeals of Virginia. Nov. 17, 1921.)

1. Sales ¶383—Evidence held insufficient to sustain finding of application by buyer of staves on improper contract.

In an action in conversion by sellers against buyer, by reason of an alleged application by the buyer of staves on a contract not existing at the time of the contract of sale in violation of such contract, evidence held insufficient to sustain a finding that the staves were not applied on a then existing contract.

2. Evidence ¶568(1)—Opinion evidence not proper.

In action by sellers for conversion by the buyer in shipping goods on later contracts of the buyer, contrary to the contract between plaintiffs and defendant, testimony of one of the sellers that they loaded the goods for the purpose of shipping "under this contract" and

(109 S.E.)

that "they were not shipped under the contract," but stating no reason for that conclusion, was insufficient to show conversion, as it was incumbent upon the sellers to show the facts and not the mere opinion of the witness.

3. Sales ¶477(1)—Seller may waive provision of contract.

A seller could waive a provision in a conditional contract of sale under seal providing that the staves could be applied by defendant buyer only on existing contracts, and permit sales by buyer to other persons.

4. Sales ¶477(1)—Provision for resale only to certain parties held waived.

A provision in a contract of sale of staves that resale by buyer could be made only to parties under existing contracts, seller retaining title for purpose of additional security for the purchase price until paid for, was waived, where the purchaser applied shipments of staves on contracts not existing at the time of the contract of sale, and no objection was made that there was a violation of the contract.

5. Sales ¶477(2)—Application of purchase of staves on improper contracts held not conversion.

Where provision in a contract for the sale of staves that they could only be applied by purchaser on then existing contracts was waived and the actual possession and right to the staves passed to buyer, and after such waiver he applied a shipment of staves on a contract not existing at the time of the original contract, sellers could not maintain trover against the purchaser under a provision in the contract retaining title in the seller.

6. Trover and conversion ¶16—Right to possession essential.

One who had neither actual possession of property nor the right to demand the immediate possession thereof at the time it was disposed of by defendant in violation of contract cannot maintain an action of trover.

Error to Circuit Court, Dickenson County.

Action by S. R. Sutherland and others against E. L. Mullins. Judgment for plaintiffs, and defendant brings error. Reversed.

Chase & McCoy, of Clintwood, for plaintiff in error.

Geo. C. Sutherland, of Clintwood, for defendants in error.

BURKS, J. The defendants in error agreed to sell to the plaintiff in error 500,000 oak staves, by a contract under seal bearing date February 10, 1919, which was modified by a supplemental contract in writing not under seal, bearing date September 6, 1919. The contract called for complete delivery by September 15, 1919. The supplemental contract simply extended the time for delivery. The price to be paid for the staves was \$57 per thousand "f. o. b. cars at Fremont, Virginia, or other points in Dickenson county," on the orders of Mul-

lins. The Sutherlands (who were the sellers, and designated in the contract as parties of the first part) agreed "not to knowingly deliver any culls," but, if upon inspection at destination by Mullins or his assigns or consignees, culls were found in the cars, it was agreed that Mullins, his assigns or consignees, should "unload and remove them from the cars, and make no charge therefor." Clauses 6 and 8 of the original contract are as follows:

"Sixth. The party of the second part hereby agrees to pay for said staves as each car is shipped, and received and inspected at destination by consignees of the party of the second part, but in the event that said report is not received within twenty days from date of shipment then said party of the second part is to pay forty dollars per thousand for the staves so shipped, the remaining seventeen dollars to be paid as soon as said report is received, and at any rate not to be longer than forty days from date of shipment. But title to the said staves is not to pass out of the party of the first part till payment is made in full for the said staves."

"Eighth. It is understood by the parties of the first part, that the above staves are to be applied on contracts of party of the second part, and is to be shipped by parties of the first part to such firms, and at such times as may be directed by the said party of the second part; the parties of the first part are to furnish to party of the second part the car number and name and the quantity of staves shipped in each car as soon as convenient after each car is shipped."

At the time the original contract was entered into, it is claimed that Mullins had contracts with the Interstate Cooperaage Company and A. Knabb & Co.; but the character of these contracts, if any such existed, is not disclosed by the record. A large quantity of staves was delivered under the contract, but they are not in controversy here and need not be further noticed.

In January, 1920, the Sutherlands, on the order of Mullins, delivered to the railroad company 138,700 staves to be shipped under the contract. These staves were consigned by Mullins to the T. Johnson Company, at Chicago, and upon inspection the culls were thrown out, and the T. Johnson Company reported the shipment as containing 125,144. Prior to this shipment, Mullins had no contract with the T. Johnson Company, but his brother did have, and the staves were shipped under the brother's contract under the name of Mullins Stave & Lumber Company. The Sutherlands made repeated efforts to collect of Mullins the contract price of this shipment, without avail, and then brought trover against Mullins to recover damages as for conversion. They laid their damages at \$13,000, and recovered a verdict for \$9,015.50, which was far in excess of the contract price. W. F. Mullins was the brother

under whose contract the shipment was made, and he was united as a defendant in the action, but the jury found in his favor. The verdict of the jury was so plainly right as to him that it is unnecessary to consider the cross-error assigned as to this finding.

The defendant E. L. Mullins, did not plead at rules, but followed the usual course and pleaded "not guilty" at the calling of case on the court docket, and the case was laid over to a later day of the term. At this later date he tendered a special plea of recoupment under section 6145 of the Code of 1919, setting up the contract of February 10, 1919, and alleging a failure and refusal of the plaintiffs to deliver all of the staves called for by the contract and a consequent damage to him of a large amount which he offered to set off and have allowed against the plaintiffs' demand. The trial court rejected this plea without assigning its reasons therefor at the time. It is suggested for the defendants in error that the refusal might very properly have been because it was not filed at the time the plea of "not guilty" was filed, but this is too improbable to warrant a ruling on that supposition, as we find in one of the bills of exception, certified by the trial judge in his rulings on evidence offered to support that line of defense, the statement that—

"The court sustains all of the objections upon the theory, and for the reason that the defendant is not allowed to plea an offset in damages or otherwise against the plaintiffs in action of tort."

It is quite manifest that the trial judge rejected the plea because he thought such a plea was not admissible in an action which was in form in tort.

A number of errors have been assigned, and several of them overlap each other; but in the view we take of the case it will not be necessary to consider them seriatim.

[1-4] The Sutherlands admit that the staves in controversy were delivered to the railroad company on the order of Mullins, "for the purpose of shipping under this contract," but deny that they were shipped by Mullins under the contract. They insist that, at the time the contract was entered into, Mullins had contracts for shipment of staves to the Interstate Cooperaage Company and to A. Knabb & Company; that the contract restricted Mullins to shipments to these two parties; and that the shipment of the staves in controversy by Mullins to the T. Johnson Company at Chicago was a conversion of their property. According to the contention of the Sutherlands, section 8 of the contract would have to be interpreted as if it read:

"It is understood by the parties of the first part (Sutherlands) that the above staves are to be applied on existing contracts of the party of the second part (Mullins) and are to be

shipped by parties of the first part to such firms as the party of the second part now has contracts with, and at such times as may be directed by the party of the second part," etc.

It may be well doubted if the contract is susceptible of the interpretation contended for. The circumstances under which the contract was entered into are not disclosed by the record, and the meaning of the language used is not clear. But if the situation be viewed in the light most favorable to the Sutherlands, it is conceivable that they intended to restrict Mullins to sales under his then existing contracts and retained the title until the staves were fully paid for, with a view to obtaining additional security for the purchase price. If this was their intention, it was poorly expressed, and, in the absence of any light on the surrounding circumstances, we are unable to say that is a proper interpretation of the contract and that Mullins should have so understood it. But even if this be the proper interpretation, it was necessary for the Sutherlands to show, in order to recover in this action, that the staves were not shipped to parties with whom Mullins had contracts on February 10, 1919. The testimony in the case does not show with whom Mullins had contracts on that date. The nearest approach to it is the incidental statement of S. H. Sutherland, in detailing a conversation with one of the parties, that "I knew that Luther's contracts were with the Interstate Cooperaage Company and A. Knabb & Co." But it does not appear therefrom, or elsewhere in the record, when these contracts were made. There is a statement in the testimony of S. H. Sutherland that they "loaded them for the purpose of shipping under this contract," and that "they were not shipped under the contract"; but he states no reason for that conclusion. His opinion that they were not shipped under the contract should have been supported by facts showing that they were not so shipped. The Sutherlands delivered them "under this contract," and if there was thereafter a conversion by Mullins, it was incumbent upon them to show the facts and not the mere opinion of the witness that there was such conversion. Furthermore, if the contention of the Sutherlands be correct that Mullins was limited in his sales to persons with whom he had contracts on February 10, 1919, it was entirely competent for them to waive this provision of the contract and permit sales to other persons. Three witnesses for the defendant Mullins testify that S. H. Sutherland, one of the plaintiffs, consented to the sale to the T. Johnson Company, and their testimony was in no way contradicted by any one, although S. H. Sutherland was recalled to the stand to testify to another matter after these witnesses had testified. This shipment to the T. Johnson Company was made

in January, 1920, and in February and March following S. H. Sutherland, one of the plaintiffs, was earnestly contending for the collection of the amount due under the contract of February 10, 1919, and, although he was at that time "not positive where they had gone," "he had learned from the bill" that they had gone to the T. Johnson Company, and had ascertained that they had paid Mullins for them, for in detailing a conversation with Mullins he says:

"And then I told him, I says, 'T. Johnson Company says these staves have been paid for,' and he admitted they had been paid for."

In addition to this, the other plaintiff, E. D. Sutherland, on March 18, 1920, wrote the defendant Mullins:

"Please let us have settlement on the stave contract as this is long past due. I have written you two letters asking for payment and cannot quite understand why the delay in this matter."

No reference is here made to any conversion though the writer had ample time to have ascertained the fact, if it existed and he intended to rely upon it. These facts constituted a complete waiver of the right, if it existed, to insist that Mullins could only sell to those with whom he had contracts on February 10, 1919, and the jury should have so found. They had no right to disregard the uncontradicted evidence on this question, and their verdict in this respect is plainly contrary to the evidence.

[5] Therefore the transaction was a perfected sale. The actual possession and the right thereto passed to Mullins, so that there was no conversion and the plaintiffs could not maintain trover. The title passed upon the consummation of that sale, and thereafter the rights of the plaintiffs (Sutherlands) were those of lienors for the purchase money. They could not sell and deliver the staves and at the same time remain the owners thereof.

"Courts have frequently, without regard to the designation of the contract by the parties as a conditional sale and the reservation of the title until the price is paid, construed the contract as in effect an absolute sale with a mortgage back as a security for the price and not a conditional sale, where the contract read as a whole and the special circumstances surrounding the transaction justified the conclu-

sion that such was the ruling intention of the parties and the proper construction of the instrument as a whole. * * * Conditional sales are not favored in law, and where it is doubtful from the face of the instrument whether the contract is a conditional sale or a mortgage, the courts generally treat it as a mortgage, for the reason that such a construction will be most apt to attain the ends of justice, and prevent fraud and oppression, because an error which converts a conditional sale into a mortgage is less injurious than an error which changes a mortgage into a conditional sale." 24 R. O. L. § 744, and cases cited; *Herryford v. Davis*, 102 U. S. 235, 26 L. Ed. 160; *Singer Man. Co. v. Smith*, 40 S. C. 529, 19 S. E. 132, 42 Am. St. Rep. 897; *Montenegro, etc., Co. v. Beuris*, 160 Ky. 557, 169 S. W. 986, L. R. A. 1916C, 557.

In no view of the case do we think that the action of trover can be maintained.

[6] The plaintiffs in the trial court mistook their remedy. They sued in trover when they should have sued on the contract. The evidence in the case fails to disclose a conversion, though it does disclose a plain violation of contract. They sold the staves to Mullins, and made delivery thereof "under this contract," and thereafter they had neither the actual possession of the staves nor the right to demand the immediate possession thereof, without which the action of trover does not lie.

The Sutherlands claim that Mullins is also indebted to them in other sums for money due them under the contract of February 10, 1919, which could not be recovered in the action of trover, and for which an action on the contract would have to be brought, so that even if the present action in trover could be maintained it would require two actions to give them complete relief. Furthermore, we are of opinion that, if the Sutherlands get the contract price for their staves, with interest and costs, they will be fully indemnified.

For these reasons, the verdict of the jury and the judgment of the trial court thereon will be set aside, and the action of the plaintiffs in the trial court will be dismissed, with costs, without prejudice to the right of the plaintiffs in said action to bring such action on the contract of February 10, 1919, as supplemented by the contract of September 6, 1919, as they may be advised.

Reversed.

(131 Va. 522)

HOOVER et al. v. HOOVER.

(Supreme Court of Appeals of Virginia. Nov. 17, 1921.)

1. Bastards ¶13—Legitimacy established if father at any time unequivocally recognized child as his.

The law so favors legitimacy that if, at any time, the putative father unequivocally recognized the child as his, such child is legitimate and the father's heir at law, no matter how often he repudiated his paternity.

2. Bastards ¶12 — Voluntary marriage of parents inferred from lack of haste and absence of threats.

Where the father of a child born out of wedlock did not marry the mother until six weeks after his arrest on a charge of seduction, and no threat, except that of the prosecution itself, was made, nor physical force used, there was an inference that his act was deliberate, and that he intended to legitimate the child; the purpose of the seduction statute being to require the seducer to right his wrong in the interest of his child as well as for the sake of the woman.

3. Bastards ¶6—Evidence held to show father's recognition of child as his.

In a partition suit involving complainant's legitimacy, evidence held to show that her father, by his conduct, his silence when he should have spoken, and his words, had recognized her as his child.

4. Bastards ¶3—Presumptions in favor of legitimacy and in support of judgment in doubtful cases.

Every fair presumption should be indulged in favor of legitimacy, and, in doubtful cases, in support of the judgment of the trial court.

Burks, J., dissenting.

Appeal from Circuit Court, Rockingham County.

On rehearing. Former opinion reversed, and judgment below affirmed.

For former opinion, see 105 S. E. 91.

O. R. Winfield, of Broadway, and John T. Harris, of Harrisonburg, for appellants.

Ward Swank, of Harrisonburg, for appellee.

PRENTIS, J. [1, 2] While in accord with the views expressed in the previous opinion (105 S. E. 91) as to the legal inferences to be drawn from the mere fact of such a marriage, a further consideration of the evidence in this case leads us to the conclusion that too much emphasis was there placed upon the testimony which was adverse to the appellee, Winnie Hoover, and that the evidence and the proper inferences therefrom in her favor were insufficiently emphasized. The vital question, as has been stated, is whether or not Benjamin Hoover ever, by words or conduct, acknowledged, accepted, admitted, or owned that Winnie Hoover was his child.

It makes no difference how often he repudiated his paternity, for the law so favors legitimacy rather than illegitimacy that if, at any time, he unequivocally recognized her as his child, she is legitimate and his heir at law. It is said in the former opinion that "no doubt if a man voluntarily married a woman who was grossly incompetent, or shortly after the birth of a child, the marriage itself would afford all the evidence necessary of recognition by the husband of the paternity of the child," and then follows the recital of the facts indicating that this marriage was not voluntary but the result of intimidation caused by his arrest and prosecution for seduction under promise of marriage. In this connection it is proper, however, to observe that there is no evidence in the record of any threat from any source whatever, except the prosecution itself and the threat to invoke the law. No physical force was suggested by any one. The accused promptly gave bail for his appearance to answer the charge. He employed counsel known to this court to be exceptionally competent to advise him and to protect his legal rights. Six weeks elapsed between the time of his arrest and the marriage. The proposition to relieve himself of the prosecution by the payment of money came from him, and when he failed in his effort the offer to marry Mattie Farrell, the mother of Winnie Hoover, came from him. There was no particular haste about it. He was told to bring his own pastor; instead of this, two days later he appeared with the pastor of the church to which the woman belonged. The marriage ceremony took place in the home of Mattie Farrell, in the presence of her foster father and mother, and after the ceremony they together retired to an upstairs room, and according to her testimony spent the night in the same apartment; whereas, according to some of the witnesses who undertake to repeat Hoover's statements, they did not sleep in the same room, but in adjacent rooms open to each other.

The inferences to be made from a marriage of this sort, where the only force applied is the force which the statute itself applies, while not conclusive, have a significance far greater than where the marriage is brought about hastily by physical force and threats of personal violence. Benjamin E. Hoover, after his arrest, had six weeks for reflection and conference with his relatives, friends, and attorney, and there is an inference therefrom that his act was deliberate and with the intention of assuming all of the obligations to his wife and child which the law and sound public opinion under such circumstances would impute. Any lesser inference tends to defeat the apparent purpose of the seduction statute, which is to require the seducer to right his wrong, as much in

the interest of his innocent child as for the sake of the woman.

[3] There is, however, much more to support the view, not only that Winnie Hoover is his child, but that he recognized her as such. His wife, the child's mother, whose testimony must always be considered in such cases, testifies to the fact of such recognition emphatically and unequivocally. The previous opinion emphasized the fact that in her bill for divorce the birth of the child was improperly alleged to have taken place after instead of before the marriage. It should be observed in this connection, however, that the bill was signed by counsel, that it was a mere bill for a divorce upon the ground of desertion, and that the date of the birth of the child and whether born before or after the marriage was entirely immaterial so far as the issue raised in that case was concerned; the only vital allegations being the residence of the parties, the marriage, and the desertion for more than three years. So that such a mistake may have been merely the result of lack of information on the part of the attorneys who drew the bill.

Then much has been said of the answer and cross-bill of Benjamin E. Hoover in this divorce suit, but here, too, the significant facts are that the answer filed as a cross-bill did not deny the marriage and desertion, and though as a cross-bill it alleged that the marriage was invalid because induced by his own fright and the threats which had been made against him, the cross-bill was withdrawn. It also appears that although that suit was pending for several months, Hoover never appeared as a witness in support of the allegations of his cross-bill, and never at any other time, when it is alleged that he made the various statements attributed to him which are relied upon to show his lack of recognition, was he under oath or subject to cross-examination.

Then Hiram Hoover testified that shortly after the marriage Benjamin E. Hoover took his wife and the child to the home of Emmanuel Hoover, his father, to visit his mother. It must also be noted that although the accusation was clear and definite, at no time, either before or after the marriage, did Benjamin E. Hoover ever deny to Hiram Hoover, the foster father of his wife, that he was the father of the child. This question and answer appear:

"Q. After the marriage and while the wife and child were living in your family, did Ben Hoover ever attempt to explain to you his failure to provide a proper home and support for the wife and child?

"A. He said it was on account of his father."

This finds striking confirmation in the opposing testimony where it is shown that Emmanuel Hoover, the father of Benjamin E. Hoover, expressed his extreme displeasure

on one occasion when this mother and child went to see his sick wife and remained there certainly for two days. Then this question and answer appear:

"Q. Please state whether or not, Mr. Hoover, in any of the conversations which you had with Ben Hoover concerning either the charge of seduction, the marriage, or the support of the wife and child, Ben Hoover ever denied that he was the father of Winnie Hoover?

"A. No, he never denied it."

Now one may recognize his child as well by conduct as by words, and this failure of Benjamin Hoover to deny the paternity of the child when so explicitly charged therewith by the woman involved and her natural protector is certainly conduct which is inconsistent with the claims which are now made. Then there is, in addition, the testimony of another witness, Mrs. Lydia Hoover, the second wife of Hiram Hoover, who before and at the time of the marriage lived in the home of Emmanuel Hoover, the father of Benjamin Hoover. She, too, testifies that he said the reason he did not live with his wife and take care of her was because his father objected to it. And she testifies that he spoke of the child as his child. The conversations with this witness took place after he had been charged by his wife with being the father of her child as well as after the marriage was notorious in the community. So that it seems to us that there was nothing improper or even improbable in such a discussion or conversation between these two. Had it occurred before the marriage, it would have been most unnatural. Her testimony is that Benjamin E. Hoover, in express language, recognized the child as his own. It cannot be discarded without imputing perjury to this witness, who is entirely disinterested, and her opportunities for such conversations are supported by other admitted facts and circumstances. That Hoover, on various other occasions, denied to his relatives and friends that he was the father of the child, is inconsistent but not in conflict therewith. It is not unusual, however, for men overtaken in such a fault as that with which Hoover was accused, to deny their guilt circumstantially, vigorously, and frequently. The question, however, is not how often he denied it, but whether at any time he recognized Winnie Hoover as his child.

Upon further reflection, we are satisfied that by his conduct, by his silence when he should have spoken, and by his words, he has recognized Winnie Hoover as his child. The contrary view will tend to defeat the manifest policy of the seduction statute, and indicate an easy pathway for the seducer who desires to evade his responsibility to the community, his legal duty to his wife, and his obligation to remove the bar sinister from the innocent child of his loins, who is entitled to bear his name.

[4]. Conceding that there are reasons for a fair difference of opinion upon the vital question of fact here involved, every fair presumption should be indulged in favor of legitimacy rather than illegitimacy, and, in doubtful cases, in support of the judgment of a trial court.

For the reasons indicated, we have concluded to affirm the decree.

Affirmed.

BURKS, J., dissents.

(131 Va. 619)

A. S. WHITE & CO., Inc., v. RYAN.

(Supreme Court of Appeals of Virginia.
Nov. 17, 1921.)

1. Limitation of actions §195(4)—Burden on plaintiff to prove nonresidence.

In action on contract instituted in March, 1921, where defendant pleaded the three-year statute of limitations and showed that contract was made in August, 1916, the burden was then cast upon the plaintiff to prove the fact of nonresidence of the defendant between such dates.

2. Pleading §339—Plea not waived by failure to call to attention of jury.

Where defendant pleaded statute of limitations, and it appeared on trial that limitations had run, the fact that the question of limitations was not specifically called to the attention of the jury did not change the pleadings, and it cannot be inferred therefrom that defendant withdrew or waived his plea of limitations.

Error to Circuit Court, Nelson County.

Action by A. S. White & Co., Inc., against Thomas F. Ryan. Judgment for defendant, and plaintiff brings error. **Affirmed.**

Caskie & Caskie, of Lynchburg, for plaintiff in error.

PRENTISS, J. A. S. White & Co. sued out an attachment against Thomas F. Ryan, alleging him to be a nonresident, setting up a contract for the purchase of certain wheat from him, alleging his breach thereof, and damages resulting therefrom. Ryan filed his answer to the petition, denying the contract or any liability for damages thereunder, and also alleging that, if any liability ever existed, it had been long barred by the statute of limitations, which he thereby expressly pleaded and relied upon.

Under Code 1919, § 6382, the parties are deemed to be at issue upon the petition and answer. The case went to trial, and there was a verdict for the plaintiff, whereupon Ryan moved to set the verdict aside upon the ground that it was contrary to the law and the evidence, which motion was sustained. The case was tried at a later term of the court, apparently upon the merits, without any reference to the statute of limita-

tions, and there was a verdict and final judgment in favor of the defendant.

The only assignment of error relied upon is that the court erred in setting aside the first verdict upon the ground that the claim was barred by the statute of limitations. The court certifies that no mention of the statute of limitations was made during the trial of the case, that no instruction was asked on the subject, no mention thereof made in the argument before the jury, and that the attention of the jury was not in any way called to this defense, except in so far as the same was relied on in the answer.

[1, 2] The question presented can be answered by a reference to the elemental principle that he who alleges must prove. The defendant in error having pleaded the statute of limitations, and the evidence clearly showing that the alleged contract was made in August, 1916, whereas this proceeding was not instituted until March, 1920, it appeared that more than three years had then elapsed after the cause of action accrued, and hence, without more, was barred. The plaintiff here, confessing this, seeks to avoid the result by claiming that the action was not barred because the defendant, Ryan, had been a non-resident of Virginia during the whole of the period involved. Of course, if this is true, the action was not barred, but it inevitably follows that the burden was upon the plaintiff to prove the fact of such nonresidence. *Switzer v. Noffsinger*, 82 Va. 522; *Miller v. McIntyre*, 6 Pet. 61, 8 L. Ed. 320. The statute having been expressly pleaded and relied upon, this was one of the issues involved. The fact that it was not specifically called to the attention of the jury does not change the pleadings, and it cannot be inferred therefrom that the defendant withdrew or waived his plea.

We are referred to the case of *Murdock v. Herndon's Executors*, 4 Hen. & M. (14 Va.) 203, as authority for a contrary view, and as showing that there is a presumption of law after verdict that the jury passed upon all of the issues. It is shown, however, in that case that the statute of limitations was not pleaded, and this, of course, is a sufficient answer to the contention based thereon and made in this case. If the jury here intended by their finding in favor of the plaintiff to decide that issue in his favor, then their verdict was plainly contrary to the evidence because the fair inference therefrom was that the action was barred. If, on the other hand (as the trial court properly, we think, held), the jury had failed to pass upon this issue only because of the failure of counsel on either side to direct their attention to that issue, then, in either event, the action of the trial court in setting aside the first verdict was not injurious to the plaintiff in error; indeed, it might well have been contended, under Code 1919, § 6251, that in the

then state of the pleadings and evidence the defendant was entitled to a judgment notwithstanding the verdict.

In *Calvert v. Bowdoin*, 4 Call (8 Va.) 217, where it was manifest from the evidence that the action was barred by the statute of limitations, the court set aside the verdict because the jury had not passed upon that issue, and, being of opinion that the evidence did not support either of the counts in the declaration, did not send the case back for a new trial in order to supply the deficiency in the verdict, but reversed the judgment in favor of the plaintiff and entered a nonsuit.

We have no doubt whatever of the correctness of the judgment, and this because it is clear that the burden of showing that the claim was not barred because of the non-residence of the defendant shifted to the plaintiff so soon as it appeared from the evidence that the cause of action arose more than three years before the proceeding was instituted.

Affirmed.

(131 Va. 762)

LYNCH v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Nov. 17, 1921.)

1. Assault and battery ⇨48—Battery includes assault.

A battery accompanies and includes an assault.

2. Assault and battery ⇨48—Intended injury may be to feelings or mind; "battery."

A "battery" is the unlawful touching of the person of another by the aggressor himself or by some substance set in motion by him, but the intended injury may be to the feelings or mind as well as to the corporeal person, and the elements of rudeness or insult may become a test of the offense.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Battery.]

3. Words and phrases—"Willfully" defined.

The word "willfully" is variously defined in legal parlance and may mean, among other things, "designedly," "intentionally," or "purposely" (citing 4 Words and Phrases, Second Series, Willfully).

4. Assault and battery ⇨48—Conviction held warranted.

Where accused knocked at door of prosecutrix and said, "Say, Mrs. M., I want to kiss a white woman; I want to see what it is like to kiss a white woman," and she replied, "No, sir," and he thereupon put his hand upon her shoulder and said, "I didn't mean to insult you," and left when she told him to get out, held, that a conviction for assault and battery was warranted.

Error to Circuit Court, Montgomery County.

Frank Lynch was convicted of assault and battery, and brings error. Affirmed.

Harless & Calhoun, of Christianburg, for plaintiff in error.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazile, Second Asst. Atty. Gen., for the Commonwealth.

KELLY, P. The defendant, Frank Lynch, was tried under an indictment containing two counts, the first charging that he broke and entered a dwelling house in the daytime with intent to commit rape, and the second merely charging him with an attempt at the latter offense. He was found guilty of assault and battery, and sentenced to a term in jail and the payment of a fine.

It is conceded by his counsel that under the indictment for felony, as above set out, the defendant could have been lawfully convicted of assault and battery, provided the evidence was sufficient for that purpose. The sole question presented for our decision is whether the trial court erred in refusing to set aside the verdict as being contrary to the evidence.

The conflicts in the testimony were settled adversely to the accused by the verdict of the jury, and the case, as it comes to us upon the facts, is as follows: On the afternoon of March 30, 1920, Mrs. Mary Martin was at home alone with her two small children, the elder of them being only two years of age. She heard a noise or knocking at the back door, and, on going to see what it meant, was met at the door by Frank Lynch, who said to her, "Say, Mrs. Martin, I want to kiss a white woman; I want to see what it is like to kiss a white woman." She replied, "No, sir;" and he thereupon put his hand upon her shoulder and said, "I didn't mean to insult you." At this juncture, she told him "to get out," and he left.

The evidence was certified in narrative form. We have stated it from the commonwealth's standpoint as fully as it appears in the record. Was it sufficient to support the verdict?

[1, 2] A battery accompanies and includes an assault. Various definitions of both offenses are found in the books, all substantially much the same, but, as is well said in 2 R. O. L. p. 525:

"A definition, however carefully drawn or comprehensive in its scope, will furnish no certain or satisfactory solution of the facts in a particular case. While it would seem that there ought to be no difficulty in determining whether any given state of facts amounts to an assault (and battery), the behavior of men toward each other varies by such mere shades that it is sometimes difficult to characterize properly their acts and words."

The surrounding circumstances, such as time and place, the relationship or sex of the

parties, the subject-matter of the words used, may have a most important bearing in determining whether a particular act constitutes an assault and battery. The law upon the subject is intended primarily to protect the sacredness of the person, and secondarily to prevent breaches of the peace. The reason of the law is the life of the law, and this maxim often finds useful application in cases of alleged assault and battery. To constitute battery there must be some touching of the person of another, but not every such touching will amount to the offense. Whether it does or not will depend, not upon the amount of force applied, but upon the intent of the actor.

"A battery is the unlawful touching of the person of another by the aggressor himself, or by some substance set in motion by him. * * * The intended injury may be to the feelings or mind as well as to the corporeal person. * * * The law cannot draw the line between different degrees of force, and therefore totally prohibits the first and lowest stage of it." 2 Am. & Eng. Ency. L. pp. 953, 955, 959.

"Any touching by one of the person or clothes of another in rudeness or in anger is an assault and battery." *Engelhardt v. State*, 88 Ala. 100, 7 South. 154; *Jacobi v. State*, 133 Ala. 1, 32 South. 158, 163; *Hyde v. Cain*, 159 Ala. 364, 47 South. 1014; *Seigel v. Long*, 169 Ala. 79, 53 South. 773, 774, 33 L. R. A. (N. S.) 1070.

In *Goodrum v. State*, 60 Ga. 509, a case holding that it is an assault and battery for a man, without any innocent excuse, to put his arm around the neck of another's wife against her will, the court said:

"To touch a virtuous wife in the way of illicit love is a far greater outrage than to touch her in anger, and equally a breach of the peace. It is violence proceeding from lust, instead of violence proceeding from rage. It issues from the passion, which, unrestrained, culminates in rape, instead of from the passion which culminates in homicide."

Mr. Minor defines battery as:

"The actual infliction of corporeal hurt on another (e. g., the least touching of another's person), willfully or in anger, whether by the party's own hand or by some means set in motion by him." Minor's Synopsis Criminal Law, 77.

[3] The above definition by Mr. Minor does not expressly mention rudeness or insult, but by using the word "willfully" clearly implies that those elements, as well as anger, may become a test of the offense. The word "willfully" is variously defined in legal parlance, and may mean, among other things, "designedly," "intentionally," or "perversely." See 4 Words and Phrases, Second Series, 1293 et seq. Its correct application in a particular case will generally depend upon the character of the act involved and the attending circumstances.

[4] Having in view the foregoing definitions and explanations of the offense, we are unable to say that the verdict of the jury in the instant case was not warranted by the evidence. Upon the case as made by the commonwealth, the accused, without invitation or excuse, entered the home of the prosecutrix, grossly insulted her, and almost simultaneously placed his hand upon her shoulder. This was an unlawful touching of her person, and hence, in contemplation of law, a battery.

It is argued that the wrongful intention of the accused in touching the prosecutrix is disproved by his declaration, "I did not mean to insult you," followed almost immediately by his departure from the room. This is perhaps one way, but it is certainly not the only way, in which the jury might under the evidence have fairly weighed his conduct. The exact order of events must here be observed. He entered the house with an evil purpose, which he communicated to Mrs. Martin. She promptly rejected his insulting suggestion. Not stopping with that, he proceeded to place his hand on her shoulder and say, "I did not mean to insult you." Was this a cessation of his overtures and a genuine apology, or was it an impudent experimental attempt on his part to continue the conversation in the hope of overcoming her objection? He had not yet shown any purpose of leaving the house. That followed promptly, to be sure, but only after he had added one insult to another by placing his hand upon her, and after her second rebuff, which assumed the form of an order to get out of the house. If it be conceded that any man, after having thus insulted a woman, could lawfully touch her, even in connection with an apology (and such a concession does not seem to us at all well warranted), there is certainly enough in the case to have justified the jury in finding that what he actually did rendered him guilty of a rude insult and a willful violation of the sanctity of her person, amounting in law to an assault and battery.

Counsel for the accused cited and relied upon section 604 of Wharton's Criminal Law, where the author, in treating of assaults, says that, if a man raise his hand against another within striking distance and at the same time say, "If it were not for your grey hairs, I would tear your heart out," it is no assault, because the words explain the act and take away the idea of an intention to strike. The doctrine as thus stated is sustained by respectable authority, and appears to be good law. It is not in point in this case, however, because, as we have seen, the jury might properly have found that the accused intended to commit a trespass upon the person of the prosecutrix, and did not desist until after he had partially carried out that intention by placing his hand upon her.

The cases of *Hardy & Curry v. Commonwealth*, 17 Grat. (58 Va.) 600, and *Woodson v. Commonwealth*, 107 Va. 895, 59 S. E. 1007, are also relied upon by counsel for the accused, but we find nothing in either of them to conflict with the conclusion herein reached. In the former the definition of assault and battery approved in the opinion by Judge Moncure recognizes "an insulting manner" as one of the tests of guilt; and in the latter, the *Woodson Case*, the court merely held that the evidence was not sufficient to warrant a conviction for attempted rape, no question of assault and battery being involved.

The judgment complained of is right and should be affirmed.

Affirmed.

(131 Va. 776)

POPE v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia.
Nov. 17, 1921.)

1. Disorderly house §17—Evidence held to show accused knew of disorderly acts.

In prosecution for keeping a disorderly house, evidence held to show that accused knew of disorderly practices on his premises.

2. Disorderly house §17—Evidence held to show habitual disorder on premises.

In prosecution for keeping a disorderly house, evidence held to show, not merely a single occasion of disorder, but habitual disorderly practices.

3. Nuisance §61—Disorderly house "public nuisance."

Generally, the fact that certain things are injurious to public morals is sufficient to render them public nuisances, and, at common law, a disorderly house is a public nuisance.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public or Common Nuisance.]

4. Disorderly house §17—Knowledge of improper practices may be circumstantially proved.

Accused's knowledge of improper practices in his establishment may be established by direct or circumstantial evidence.

5. Disorderly house §15—Proprietor presumed to know of habitual practices.

Actual knowledge of a proprietor of a resort of indecent and immoral practices on his premises need not be shown, in prosecution for keeping a disorderly house; it being sufficient to show such facts, such as recurrence of the practices, that knowledge would be imputed to him.

6. Disorderly house §4—More than a single act of disorder required.

While there must be something more shown, to support conviction of keeping a disorderly house than a single act of improper conduct,

there is no particular extent of time prescribed during which the improper practices must continue or recur, or any fixed amount of recurrence of dissolute practices to constitute an establishment a disorderly house.

7. Disorderly house §15—Illicit use may support inference of continuous use.

A building may be so used on a single day as to justify the inference, with but slight additional evidence, that the illicit use has been continuous; the inference being one of fact, not of law, and one to be drawn, if at all, by the trial judge in the light of the circumstances.

8. Disorderly house §17—Positive proof of actual knowledge of disorderly practices not necessary.

In prosecution for keeping a disorderly house, an instruction that positive proof of actual knowledge of accused of the acts and doings of the women he employed was not necessary, since the law required him to use reasonable diligence to ascertain the character of such acts and doings, and that the state was required only to prove facts putting a reasonable man on notice, held not incorrect.

9. Disorderly house §4—"Common and habitual occurrence" of disorderly acts defined.

In prosecution for keeping a disorderly house, an instruction that, before the acts complained of might be regarded as constituting a public nuisance, they must be of common and habitual occurrence, but that the law fixes no definite continuance of time during which such acts must occur to meet the requirements of "common and habitual occurrence," it being sufficient if they occur with such frequency and during such substantial period of time covered by the indictment, as to constitute a continuing menace to public morals, held not incorrect; for the quoted words have a flexible meaning, and are not to be so construed as to impose too weighty a burden upon society when seeking to deal with evils of this character.

10. Criminal law §829(1)—Elision from proffered instruction of matter covered not prejudicial.

Elision from a proffered instruction of matter as to which the jury has already been adequately instructed is not prejudicial.

11. Criminal law §741(1), 829(3)—Proffered instruction held properly refused, weight of negative evidence a jury question.

In prosecution for keeping a disorderly house, where the jury had been instructed as to necessity of common and habitual occurrence of disorderly practices, a requested instruction, that if the jury believed from the evidence that the police and various respectable citizens had visited accused's establishment prior to the night in question and had not seen any improper conduct, then, if there was improper conduct on the night in question, this was insufficient for conviction, as the improper conduct must be habitual, was properly refused, and it was for the jury to determine the value of the negative evidence of the police and various respectable citizens in view of evidence conclusively showing improper conduct on the

night in question of such character as to suggest habitual occurrence.

Error to Corporation Court of Norfolk.

John Pope was convicted of keeping a disorderly house, and brings error. Affirmed.

Tomlin & Maupin, of Norfolk, for plaintiff in error.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazile, Second Asst. Atty. Gen., for the Commonwealth.

SAUNDERS, J. John Pope was indicted in the corporation court of the city of Norfolk for keeping and maintaining a disorderly house in that city on November 23, 1920, and on divers other days within 12 months preceding that date—that is to say, he was indicted for maintaining a common-law nuisance. It is not necessary to reproduce the indictment in full. Upon the trial under this indictment, the defendant was convicted, and his punishment fixed by the jury at 6 months in jail and a fine of \$500. The accused applied for and secured a writ of error to the judgment of the court. His petition assigns various errors:

[1] First. The court erred in giving instructions 4 and 9, at the instance of the commonwealth.

Second. The court erred in amending instructions 5, 6, and 7, prayed by the accused, and giving them as amended, and refusing to grant instruction 10, offered by the accused.

Third. In overruling the motion of the accused to set aside the verdict as contrary to the law and the evidence, and grant a new trial.

Under this head, the petition says:

"These assignments of error can be argued together, since the real point in issue has a twofold aspect:

"I. Whether under the evidence the accused has been shown to have had any knowledge of any unlawful or disorderly acts.

"II. Whether evidence regarding a single occasion of disorderly acts in the conduct of a lawful business is sufficient under the law to justify a conviction of the offense of maintaining a common nuisance."

In support of his contentions of law, petitioner cites many precedents and authorities from other states, alleging that he can find nothing in point in the law writers, and precedents of this state.

John Pope, the defendant, is a colored man, and the proprietor of the Chesterfield Hotel, in the city of Norfolk, a hotel run by and for colored people. Pope has been engaged in this business since 1918. In connection with the hotel business the defendant conducted a cabaret, in which food and drink were sold to his customers. Dancing by paid performers, as well as patrons, constituted a feature of the entertainment which was provided.

The dances were "shimmy," or "honk-a-tonk" dances, and were indulged in by both white and black persons. It does not appear that the two races were on the floor at the same time, the floor being cleared of colored performers when the white people danced. Nor did the whites and blacks eat together, further than being in the same room, the tables for the white people being on one side of the room and for the colored people on the other. The locality is a colored one.

In September, 1920, in addition to his hotel license, Pope applied for and secured a dance hall license for his cabaret. On the night of November 23, 1920, J. H. Holloman, Keville Glennan, Robert B. Murray, Wm. Jenkins, and Herman Thomas, the last four being members of the staff of the Virginian-Pilot, a Norfolk newspaper, visited the Chesterfield hotel and attended the cabaret performances. These witnesses testify with almost complete unanimity as to what they saw and heard on the occasion of the above visit, differing only in respect of trivial details. The testimony of these witnesses is to the following effect:

They arrived at the Chesterfield Hotel about half past 12, and sent for John Pope, asking him if it would be all right to bring in a party of newspaper men. Pope replied that it would, but that there were some policemen in the place at the time. The party suggested that they could wait, but Pope told them to "come in if they wanted to; that the police would leave in a little while, and things would be livelier after 'the law' left." Later Pope denied that he made this remark. Pope conducted the party to the cabaret. There they found tables around the wall, with a middle space for dancing about 15 feet long, and 8 or 10 feet wide. White and colored people were sitting at the tables eating and drinking, the whites on one side, and the colored on the other. The visiting party remained until about 2, and when they left everything was in full swing. Holloman described what he saw as follows:

Two regularly employed professionals sang and danced, also a colored man. The songs were not suggestive. Between times white persons, male and female, danced. The professionals danced the "shimmy," or muscle dance, and were more expert than other "shimmy" dancers whom he had seen on the "stage, and in other places." The colored man was described as being unusually expert in the art of shaking the various portions of the body. One of the visitors was a white girl, who was under the influence of liquor, and described herself as being as drunk as ——. She wore socks, and when dancing raised her skirts to exhibit her naked legs. This girl danced with another white girl for a minute or two in a disgusting fashion. The two women stood in the middle of the floor and went through motions suggestive of sexual intercourse. When the dance was concluded—

ed the girl who was intoxicated took her seat by her escort and leaned back against him, putting her feet on another chair with her dress above her knees, exhibiting her naked legs. There were seven or eight white women present accompanied by men, and about an equal number of colored women and men. The witness (Holloman) states that he was at Pope's place after midnight about two weeks prior to the time in question, and that the dancing of the professional female dancers on that occasion was of the same character as that which took place on November 23d. On both of the occasions described by this witness, the accused was on the premises. The other witnesses confirmed all that Holloman stated, and added other details in their description of the performances of the evening on the part of the dancers, and of others. Describing the dancing of one of the colored women, the witness Glennan says: "She danced an indecent muscle dance, pulling up her skirt within two inches of her crotch." This dance was followed by a dance by a white man, apparently a patron of the place, who attempted a similar muscle dance. Then came a dance by a colored man, which was of the same character, only more exaggerated. The next dance was by two white women, patrons of the place, one of them being intoxicated. It was to Mr. Glennan that one of these girls made the remark about being drunk. The dance by these women is described by this witness precisely as stated by Holloman. Glennan also confirms Holloman's account of the performances of the expert negro male dancer. Continuing, this witness said:

"I had noticed that some of the white patrons at other tables would leave the room, and return after a brief absence with some liquid which I took to be whisky, and poured a small quantity in four or five glasses, and filled them up with ginger ale. Thereafter, the parties seemed to liven up to some extent, but I do not know that it was whisky."

Later witness saw a white man at another table get up and go out of the room, and come back in a few minutes with two pint bottles which looked like whisky. Subsequently, the witness got up, and went out in the hall with Mr. Jenkins, and just outside of the cabaret door he saw a young negro man, and asked him if he could get them some liquor. The negro replied that he could in a few minutes for \$7 a pint. Glennan went back to his table, and in a few minutes the negro summoned him into the hall, Jenkins accompanying him. They followed the negro into an unoccupied room immediately across the hall from the dance hall; as they went into this room the light was turned on by some one in the hall, who said: "I'll turn the light on for you." Witness did not know who made this remark, or turned on the light. The young

negro produced a pint of liquor, for which witness paid him \$7, but the negro insisted that the witness pour the whisky from the whisky bottle into a ginger ale, or Coca-Cola bottle before it was carried back to the table. This was done. Witness "did not know this negro; never saw him before, or since," and could not say that he was an employee of John Pope, but "he seemed to have the run of the place." The whisky was taken back to the dance hall, and most of it drunk by Glennan and his associates. Witness would not say that John Pope was in the room when anything suggestive or vulgar was going on, but he came in several times. Witness and party were at the dance hall about two hours. During that time "no effort was made by any one to prevent the recurring indecency, and drinking described, and it all took place in full view of all present, white men and women and colored men and women."

The witness Murray confirms Glennan's testimony. He heard Pope's statement that things would liven up as soon as "the law" left. He saw the dancing which has been described, and states that the "dancing of the negro women performers and of the negro men was indecent;" that he had seen similar dances on the stage, but the dances at John Pope's place were worse, because more exaggerated. This witness states that, when the expert negro male dancer was performing, he "danced close to the table where the young woman who wore socks was seated, and in reaching distance of her shook his breast in her direction, whereupon she responded by shaking her breasts at him." Going into another part of the building, witness met John Pope, and was asked if he was having a good time. On his answer in the affirmative, Pope said:

"I am glad to hear it; I try to show my white friends a good time; we got the liveliest place in the country, and I'm going to keep it live unless my white friends get me mixed up with the law."

Witness drank part of the liquor which Glennan brought back in the Coca-Cola bottle, and it was whisky. Witness also saw people at other tables pouring liquor from bottles into their glasses, and filling same with ginger ale. He did not know what was poured, but immediately thereafter the parties would liven up, "as if cheered by the drink." He heard one white girl at another table say: "They must have put dynamite in this stuff." To this witness the most shocking feature of the performance was that the dances described took place before negroes and white people of both sexes. When witness left, Pope was on the premises, and things seemed as lively as at any time during the night.

William Jenkins is city editor of the *Virginian-Pilot*, and was a member of the party

on the night in question. His testimony is to the same substantial effect in all respects as that of Mr. Glennan. The last witness in chief for the commonwealth was Herman Thomas, also a member of the staff of the *Virginian-Pilot*. This witness in the main saw the same things, and testified on the same lines as the other members of the party. He regarded the dancing of the paid performers "indecent." Had seen "shimmy" dancing at other places, and on the stage, and considered it immoral. Regarded the dancing at John Pope's by the negro performers as similar in character, but more exaggerated. He saw the indecent and degrading performance by the negro dancer and the intoxicated white girl, and said that it lasted from a half minute to a minute. He also saw the "highly suggestive and indecent" dance by the two white girls, described by the other witnesses. Witness partook of the liquor brought back by Mr. Glennan, and said that it was whisky, and had a kick in it. Saw other people pouring something from bottles into their ginger ale, and they appeared to be "liveller" thereafter. He thought the dancing of the professionals was "like what is called oriental, or 'hootchy-cootch' dancing."

The testimony for the defendant is voluminous, but in the main does not relate to the occurrences of November 23, 1921, but to conduct in the cabaret on previous occasions. A number of the witnesses for the accused are police officers, and members of the vice squad of Norfolk city. One and all these officers state that they had been in Pope's cabaret numerous times, and while there had never observed any disorder, or indecent behavior, or any conduct justifying an arrest. Some of the officers had seen the "shimmy" dancers, and did not consider their dances "immoral, indecent, or suggestive, or different in character from what is commonly performed at theaters and cabarets." One or more of these witnesses state that they had been at the cabaret at different hours of the night, and by different doors, and had never been able to detect anything which would warrant an arrest, though they made every effort to discover violations of the law.

Without going into details, it may be said that the testimony of these officers gives the cabaret a clean bill of health, so far as their observation went, for the period preceding the night of November 23, 1920. Sergeant Moore states that he consulted Mr. R. B. Spindle, assistant city attorney, with reference to keeping white people out of John Pope's establishment, and was advised by him that he "knew of no law to exclude white people from the place, if their tastes were sufficiently degraded to make association with negroes desirable." This witness also stated that he had "tried particularly to discover whether any whisky had been sold

at Pope's establishment, but had been unable to discover any evidence of sales."

Benjamin Vick and William Morrisette were at the cabaret on the night of November 23d, but saw nothing improper in the conduct of any one while there.

The other witnesses for the defendant, several of them being colored physicians, agree in saying that, as visitors at the cabaret, they had never seen anything indecent or immoral, or different from what they had seen at the theaters and other cabarets. Nor had any of the witnesses who testify on this point bought any liquor at the Chesterfield, or seen any sold or drunk there. However, one or more of the witnesses for the accused state that had they seen such dancing as was described by the witnesses for the state, they would have regarded it immoral. Some of the witnesses for the accused state that they would not have visited or taken friends to Pope's cabaret if they had considered the place disreputable.

One of the witnesses for the accused, Priscilla Crump, stated that she thought the opening of the Chesterfield had been a benefit to that part of town; that it seemed to be a nice place. On cross-examination this witness added that she knew 800 Lincoln street (that is, the Chesterfield Hotel) when it was occupied by Jennie Williams, a white woman, and run as a bawdyhouse, and that "she supposed her establishment was a benefit to the community." Witness added that she had never heard any of the neighbors complain of noise or disorder from Pope's place. In this connection it may be stated that the witness Jenkins testified that he did not think the "music was audible to a great distance outside of the cabaret, as the walls were thick and without windows."

The accused testified in his own behalf, denying in toto that he conducted a disorderly house, or was aware of any acts of indecency, impropriety, or illegality on his premises. He insisted that the dances were decent, and the women performers of good character; that he had never had any complaints of impropriety against the conduct of his cabaret; that he had never allowed liquor to be drunk there; that it was possible it was drunk there, as bootleggers were very active in Norfolk; that he had never given an invitation to a white person, other than the police, to visit his premises, and had consulted the police authorities as to whether there was any objection in law to white people visiting his cabaret, and was advised by Sergeant Dudley, as coming from the commonwealth's attorney, that it was not unlawful for white people to come there as long as there was no disorder, or misbehavior; that he had kept the races apart in his cabaret, but had made no effort to exclude white people; that he was about the cabaret at different times on the night of November

23d, but saw no indication that liquor was being served, nor anything improper or indecent in the way of dancing or conduct; that if he had seen such vulgar and suggestive dancing as was described by the newspaper men, or had been told of its occurrence, he would have put a stop to it at once; that the colored performer was a negro actor then playing in Norfolk, who had volunteered to dance that night, and he had accepted his offer (this man was not put on the stand); that he had been raided twice, arrested with other men, and charged with gambling, and acquitted; that there were no signal buttons in his house; that he was willing to refuse white people admittance in the future if the police would support him in that action, but that heretofore he "didn't know how he could stop them from coming"; that he knew nothing of the whisky purchased by Mr. Glennan; that he never had had cause to interfere with "any conduct occurring in his dance hall"; that one Clarence Williams was the floor manager of his dance hall, and was on duty continuously during the visit of the newspaper party; that Williams had been summoned for the commonwealth and was then in the courtroom; that he (Pope) was on the premises most of the time, and in the dance hall from time to time, but most of his work was at the buffet in another part of the building.

Nowitzky, a police officer of Norfolk city, was put on the stand for the commonwealth. He stated that he participated in two raids on the Chesterfield Hotel in February, 1920, when John Pope and other colored men were arrested for gambling; that, while one policeman was reading the warrant to Pope, and witness was on his way to the third floor of the hotel, he could see the lights flickering on and off on said floor, as if a signal was being made; that he found about a dozen negro men in a room on the third floor, who tried to run when he reached that floor; that he traced the electric wire from said room, and found that the lights could be controlled from the telephone booth on the first floor.

There was evidence before the jury, in addition to what has been cited, but the abridgment given is sufficient for a disposition of this case. It will be noted that none of the witnesses for the accused, save John Pope, and possibly a police officer or two, who were present in the cabaret prior to and for a short time after the arrival of the newspaper party testify as to the occurrences of that night. Even the testimony of these officers and of the accused himself is negative in its character. The former saw nothing amiss while on the premises. The incidents of that particular evening, as related by the witnesses for the state, are therefore substantially unchallenged. It needs no argument to establish the conclusion that much of the dancing described was indecent, degrading, and

prejudicial to the public morals. The evidence as to the purveying of ardent spirits on the premises is both direct and circumstantial, and convicts the accused of guilty knowledge of and participation in same. The stuff that was brought to the dance hall in Coca-Cola or ginger ale bottles, and added to the ginger ale in the glasses of the patrons was evidently whisky, or some variety of ardent spirits. One or more witnesses identify it as whisky. The comment of one young woman that "they must have put dynamite in this stuff," and the enlivening effect upon the drinkers of this addition to the harmless ginger ale, convincingly indicates that the contents of the Coca-Cola bottles were ardent spirits in some form. The contention of the accused is that he knew nothing of the sale of liquor on his premises; that he was opposed to such sale, and had never authorized or permitted it; that if conducted it was the work of bootleggers who had obtruded themselves upon his premises, and availed themselves of the opportunities afforded to sell contraband spirits to his patrons. The facts related by the witnesses repel and refute this contention. It was not a casual sale, a single incident of an evening, but a continuous performance. The witnesses relate that they saw white patrons of the cabaret going out from time to time, and returning with enlivening fluid in Coca-Cola bottles. Thereupon Mr. Glennan went out and found a young negro just at the door of the dance hall. He arranged with him to procure whisky at \$7 a pint. In a few minutes the negro summoned witness to the hall. As they went across the hall into an unoccupied room, some one obligingly turned on the light. The whisky was thereupon secured, and poured into a Coca-Cola bottle, as required, in order to avert suspicion as to its contents upon return to the dance hall. The witness did not know this negro, but stated that he seemed to have "the run of the place." According to defendant this negro and his ally who turned on the light, were organized bootleggers, plying their nefarious traffic upon his premises, using his rooms and lights, and serving his patrons with whisky at \$7 a pint, without his consent, and contrary to his wishes.

It would be passing strange, indeed it would tax human credulity to believe that such was the case. It is conceivable that an employee, or employees, of a hotel proprietor, himself firmly opposed to this illicit traffic, and using his best efforts to suppress the same, might make a sale, or sales, of ardent spirits on the premises of such a proprietor without his knowledge. Even an interloper at times might effect such sales. Under these circumstances the owner would be guiltless of any offense. But the case supposed is not the case in judgment. The whisky supplied was as readily secured and as systematically provided as ginger ale or Coca-Cola. The opera-

tor was at the door of the cabaret, within Pope's establishment. He used one of Pope's rooms in which to transfer the whisky into the Coca-Cola bottles, and had an ally in the building to turn on the lights. He was apparently on duty during the entire period of stay of the witnesses for the state, which was one and a half hours at least. It would not be reasonably likely that undesired bootleggers, mischievous interlopers, could thus enter without detection upon the premises of a man who was regularly coming and going from his cabaret to his buffet, and without his knowledge, or that of his employees, ply a profitable and illicit traffic in his establishment under the circumstances related. This presumed bootlegger was in evidence whenever whisky was desired, for it is a just inference that other patrons procured their spirits just as Glennan did; but he was apparently invisible to the accused, or to any of his attendants. It is evident that the whole arrangement was a craftily designed, but transparent, scheme to evade the law, and that the sale of ardent spirits was merely one of the illegal practices pursued in the establishment of the accused.

It is a noteworthy circumstance, and one to the prejudice of the defendant, that he introduced no witnesses to repel in direct fashion the specific statements of the witnesses for the commonwealth. If these damaging statements were not true, then their falsity could have been established by other witnesses present on that occasion. Such witnesses were available. There were over 30 visitors, white and black, male and female, in the cabaret after Glennan and his associates arrived. In addition, there was present in the courtroom at the time of the trial the floor manager of the accused, one Clarence Williams, who was "on duty continuously during the visit of the party composed of Glennan and others, on November 23, 1920." If the evidence of the members of this party was true in detail, then Clarence Williams saw the vulgar, immoral, and indecent things described by these witnesses, and either did not consider them indecent and immoral, or, knowing them to be such, did not restrain them, or report their occurrence to the proprietor. In either view, an inference injurious to the character of the establishment may be drawn.

[2] Under the third assignment of error, the petition says:

" * * * The real point at issue has only a twofold aspect:

"I. Whether under the evidence the accused has been shown to have had any knowledge of any unlawful or disorderly acts; and

"II. Whether evidence regarding a single occasion of disorderly acts in the conduct of a lawful business is sufficient under the law to justify a conviction of the offense of maintaining a common nuisance."

Apparently the theory of the defense is that they have established by the witnesses for the accused that, prior to November 23, 1920, Pope had conducted a decent, orderly, and unobjectionable dance hall, and that the conduct of the individuals on the night in question, as described by Glennan and his companions, even if taken to be true, was fortuitous and unexpected, contrary to the tenor of the cabaret entertainments, and unknown to and undesired by the proprietor. It will be conceded that, if such was the case, the defendant should be discharged. A single act of vulgarity or indecency by paid performers, interpolated contrary to the instructions or wishes of the owner of a house, or the unexpected indecencies of patrons on a single occasion, or in the course of a single evening, would not constitute an establishment a common nuisance. But if the performances at Pope's place were habitually and uniformly decent, if they were attended normally by decent people, seeking lawful recreation in the form of wholesome and pleasurable entertainment, and the sights witnessed by Glennan and others were abnormal unusual, and fortuitous, the question may well be asked, How did it happen that the evening in question furnished so many varieties of indecency, shocking in themselves, but which apparently did not shock the observers, male or female, or call for warning or rebuke from the floor manager of the accused, who was on duty all of the time? If the performances of that evening, however, were typical and characteristic of the entertainment afforded by the accused, then undoubtedly the house was a "common, ill-governed, and disorderly house" a plague spot in the community, and a menace to decency and good morals. At best, the "shimmy," wherever rendered, is not a refined or elevating dance. Slightly exaggerated, it easily becomes a suggestive and indecent performance.

The testimony of various witnesses for the commonwealth is that on the evening in question the shimmy dancing of these paid performers was "indecent." Holloman states that these dancers were more expert than like dancers he had seen elsewhere, and that the dancing on the evening of the 23d was of the same character as the dancing he had seen in the same cabaret on a prior occasion. Other witnesses describe as indecent the dancing which Holloman calls "more expert" than that of like performers elsewhere, and which is described by another witness as being "more exaggerated." Having in mind that this specific dancing of the evening of the 23d was pronounced "indecent" by several witnesses, the jury doubtless interpreted the terms "exaggerated" and "expert," as used by Glennan and Holloman, to be equivalent to indecent, and concluded that the perform-

ances of "like character" on a previous occasion were also indecent. They were justified in concluding from the testimony of Holoman and others, and by derivation from the internal evidence afforded by the character of the entertainment observed by the witnesses for the state during the hours between midnight and 2 in the morning, as well as from the conduct and behavior of the patrons attending this entertainment, that the incidents described were normal, not abnormal—usual, not unusual—and typical of a continuing style of entertainment furnished by the defendant; that is to say the evidence supported the boast of the accused that his cabaret was the "liveliest place" in the country on the night in question, and the further conclusion that it had been "lively" theretofore.

[3] As a general proposition, the fact that certain things are injurious to public morals is sufficient to render them public nuisances. At common law a disorderly house is a public nuisance, and a disorderly house has been defined as follows:

"A disorderly house is a house in which people abide, or to which they resort, to the disturbance of the neighborhood, or for purposes injurious to public morals, health, convenience, or safety." 14 Cyc. p. 492.

[4] The state must prove a defendant's knowledge of improper practices in his establishment, but such knowledge may be established like any other fact by direct or circumstantial evidence. It has been held in some cases that a proprietor is presumed to have knowledge of that which goes on in his house, if it is a continuing practice. See *De Forest v. United States*, 11 App. D. C. 458.

[5] In *Jones v. State*, 10 Okl. Cr. 79, 82, 133 Pac. 1134, an instruction was sustained by the appellate court in which the jury was told that it was not necessary for the state to prove actual knowledge on the part of the accused of the character of his place, or of the inmates, or of those who resorted there, but such facts and circumstances may be shown as will convince a jury beyond a reasonable doubt that the accused was bound to have cognizance, or knowledge, of the inmates of the house, or of those who resorted there for the purposes set out in the information. The principle embodied in this instruction applies to proof of cognizance by the proprietor of indecent and immoral practices in his establishment, when they are recurrent. A proprietor should be diligent to see that his entertainments are not destructive of morality, or infected with indecency. He is not permitted to shut his eyes to occurrences that it is his duty to prevent, and find safety in a claim of ignorance.

[6] Counsel for petitioner insists that, if a house is not one prohibited by law, the state must show that disorderly conduct in the house was of common and habitual occur-

rence, with the proprietor's knowledge, before it can convict him. It is true, as heretofore stated, that there must be something more than a single act of improper conduct to support conviction. There must be recurrence; but there is no particular extent of time prescribed during which the improper practices must continue, or recur, or any fixed amount of recurrence of dissolute practices to constitute an establishment a disorderly house.

In *Commonwealth v. Gallagher*, 83 Mass. (1 Allen) 593, the court said:

"The evidence was sufficient to warrant the jury in convicting the defendants. A disturbance of the public peace by the assembly of noisy and dissolute persons, the illegal sale of intoxicating liquors, and other similar acts which tend to make disorder and injure public morals, and thus to create a common nuisance in a house or tenement, may be proved to have occurred in the course of a few hours (italics supplied) as well as during a number of days, a week, or a month. It is the nature of the acts done, not the length of time during which they are committed, that constitutes the offense."

Petitioner seeks to avert the application of this precedent to the case in judgment, by pointing out that in the case cited the defendant was selling liquor, a thing prohibited by law, and maintaining his establishment for that, and no other purpose. Hence, his establishment was unlawful *per se*. But, as has been pointed out, while Pope had a license to conduct a lawful establishment, the evidence in the instant case shows that he was selling liquor to his patrons, a prohibited enterprise. The court in its opinion, *supra*, refers to the illegal sale of intoxicating liquors as one means by which the peace may be disturbed, but it adds: "And other similar acts which tend to make disorder and injure public morals."

"If a man keeps a house open to the public and there sells intoxicating liquor generally to persons who come together, and they, when stimulated thereby, or otherwise, make disturbance, or commit acts of immorality, or in any matter violate public decency and decorum, the place is a disorderly house." 1 Bish. Cr. Law (7th Ed.) § 1113.

[7] In the case of *Tenement House Department v. McDevitt*, 215 N. Y. 160, 165, 109 N. E. 88, 89 (Ann. Cas. 1917A, 455), it is said:

"It is true, of course, that a building may be so used on a single day as to justify the inference, with but slight additional evidence, that the illicit use has been continuous. But the inference in such a case is one of fact, and not of law, and must be drawn, if at all, by the trial judge in the light of all the circumstances."

Petitioner discredits this authority on the ground that it is dictum, not doctrine. Conceding this to be true, the principle announce-

ed is essentially sound, and, if not law, should be made law.

It has been said that a conviction will be sustained on an indictment for keeping a disorderly house, upon proof of the drawing together of vicious, dissolute, or disorderly persons engaged in unlawful or immoral practices, thereby endangering the public peace, and promoting immorality. *Thatcher v. State*, 48 Ark. 60, 2 S. W. 343.

On the night in question, there were present in Pope's cabaret whites and blacks, male and female, some of them certainly vicious and dissolute, and engaged in immoral practices. Drinking was prevalent, and one woman at least was drunk. The evidence indicates that the happenings of that evening were not casual, fortuitous, or unexpected. The methodical way in which liquor was sold shows that it was a customary practice, craftily designed, not the work of an intruding bootlegger defying at once the law and the defendant on his own premises. The illegal performances were continuous until long after midnight. The pace was "fast and furious." The dancing described as "indecent" was of the same character as that occurring on a previous evening. Hence, "additional evidence, even if slight," was not lacking, and the jury was justified in drawing the inference of fact, which evidently they did draw, that the occurrences of the night in question were measurably a recurrence of like antecedent illegalities.

[8, 9] The plaintiff in error complains that the following instructions were given at the instance of the commonwealth:

Instruction No. 4.

"Positive proof of actual knowledge by the defendant of the acts and doings of the women he employed is not necessary, since the law requires him to use reasonable diligence to ascertain the character of such acts and doings, and all that the state need do is to prove facts which would put a reasonable man on notice; but knowledge on the part of the defendant, either actual or constructive, is an essential element of the offense, and must be proved by the commonwealth beyond a reasonable doubt, either by direct, or circumstantial evidence."

Instruction No. 9.

"The court instructs the jury that, before the acts complained of may be regarded by the jury as constituting a public nuisance, they must be of common and habitual occurrence, but the law fixes no definite continuance of time during which such acts must occur to meet the requirements of 'common and habitual occurrence.' It is sufficient to meet this requirement if they occur with such frequency, and during such substantial period of time covered by the indictment, as to constitute a continuing menace to public morals."

It is not perceived that the instructions complained of announce incorrect principles

of law, or were to the prejudice of accused. The defendant in the instant case may complain that the evidence of the state does not justify conviction under the conditions imposed by these instructions, but the principles stated are sound enough. One of the authorities cited by petitioner, to wit, 18 Cyc. p. 1246, says:

"A person, to be criminally responsible for the keeping of a disorderly house, must have knowledge of the disorderly conduct in or about the house, or of improper use to which the house is put. However, actual knowledge of the keeper is not necessary; implied or constructive knowledge is sufficient. Such knowledge need not extend to particular acts, or facts."

And on page 1272, *Id.*:

"Defendant's knowledge of the character of the house may be sufficiently shown either by direct or circumstantial evidence."

Another court has said, and we agree with its pronouncement, that—

A defendant "cannot shut his eyes to what is going on around him, for the purpose of avoiding knowledge, and then defend on the ground of lack of knowledge."

It is perfectly true, as stated in instruction 9 in effect, that there must be continuance by repetition of improper acts, to constitute a disorderly house; or, to state the same proposition in different language: "There must be some measure, though brief, of continuity and permanence." But this measure of continuity and permanence of operation is a question of fact to be proved as any other fact. Another authority says: "The acts of misconduct should be at least often enough to indicate a manner of keeping."

Instruction 9 advises the jury that the "acts complained of, before they can be regarded as a public nuisance, must be of common and habitual occurrence." But these words, "common and habitual occurrence," have a flexible meaning, and are not to be so construed as to impose too weighty a burden upon society when seeking to deal with evils of this character. The hands of organized authority must not be tied by too great refinement of construction. A killing must be a willful, deliberate, and premeditated killing to be murder in the first degree; it must be a predetermined killing upon consideration; but this has not been construed to mean that the design to kill should have existed for a considerable duration of time. It is familiar law that such design may be formed at the moment of the commission of the act. So, in cases of the character of the instant case, the continuance by repetition of indecency and immorality in the house of an owner, with his assent and connivance, necessary to make the house a disorderly house,

has no fixed duration or definite time limit prescribed, provided the acts of misconduct are often enough to indicate a manner of keeping. Each case must be adjudged according to its own circumstances. Instruction No. 9 correctly defines for the jury the words "common and habitual occurrence," and left them to determine from the evidence whether the acts complained of were of "common and habitual occurrence," as so defined.

We find no error in these instructions.

Plaintiff in error complains further that the court amended instructions 5, 6, and 7, offered by him, and gave them in amended form. The amendment of 5 and 6 consisted in the addition of the words: "And such knowledge must be actual, or constructive, as defined by instruction No. 4." This amendment was certainly proper.

[10] The court amended instruction No. 7 for the defendant by striking out the concluding paragraph of same, and adding the following words to the preceding paragraph: "But such improper conduct must cover a substantial period of time." The matter stricken out referred to the necessity for a recurrence of unlawful conduct to make an establishment a disorderly house. On this point the jury had been adequately instructed by instruction No. 9 for the plaintiff. Hence, the elision of the concluding paragraph did not operate to the prejudice of defendant. Nor was it to the latter's prejudice that the jury was told in the matter added by the court that the "improper conduct" essential to justify conviction "must cover a substantial period of time."

[11] Instruction 10 offered by the defendant was rejected by the court. This instruction advised the jury that, if they believed from the evidence that the police and various respectable citizens had visited Pope's establishment prior to November 23, 1920, and had not seen any improper, immoral, or indecent conduct during that period, then, if the jury believe that there was improper conduct on the part of persons on the night in question, this was insufficient for conviction; that in order to justify conviction, the improper conduct must be customary, common, or habitual. There was no occasion to give this instruction. The jury had already been instructed with respect to the necessity for common and habitual occurrence to support conviction, and advised as to the meaning of the words "common and habitual oc-

currence." It was for the jury to determine the value to be attached to the evidence of the police, and of the various respectable citizens who had visited the cabaret of the accused prior to November 23, 1920. If instruction 10 was intended to advise the jury that the fact that officers and citizens, on repeated visits to defendant's establishment, prior to November 23d, had not observed anything improper, indecent, or illegal, was in itself conclusive evidence that improper, immoral, and illegal acts had not taken place during that period, then the instruction was manifestly improper. The lack of value of such negative evidence is illustrated in the instant case. At least two police officers were in Pope's establishment on the night of the 23d, and while there saw "nothing out of the way in the conduct of anybody," or "anything like what they (i. e., the witnesses for the state) testified to." Nevertheless, it is conclusively shown that on this very night disgusting and revolting acts to the prejudice of good morals took place, and that ardent spirits were easily procured by the visitors at the door of the dance hall, and within the establishment of the accused.

This case was submitted to a jury under sufficient instructions. They have passed upon the conflict of testimony, such as it is, and reached a conclusion adverse to the accused. There is no reason to interfere with that verdict.

The petition of the plaintiff in error states, referring to the verdict, that—

The "only natural and reasonable inference is that John Pope was convicted, not on the law and the evidence, but in consequence of popular hysteria induced by one of those moral upheavals which periodically occur in nearly every city. The accused in this case is a vicarious sacrifice to the gods of respectability and reform."

This contention, repeated in different terms in other portions of the petition, has caused us to reproduce the evidence in considerable measure, and to discuss it, as well as the questions of law, at no little length, in the effort to ascertain whether in this case there was a miscarriage of justice, as insisted by petitioner. We are satisfied that the jury was sufficiently and correctly instructed as to the law, and that they were justified in their conclusion that the defendant was guilty as charged. The case will be affirmed.

Affirmed.

(131 Va. 557)

NEY v. HAUN.

(Supreme Court of Appeals of Virginia. Nov. 17, 1921.)

1. Carriers ⇐4—Truck driver transporting goods between two cities not a common carrier in transporting goods to third city in one instance.

Truck driver engaged in the transfer business in a certain place under license, but not licensed to engage in such business in another city and not pursuing the business of carrying goods over a route from such other city to a third city, and never having held himself out as undertaking to carry goods for the public generally between them, did not, in undertaking to transport goods between such places in a particular instance, assume the liability of a common carrier.

2. Carriers ⇐4—"Common carrier" defined.

To constitute a person a common carrier of goods in a particular instance the carriage in question must be over a route or within a territory over or within which there has been a general undertaking by the person, a holding of himself out as undertaking to carry goods for the public generally, as a business, over that route or within that territory, which undertaking may be either express or may be implied from conduct by a series of acts by known habitual continuance in such line of business.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Common Carrier.]

Error to Circuit Court, Rockingham County.

Action by Ferdinand Ney against Joseph H. Haun. Judgment for defendant, and plaintiff brings error. Affirmed.

This is an action of trespass on the case in assumpsit instituted by Ney, the plaintiff in error, as plaintiff in the court below against Haun, the defendant in error, as defendant in the court below, to recover alleged damages to a certain victrola and other articles of furniture, which the defendant undertook for hire to carry for the plaintiff from the city of Harrisonburg, Va., to the city of Washington, D. C., by means of an automobile truck, the furniture being badly broken to pieces en route by the overturning of the truck.

There was a trial by jury, and a verdict and judgment for the defendant.

The evidence is conflicting on the subject of whether the accident was caused by the negligence of the defendant, and there was testimony to the effect that the accident was not caused by any negligence of the defendant; so that upon that issue the verdict could not be disturbed by the court.

The plaintiff, however, contended before the trial court, and urges before us, that the defendant was a common carrier with re-

spect to the undertaking of carriage in question, and was therefore liable as an insurer, under the doctrine, applicable at common law, fixing the liability of a common carrier in such case. And upon that subject the plaintiff asked the court to instruct the jury, as follows:

"The court instructs the jury that, if they believe the said defendant, Haun, contracted with the said plaintiff, Ney, to transport his furniture from Harrisonburg, Va., to the city of Washington, and that the said property was injured or destroyed while in the possession of the said Haun, through no fault on the part of said Ney, then the jury must find for the plaintiff such damages as from all the evidence in the case they may believe him entitled to."

The court refused to give such instruction. That action of the court is by the plaintiff assigned as error.

The evidence in the case bearing on the question of whether the defendant was a common carrier with respect to the undertaking of carriage involved is uncontroverted, and is as follows:

The defendant testified:

"That he was a licensed transfer man under the laws of Virginia with his place of business at Bridgewater, Rockingham county; that he had no license to do business in the city of Harrisonburg; that on a former occasion he had hauled a load of potatoes to Washington for a brother of the plaintiff, and that was the only time he ever hauled to Washington until he took the plaintiff's furniture."

In regard to the undertaking of carriage involved in the instant case, the defendant testified:

"That he was called (by the plaintiff by telephone) from Bridgewater to Harrisonburg for the purpose of contracting for the hauling of the load of furniture from Harrisonburg to the city of Washington, and that he (the defendant) agreed to haul the same for the sum of \$45."

Chas. A. Hammer, of Harrisonburg, for plaintiff in error.

H. W. Wyant, of Harrisonburg, for defendant in error.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

The sole question presented for our decision in the instant case is the following:

Was the defendant, Haun, although a common carrier of goods in Bridgewater, such carrier from Harrisonburg to Washington, at the time of the undertaking of carriage involved in this action?

[1] This question must be answered in the negative.

It appears from the uncontroverted evidence in the case that the carriage of goods by the defendant from Harrisonburg to

Washington was not the habitual business of the defendant, but a casual undertaking merely. He did not pursue the business of carrying goods over that route as a public employment. He had never held himself out as undertaking to carry goods for the public generally between those places.

[2] By the great weight of authority one of the essential requisites to constitute a person a common carrier of goods in a particular instance is that the carriage in question must be over a route or within a territory over or within which there has been a general undertaking by the person, a holding of himself out as undertaking, to carry goods for the public generally, as a business, over that route or within that territory. Hutchinson on Carriers (3d Ed.) §§ 47, 48, 49, 60; 1 Michie on Carriers, §§ 1 and 2; 6 Am. & Eng. Enc. of Law (2d Ed.) pp. 251-253; 10 C. J. p. 41; and authorities cited by these text-books, too numerous to be cited here. The dominant and controlling factor, which is the test of the nature of the employment and which fixes the carriage as that of a common carrier, is the public profession, the public undertaking, and that undertaking fixes also both the character of the articles undertaken to be carried and the extent of the territory covered by the business. It is true that the undertaking need not be express. It may be implied from conduct. But, if the undertaking is to be implied from conduct, it must be evidenced, as said in *Fish v. Chapman*, 2 Ga. 349, at page 354, 46 Am. Dec. 393, "by a series of acts, by his known habitual continuance in this line of business."

As said in *Hutchinson on Carriers*, supra, § 60:

*"Must Undertake to Carry by Customary * * * Route.*—Common carriers * * * undertake to carry * * * only * * * over the route to which their business is confined. Thus common carriers * * * cannot be required to carry * * * by a route to which his business does not extend. And even if a carrier should in a particular instance undertake by a special contract to carry goods by unusual and exceptional * * * routes, his liability would be based upon his contract, and not by the ordinary rules governing common carriers."

(This is, of course, not applicable in cases where the common-law rule has been changed by statute; but there is no such statute bearing upon the case before us.)

As said, however, by the same authority last cited in another place (§ 49):

"What circumstances will be sufficient to invest the employment of the carrier in particular cases with the character of a public one, and what profession or course of dealing on his part will be considered as enough to constitute him a common carrier, instead of a private carrier for hire, is, however, sometimes a question of no little difficulty, and has given rise to a considerable diversity of opinion and contro-

versy. The criterion by which it is to be determined whether he belongs to the one class or the other is generally considered to be whether he has held himself out or has advertised himself in his dealings or course of business with the public as being ready and willing, for hire, to carry perishable classes of goods for all those who may desire the transportation of such goods *between places which he professes in this manner his readiness and willingness to carry*. If he has done so, he is of course to be regarded as a common carrier; but, if not, he will be treated as a private carrier for hire." (Italics supplied.)

As shown by this authority, such is the rule in England and in a large majority of the American courts. To the same effect, see *Carleton v. Boudar*, 118 Va. 521, 525-527, 88 S. E. 174, 4 A. L. R. 1480.

The text-book last cited thereupon proceeds, in sections 50, 51, 52, and 53 and notes, with a review of the minority holding of certain cases in Pennsylvania, Tennessee, and New Hampshire, which is referred to as the Pennsylvania rule, and which denies the necessity for any public profession or undertaking in order to impose upon the carrier the character and consequent liability of a common carrier, and which holds that one who has never assumed the character of a public carrier, whose contract to carry may be confined to one particular instance, or pro hac vice, as it is termed, may assume thereby all the responsibilities of a common carrier, if he has occasionally accepted the goods of others for transportation for hire. These holdings are not considered sound by the learned author of the text-book last cited, and we concur in that view. In the leading case of *Fish v. Chapman*, supra, 2 Ga. at page 355, there is also a disapproval of the Pennsylvania rule, where it is said that there can be little doubt that that holding "is opposed to the principles of the common law and its rule wholly inexpedient"—citing numerous authorities.

The case of *Farley v. Lavary*, 107 Ky. 523, 54 S. W. 840, 21 Ky. Law Rep. 1252, 47 L. R. A. 383, among the authorities relied on for the plaintiff, does not rest upon the Pennsylvania rule. It is, however, peculiar in its facts. In that case the inception of the carriage was within the city, the corporate limits of which were the territorial limits of the usual business of the carrier; almost the whole route of the carriage was within such limits; but the contract of carriage and the carriage involved in that action in fact extended somewhat beyond the limits of the city. The question was whether the carrier was acting as a common carrier and liable as such while carrying the goods outside of the city limits. The court on the single authority of *Ireland v. Mobile, etc., R. Co.*, 105 Ky. 400, 49 S. W. 188, 453, 20 Ky. Law Rep. 1586, 1589, applied the doctrine there laid down as applicable to railroad companies, and

held that the contract was made by the carrier in his capacity of a common carrier and was in effect a contract to carry for the whole distance in the capacity of a common carrier. We feel that we are not called upon to approve or to disapprove of the holding in that case, as its facts are entirely dissimilar to those of the case before us.

In conclusion we will say that, while we have no disposition whatever to relax the established rules with respect to what undertaking, express or implied, constitutes a common carrier, nor to relieve common carriers from any of the duties or responsibilities imposed upon them by law, we have no disposition to extend those rules so as to embrace within them those who, according to the majority view of the courts on the subject, are not common carriers.

The case will be
Affirmed.

(131 Va. 576)

TALBOTT v. SOUTHERN SEMINARY, Inc.

(Supreme Court of Appeals of Virginia. Nov. 17, 1921.)

1. Innkeepers §13—"Ordinary" and "boarding house," within lien statute, distinguished.

In the statutes from which Code 1919, § 6444, was taken, giving a lien to the proprietor of an inn, ordinary, or boarding house, the term "ordinary" means a public house where food and lodging were furnished to the traveler and his beast, at fixed rates, open to whoever might apply for accommodation, and where intoxicating liquor was sold at retail; while "boarding house" was a place of private entertainment, where special contracts were usually made.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Boarding House; Ordinary.]

2. Innkeepers §13—"Boarding house" and "house of private entertainment" in lien statute are synonymous.

Within Code 1919, § 6444, giving the keeper of an inn, boarding house, or house of private entertainment, which as originally enacted and as last amended before codification had no comma between "boarding house" and "house of private entertainment," those terms were intended to be synonymous.

3. Innkeepers §13—Boarding school is not "boarding house" within lien statute.

A corporation authorized to conduct a boarding school is not the keeper of a boarding house within Code 1919, § 6444, giving the keeper of a boarding house a lien on the property of guests therein, so that such school cannot claim a lien upon the trunks of students therein.

Error to Corporation Court of Buena Vista.

Action in detinue by A. L. Talbott against the Southern Seminary, Inc. Judgment for

defendant, and plaintiff brings error. Reversed.

H. S. Rucker, of Buena Vista, for plaintiff in error.

Jno. Dabney Smith, of Buena Vista, for defendant in error.

BURKS, J. A. L. Talbott entered his two daughters as students in the Southern Seminary, Incorporated, and a few days thereafter withdrew them. The seminary seized the trunks of the two girls and refused to deliver them to their father, who was the owner thereof. Thereupon Talbott sued out a warrant in detinue for the trunks and their contents before a justice of the peace, which, upon application of the defendant, was removed to the corporation court of the city of Buena Vista for the trial. At the trial before a jury in that court, there was a verdict and judgment for the defendant. The case is brought here upon a writ of error to that judgment awarded to the plaintiff.

The defendant claimed a lien on the trunks and contents by virtue of section 6444 of the Code, and the trial court instructed the jury in accordance with that view. Whether that section is applicable to the facts of this case is the crucial question and the only one we need decide, although others were discussed.

The "Southern Seminary, Incorporated," as its name imports, is an incorporated institution, and, by the terms of its charter, "The purposes for which it is formed are to conduct a private school for girls and young women." As "subsidiary purposes," it is allowed to deal in real or personal property, to make contracts, to issue bonds, to deal in its own stock and that of other companies, to declare dividends, "and to exercise other powers incident to the carrying out of the purposes of this charter of incorporation not inconsistent with the laws of the state of Virginia." These are all of its enumerated powers, and we may assume, for the purposes of this case, that these powers embraced the power to conduct a boarding school.

Section 6444 of the Code is as follows:

"Every innkeeper, keeper of a boarding house, or house of private entertainment, shall have a lien upon and may retain possession of, the baggage and other property of his guest or boarder brought upon his premises, and also upon the property of an employer of such guest or boarder, controlled and brought upon said premises by such guest or boarder in the course of his employment, for the proper charges due from such guest for his board and lodging."

[1, 2] When this statute was enacted in 1879 (Acts 1878-79, p. 76), a lien was given to "the keeper of any ordinary, house of private entertainment or boarding house." There was no comma after the words "private enter-

tainment." This statute was carried into the Code of 1887 as section 2489, and there was some change in the phraseology and punctuation. In that section a lien is given to "every innkeeper, keeper of an ordinary, boarding house, and house of private entertainment." Prior to that time no distinction had been made in the statute between an innkeeper and the keeper of an ordinary. Section 2489 was amended in 1906 (Acts 1906, p. 250). In the amendment a lien is given to "every innkeeper, keeper of an ordinary, boarding house or house of private entertainment." This act restores the punctuation of the act of 1879, apparently making "boarding house" and "house of private entertainment" synonymous. For many years prior to the first enactment, the term "ordinary" had a well-defined meaning in this state. It was used to designate a public house where food and lodging were furnished to the traveler and his beast, at fixed rates, open to whoever might apply for accommodation, and where intoxicating liquor was sold by retail. It was a house of public entertainment and a common designation of it was a "tavern." As it was liable to abuse its privileges, its conduct was controlled by law, and the county courts met annually to fix "tavern rates." For example, prices were fixed for lodging under different conditions. A striking illustration of this is the price of "lodging with clean sheets." The prices of the different kinds of drinks were also fixed, as for instance, "the price of whisky or brandy with loaf sugar," and other things that we now look back upon with curiosity. In contrast with this house of public entertainment, usually designated a tavern or hotel, there was also what was known as a boarding house, which was a place of private entertainment, where special contracts were usually made for a definite time, and the two terms "boarding house" and "private entertainment" were often used interchangeably to mean the same thing. Hence we find both in the acts of 1879 and of 1906 the term "boarding house or house of private entertainment" without any punctuation, showing that they meant the same kind of house. Under the term "boarding house," Black, in his Law Dictionary, says:

"A boarding house is not in common parlance, or any legal meaning either, a private house where one or more boarders are kept occasionally only and upon special considerations, but it is a quasi public house where boarders are generally and habitually kept, and which is held out and known as a place of entertainment of that kind. *Cady v. McDowell*, 1 Lans. (N. Y.) 486.

"A boarding house is not an inn, the distinction being that a boarder is received into a house by a voluntary contract, whereas an innkeeper, in the absence of any reasonable or lawful excuse, is bound to receive a guest when he presents himself. 2 El. & Bl. 144.

"The distinction between a boarding house

and an inn is that in a boarding house the guest is under an expressed contract, at a certain rate for a certain period, while in an inn there is no express agreement; the guest being on his way, is entertained from day to day according to his business, upon an implied contract. *Willard v. Reinhardt*, 2 E. D. Smith (N. Y.) 148."

[3] The term "boarding house" also embraces the idea that the boarder is free to come and go as he pleases, at all reasonable hours, and the landlord has no control over his movements. If a visitor to Lexington were seeking a "boarding house" for his temporary sojourn, it would never occur to any one to suggest the Virginia Military Institute as a boarding house. It is a boarding school where the cadet is subject to control and gets his food and lodging, but it is not a "boarding house."

Ordinary words used in a statute must be given the usual, ordinary, and common meaning unless a different intent is in some way manifested. In order to apply section 6444 to the Southern Seminary, we should have to read into it the words "boarding school," or else hold that "boarding house" embraces boarding schools, and this we cannot do. A boarding school is not a "boarding house" within the meaning of the statute, and the trial court erred in so holding.

The verdict of the jury will therefore be set aside, and the judgment thereon of the trial court be reversed, and, in accordance with section 6365 of the Code, an order will be entered in this court that the plaintiff recover of the defendant the trunks in the warrant mentioned, and their contents, and his costs in this court and also in the trial court.

Reversed.

(131 Va. 623)

WITHROW'S EX'X et al. v. PORTER.

(Supreme Court of Appeals of Virginia.
Nov. 17, 1921.)

1. Ejectment §119(2)—Equitable defense, good in ejectment, may be basis for injunction against enforcement.

Even if a contract of purchase is an equitable defense to ejectment, permitted under Code 1919, §§ 5471, 5472, that fact does not preclude a bill to restrain the enforcement of the judgment in ejectment under the express provision of section 5473.

2. Ejectment §119(2)—Demurrer held not to attack bill for want of equity.

On a bill to restrain enforcement of a judgment in ejectment, a demurrer on the ground that the subject-matter in controversy had been settled by a judgment at law is not sufficient to put complainant on notice that defendants intended to claim that the bill did not state equities which ought to prevail over defendant's regular title under the judgment in ejectment.

3. Ejectment \S 119(2)—Bill held to state grounds for restraining enforcement of ejectment judgment.

A bill, alleging that complainant had a contract for the purchase of the property involved in ejectment, and that a receipt defeating his rights under the contract was obtained from him by fraud, states sufficient equity to entitle complainant to an injunction restraining enforcement of the judgment in ejectment.

4. Equity \S 263—Demurrer to answer held sufficient as motion to strike.

In a suit in equity a so-called demurrer to the answer, which stated reasons why the answer was insufficient and prayed that it be dismissed and stricken from the record, was a substantial compliance with Code 1919, \S 6123, abolishing exception to answers for insufficiency and substituting therefor a motion to strike out.

5. Appeal and error \S 1040(2)—Filing demurrer, instead of motion to strike answer, held harmless.

Though it is not good practice to demur to the answer to a bill in equity, and the language of a so-called demurrer to the answer was not in compliance with Code 1919, \S 6123, the action of the court in rejecting the answer would be harmless if no opposition was made to the form of the procedure and the answer was insufficient.

6. Equity \S 263—Answer filed by leave cannot be stricken as too late.

An answer to a bill in equity, filed after the expiration of time permitted by Code 1919, \S 6122, cannot be stricken because filed too late, where it was filed with express leave of the court.

7. Vendor and purchaser \S 82—Agreement, changing contract from sale to rental, held valid.

Where a contract for the sale of house and lot on installments expressly provided that if the purchaser defaulted in paying the installments the payments already made should be treated as payment of rent at a vested sum per month, a subsequent agreement, indorsed on the back of the contract and acknowledged by the purchaser, that the payments be accepted as rent, and that the vendor be released from his obligation on the contract, is a valid transformation of the contract from one of purchase to one of rent, which is supported by the original consideration for the contract, and bars the purchaser's right to performance of the contract on completion of the payments, unless his subsequent agreement was obtained by fraud.

Error to Circuit Court, Rockbridge County.

Suit in equity by Ben Porter against J. M. Withrow and others, subsequently revived against J. M. Withrow's executrix. Decree for complainant, and defendants bring error. Reversed.

Wallace Ruff, of Lexington, and Curry & Curry, of Staunton, for plaintiffs in error.

Hugh A. White, of Staunton, for defendant in error.

KELLY, P. This is a suit in equity, originally brought by Ben Porter against J. M. Withrow and others, and subsequently revived against Withrow's executrix, the purpose of which was to enjoin the enforcement of a judgment in ejectment theretofore obtained by Withrow against Porter for a certain house and lot, and to obtain a decree for the specific performance of an alleged contract for the sale thereof by Withrow to Porter. The relief prayed for was granted by the circuit court.

The bill was filed in July, 1919. A satisfactory disposition of the controversy before us will necessitate a somewhat full statement of the principal allegations made by the complainant, which in substance were as follows:

That on the 27th day of August, 1912, the complainant, Ben Porter, entered into a written contract with J. M. Withrow, whereby the latter agreed to sell to the former a certain house and lot situated in the town of Lexington, an unsigned copy of the contract being exhibited and filed with the bill as a part thereof;

That complainant cannot read and write, but believes that Withrow signed a duplicate copy of the contract and kept the same in his possession;

That complainant was to pay \$750 for the property, of which \$50 was to be paid in cash and the balance in payments of \$10 per month, the deferred payments to bear interest;

That the complainant complied with his contract literally for a long time after it was made, but later for various reasons sometimes omitted the payments when due, but that such omissions were fully understood and acquiesced in by Withrow;

That the last payment was on May 2, 1917, at which time Withrow made no claim that there had been any forfeiture of complainant's contract;

That during a large part of the time since the date of the contract Withrow was drunk or incapacitated by a drug habit, and not in a condition to receive money or transact business, and during a part of that time was in an asylum with no committee or other person to whom payments could be made;

That some time prior to July 2, 1917, Withrow employed counsel, and thereupon claimed that complainant had forfeited his rights as a purchaser;

That the complainant also employed counsel, and was advised not to sign any papers without the latter's advice;

That on July 2, 1917, Withrow offered complainant a paper or receipt, copy whereof was exhibited and filed with the bill and

made a part thereof, which the complainant thought was for a part payment on the house and lot, but that the words and conduct of Withrow in connection therewith led the complainant to suspect an attempt to deceive him.

That complainant took this paper to his attorney, was advised that it represented a claim on Withrow's part that complainant had forfeited his purchase and was renting the property, and that he was also advised not to make any further payment unless it was received and accepted as a part of the purchase money;

That complainant has made no further payment, although he has been ready, willing, and anxious to pay the balance in full and complete his purchase;

That since complainant took possession of the property he has paid \$380 or more on the contract, and has, with the knowledge of Withrow, permanently improved the property to the extent of \$103, and has also paid all the taxes thereon except for the year 1918, and would have paid them for that year if he had not found on going to the treasurer's office to make the payment that Withrow had already paid the same;

That on July 14, 1917, Withrow executed a deed of trust on the property mentioned to secure the payment of \$1,000 to the Rockbridge Building & Loan Association, the deed of trust embracing other property abundantly sufficient to secure the debt, and complainant avers that Withrow, knowing he had no right to claim a forfeiture of the contract with complainant, placed this deed of trust on the property that he might thereby defraud and defeat complainant by placing the property in the hands of an innocent purchaser; but that neither the trustee in the deed of trust, B. P. Ainsworth, nor the beneficiary, Building & Loan Association, are innocent purchasers, as Ainsworth, trustee, was of counsel for Withrow and was fully cognizant of complainant's rights;

That in October, 1918, Withrow, together with Ainsworth, trustee, instituted an action of ejectment against complainant to recover the property, "and this for the purpose of carrying out his intentions when he made the said deed of trust," and that in said action complainant "under the rules of law pertaining to an action of ejectment was prevented and not allowed to make his equitable defense as hereinbefore set forth, and judgment was rendered against him" in May, 1919;

That after the said judgment in ejectment was rendered, Withrow, through his counsel, stated that all he wanted was his money with interest, and complainant through his counsel offered to pay Withrow all that was due him under the contract, requesting a statement of what was due, and that a statement was rendered which complainant found

to be unjust and incorrect, and that Withrow refused to accept settlement upon a correct and legal calculation of the amount of principal and interest due.

The prayer of the bill was that the said Withrow, Ainsworth, trustee, and the Building & Loan Association be made parties defendant; that the execution of the judgment in ejectment be enjoined and restrained until complainant's rights could be determined; that complainant be permitted to complete his payments for the property purchased as set out in the bill; that the balance which he owed thereon to Withrow be treated as a mere lien against the property; that a full accounting of what he owed Withrow be had; and for general relief.

The contract of August 27, 1912, referred to in the bill was as follows:

"Contract, made this the 27th day of August, 1912, by which J. M. Withrow agrees to sell to Ben Porter that certain house and lot situated on the north side of Randolph street in the town of Lexington, Va., and fronting 36 ft. 4 in. on said street and extending back 79 ft. 8 in. to a buggy shed, it being the same property which was conveyed to the said J. M. Withrow by deed from Mrs. Lucy M. Haughwaut of date June 15, 1906, and recorded in Deed Book No. 98 at page 411 in Rockbridge county clerk's office, to which deed reference is hereby made for a more accurate description of this property for the consideration of seven hundred and fifty (\$750.00) of which fifty dollars (\$50.00) has been paid in cash, receipt of which is hereby acknowledged, and the balance is to be paid in payments of \$10.00 or more per month until the purchase price with interest at 6% per year shall have been paid in full, together with any taxes, insurance, or other costs that may have been advanced by said Withrow.

"Said Porter is to keep the taxes paid up on this property, and also keep the property insured, for the benefit of the said Withrow, both of which shall be prorated as of this date.

"On the completion of the payments as called for under this contract said Withrow guarantees to give a good and sufficient deed of general warranty to said property.

"In case of the failure of said Porter to make the payments of at least \$10.00 per month then this contract shall become null and void as to the contract of sale, and whatever shall have been paid by said Porter shall be regarded as rent at \$6.00 per month."

The paper or receipt of July 2, 1917, referred to in the bill, is as follows:

"Lexington, Va., July 2, 1917.

"Received of Ben Porter in full to January 1, 1918, on house that he now occupies on Randolph street. On January 1, 1918, I agree that, at my option, I will give him \$36.00 cash or a receipt in full for rent on this house to July 1, 1918."

A preliminary injunction against the execution of the judgment was awarded which was never afterwards specifically enlarged or perpetuated, but such proceedings were

had in the cause as that a final decree was entered in favor of Porter, whereby he was given the right to pay the balance of principal and interest on the purchase money as originally agreed upon, and upon making such payment to have a deed for the property. From that decree this appeal was allowed.

There was a demurrer to the bill which the court overruled, and this action is the basis of the first assignment of error.

The grounds of the demurrer were stated in writing, and were two in number. It is conceded by counsel for appellants that the second ground was not good, and that the validity of the demurrer depends upon the first ground, which was as follows:

"The subject-matter in controversy was heretofore settled by judgment of the circuit court of Rockbridge county pronounced on the — day of May, 1919, in an action of ejectment under the style of J. M. Withrow v. Ben Porter."

[1] This ground of demurrer was clearly unsound. There is a good deal of discussion in the briefs as to whether the bill alleged such a contract as would have entitled Porter under section 5471 of the Code to set it up as an equitable defense to the action of ejectment. The discussion seems immaterial. The bill alleges that the equitable defense as therein developed was in fact not made in the action at law. Whether it was attempted or not is unimportant. If it was not one of the two equitable defenses which under sections 5471 and 5472 of the Code may be set up in an action of ejectment, then, of course, any offer of it would have been futile, and the complainant's only remedy would have been in equity. If it was such a defense, then under the express terms of section 5473 of the Code it is provided that whether a defendant in ejectment "shall or shall not . . . attempt such defense, he shall not be precluded from resorting to equity for any relief to which he would have been entitled" if sections 5471 and 5472 had not been enacted.

[2, 3] Counsel for appellants concede that they are restricted upon the demurrer to the ground thereof above quoted, and admit that this places them upon "a narrow neck of land," but they contend that the language of that ground of demurrer is sufficient to put the complainant on notice that the defendants intended to claim that the bill did not state equities that ought to prevail over the defendant's legal title under the judgment in ejectment. We are unable, however, to accept this view without giving to the language used an unnatural and strained construction. Furthermore, if we could sustain that view, we think that the bill itself substantially stated grounds upon which, if proved, the plaintiff would be entitled to a specific execution of the contract of sale. If

there were nothing else in the case except the contract and receipt exhibited with the bill, and if the receipt was given to and accepted by Porter as the result of a fraudulent scheme on the part of Withrow to defeat the former of his rights under the contract of purchase, then the receipt ought to be disregarded as evidence, and the mere fact that Porter was in default as to his payments would not have operated as a forfeiture of the contract, and he would have been entitled to a deed upon the payment of the balance of the purchase money with interest. *East v. Atkinson*, 117 Va. 490, 494, 85 S. E. 468. There was no error in overruling the demurrer to the bill.

The next assignment of error to be considered involves the action of the court in rejecting: First, an original answer and cross-bill; and, second, an amended answer and cross-bill offered and filed by the defendants.

The temporary injunction above mentioned was awarded in vacation on July 22, 1919. No further order was entered, and nothing else appears to have been done in the cause until May 18, 1920, at which time a decree was entered, reciting the death in February, 1920, of J. M. Withrow, directing that the cause as to him should thereafter proceed in the name of his administratrix (subsequently corrected to executrix), admitting Addie L. Withrow, widow and devisee of J. M. Withrow, to come into the case as a party, noting the demurrer to the bill, authorizing the filing of an answer and cross-bill by the defendants, with "demurrer" thereto by complainant, and continuing the case for consideration and further decree in vacation.

The subsequent action upon the demurrer to the bill has been stated and disposed of. The so-called demurrer to the answer and cross-bill referred to in the above recited decree was in writing, and was as follows:

"The plaintiff in this cause comes and excepts and demurs to the answer of the defendants filed in this court and moves that the same be dismissed and stricken out on the following grounds:

"(1) Instead of being an answer, the paper filed purporting to be an answer, sets up entirely new matter as a defense to the bill, which can only be done by a cross-bill.

"(2) The matters set up in defense in said answer, even if properly presented by answer, are not sufficient in law because the answer admits a written contract between the plaintiff and J. M. Withrow, said contract being a sale and purchase of real estate, and the said answer offers nothing to show that said real estate has ever been sold or transferred back from the plaintiff to J. M. Withrow.

"The plaintiff, therefore, prays that the said answer be dismissed and stricken from the record."

[4] No objection was made to the form of this paper, and it may be regarded as a substantial compliance with section 6123 of the Code, abolishing exceptions to answers for

insufficiency, and substituting therefor a motion to strike out.

On the 8th of September, 1920, a decree was entered, overruling the demurrer to the bill (as already stated), but sustaining the demurrer and motion to dismiss the answer, with leave, however, to the defendants "to file an amended or additional answer, or take such other proceedings as this may be advised." That decree further adjudicated that the complainant was entitled to have the amount due by him to the estate of J. M. Withrow on the contract of purchase duly fixed and ascertained, and, when so fixed and ascertained and paid, to have a deed for the house and lot, and referred the cause to a commissioner to make up an account showing the balance due.

On November 19, 1920, the defendants filed their petition, praying that they might be allowed to file an amended answer and cross-bill, and on the same day an order was entered, noting that petition and the objections of complainant to the filing of the amended answer and cross-bill.

On May 18, 1921, the plaintiff filed the following paper, called a demurrer to the amended answer and cross-bill, to wit:

"The plaintiff comes and demurs to the amended answer and cross-bill, and for grounds therefor says: (1) It is too late to file such answer and cross-bill. (2) The answer is not sufficient in law, for the same reasons as set up in the original demurrer to the original bill [meaning answer]."

On the 18th of May, 1921, the court entered a decree, which, so far as material here, contains the following recitals and adjudications:

(a) That the cause came on to be heard upon the papers formerly read, upon the first report of the commissioner filed in November, 1920, and exceptions thereto, on the petition and amended answer and cross-bill "filed by leave of court on the 19th of November, 1920"; (b) that the reasons for the delay in the filing of the amended answer and cross-bill are deemed sufficient and "the court doth formally authorize and approve the filing of said amended answer and cross-bill"; (c) that the plaintiff filed a demurrer to the amended answer and cross-bill; (d) that the demurrer to the amended answer and cross-bill is well taken, and is sustained, but with leave to the defendants to take such further proceedings as they may be advised; (e) that the cause is recommitted to the commissioner to restate at the bar of the court the account appearing in his first report; (f) that the commissioner thereupon, in compliance, with the above direction, appeared and submitted a restatement of the account; (g) that the restatement of the account was correct and ratified and confirmed in all respects; (h) and that when the complainant, Ben Porter, shall have paid off the amount

as therein fixed, the executrix of J. M. Withrow shall make to Porter a deed with general warranty for the property.

[5, 6] As shown above, the so-called demurrer to the amended answer and cross-bill was in writing. It was, of course, not good practice to demur to the answer, and the language of the decree and the language of the so-called demurrer were not in compliance with section 6123 above cited, but no objection was made to the form of procedure in the lower court, and if the action of the court in rejecting the answer had been correct in result, the error in the form of procedure would be treated as harmless, and would be disregarded in this court. But, dealing with the objections to the answer in this way, if the first objection, which was that the answer was filed too late, meant to invoke the provisions of section 6122 of the Code, which provides that an answer in equity must be filed within six months from the date of the service of process unless after notice to the adverse party, and for good cause shown, additional time be granted by the court, then the point is not good. The second answer, like the first, was filed by leave of court, and as to the second, as appears from the abstract of the decree last referred to, the court expressly held that the reasons for the delay were sufficient, and expressly authorized the filing of the answer.

We come now to the real point in the case: Did the court err in rejecting the first and second answer and cross-bill, and in proceeding to adjudicate the rights of the parties upon the record without regard to such pleadings?

The chief reason assigned by the complainant for the rejection of the original and amended answer and cross-bill was that the matters of defense set up therein were not sufficient in law, because they "admitted a written contract between the plaintiff and J. M. Withrow, said contract being a sale and purchase of real estate, and * * * offer nothing to show that the said real estate has ever been sold or transferred back from the plaintiff to J. M. Withrow."

We need not set out at any length the contents of the original and amended answer and cross-bill. They were much the same in substance, the amended pleading being in the main a mere amplification of the original, and the following are the admissions, denials and averments therein which we deem material on this hearing:

(a) That the defendants admit that Withrow entered into the written contract with Porter as alleged in and filed with the bill; (b) that Porter failed and refused to comply with the terms of the contract; (c) that his failure to make the payments as provided for in the contract was without sufficient justification or excuse, but due solely to his carelessness and indifference, and in no wise

to the sickness or incapacity of Withrow to receive the payments; (d) that finally on July 2, 1917, Porter having at that time defaulted in 33 monthly payments, not including the month of July, 1917, and having failed and refused to comply with the contract, and Withrow having become fully convinced that Porter never intended to comply with the same, Withrow had an interview with Porter at the office of Withrow's counsel in Lexington, at which interview the whole situation was gone into fully with Porter and a settlement made with him in which the whole transaction was fully explained, and in which Porter agreed to the settlement which was then made and evidenced in part by the receipt or paper of July 2, 1917, filed with the bill; (e) that on the same day, July 2, 1917, and at the same time, there was indorsed on the back of the original contract of sale held by Withrow the following agreement, signed and acknowledged by Porter:

"Lexington, Va., July 2, 1917.

"Received of J. M. Withrow a receipt for rent in full on house I live in on Randolph St. to January 1, 1918, with an agreement annexed that on that date he pay me \$36.00 in cash or give me a receipt in full for rent on the house to July 1, 1918. In receiving this receipt and agreement as I have on this day done, I relinquish and fully release J. M. Withrow from any claim or liability for money paid in connection with the terms of the writing on the reverse side of this paper.

"Ben Porter.

"State of Virginia, County of Rockbridge, to wit:

"I, John L. Campbell, a commissioner in chancery for the circuit court of the county and state aforesaid, do certify that Ben Porter, whose name is signed to the writing above, dated July 2, 1917, has this day, acknowledged the same before me in my county and state aforesaid, the contents and purport of the writing having been fully explained to him.

"Given under my hand this the 2d day of July, 1917. John L. Campbell."

The answer further denies that Porter made any substantial or permanent improvements on the property, and also denies that Porter is unable to read and write, or that he did not fully understand the nature of his agreement of July 2, 1917, but, on the contrary, alleged that he could read and write, and that he signed the agreement last recited in his own handwriting.

It is to be especially noted that the contract indorsed on the back of the original agreement, and alleged to have been signed and acknowledged by Porter, is not in any way referred to in the bill. Its first appearance in this case is in the original answer and cross-bill. In connection with the proffer of this paper the answer denies that Ben Porter could not read and write, avers that he signed the paper in his own handwriting,

and that it, as well as the receipt, were fully explained to him.

[7] The two papers taken together constitute a good defense to the bill. The original contract between the parties was clear and explicit, and was one which they could lawfully make. It was to be a sale if Porter kept up and completed all his payments, but, if not, then it was to be a contract of rental at \$6 per month. If there had been no alternative provision in the contract whereby it was to be converted into a rental contract, or even with such provision, the mere failure to promptly pay the installments of purchase money would not have operated as a forfeiture, and under ordinary circumstances the complainant could have entitled himself to a deed by paying the balance of the principal and interest. *East v. Atkinson*, supra. But the receipt and contract of July 2, 1917, construed together, could only have meant that the parties recognized the termination of the sale feature of the contract and its conversion into a rental. The agreement which Porter signed and acknowledged on the last-mentioned date says:

"In receiving this receipt and agreement as I have this day done, I relinquish and fully release J. M. Withrow from any claim or liability for money paid in connection with the terms of the writing on the reverse side of this paper."

This language may not have been happily chosen, and might have been more explicit, but it could hardly have meant anything other than that Porter was giving up his right to purchase the property. The only obligation which Withrow could possibly have been under to him "for money paid in connection with the terms of the writing on the reverse side" was an obligation to convey the property to Porter, and it was this obligation which Porter by the language used there must be held to have released.

The learned counsel for the appellee says in his brief:

"The only issue raised by the bill and answer is as to whether the two writings constitute an abandonment of the contract by the appellee. If appellant relies upon these papers, as he says he does, then he must stand or fall on these papers."

In this latter statement we concur, but we are further of opinion that these papers set up a complete defense to the bill, and must prevail unless they are tainted with fraud.

It is not necessary for the appellees to claim that there had been a completed forfeiture of the contract of sale, and we do not understand them to rely thereon. The contract was in the alternative, and was to be either a sale or a lease under certain conditions therein stipulated. Whether there had been a forfeiture or not of the sale feature, complainant, according to the answer

and cross-bill, was inexcusably in default in his payments, and upon a settlement he and Withrow put into effect the lease feature, and did so in writing. No new consideration was required for this arrangement. It was provided for in the original contract between the parties, and was a part thereof.

It follows from what has been said that the court erred in rejecting and striking out the original and amended answers and cross-bills.

The other errors need not be considered. If the plaintiff is entitled to a decree for specific performance of the contract of sale, that right must be established by setting aside the writing which he signed and acknowledged on July 2, 1917, and this can only be done upon proof that the same was obtained by fraud.

This court will enter an order reversing the decree of the lower court in striking out the answers and cross-bills, and remanding the cause for further proceedings. When it goes back, unless the complainant can show that the papers of July 2, 1917, were executed as the result of fraud on the part of Withrow, then the bill should be dismissed. If, on the other hand, such fraud be shown, then a decree should go in favor of the complainant, providing for a deed substantially upon the terms set forth in the decree of May 18, 1921.

Reversed.

(131 Va. 817)

COMMONWEALTH v. THOMPSON.

(Supreme Court of Appeals of Virginia. Nov. 17, 1921.)

1. Criminal law §134(1)—Apprehension that prisoner cannot have fair trial is insufficient to require change of venue.

A mere apprehension by accused that he cannot have a fair trial in the county in which the offense was committed because of prejudice is not sufficient to support a motion for change of venue, but he must establish by independent and disinterested testimony facts which make it probable that his fears are well founded.

2. Criminal law §134(1)—Public attitude requiring change of venue must be that at time of trial.

Testimony in support of a motion for change of venue because of prejudice which would prevent a fair trial must establish the condition in the public mind at the time of trial.

3. Criminal law §121—Court has wide discretion over motion for change of venue for prejudice.

In ruling on a motion under Code 1919, § 4914, for change of venue because of local prejudice, which would prevent a fair trial, the trial court has a wide discretion.

4. Criminal law §134(1)—Proof held not to show abuse of discretion in denying change of venue.

Proof that, after accused was arrested at the time of the homicide, the officers were prevented by mobs from removing him to another place, and that he was struck by members of the mob, and subsequently made his escape, but that at the time there was no attempt to lynch him, and that more than two months since had elapsed, during which time no demonstration had been made against him, though part of the time he was in jail within the county, held not to show abuse of discretion in denying change of venue because of local prejudice.

5. Criminal law §151—Application for continuance is addressed to court's discretion.

A motion for continuance in criminal case is addressed to the sound discretion of the court under all circumstances of the case, and the court's decision will not be reversed unless plainly erroneous.

6. Criminal law §603(2)—Denial of continuance at term of indictment held not abuse of discretion.

The denial of continuance on oral application made the day after indictment was not an abuse of discretion where the application did not show how long counsel represented accused, nor show the impossibility of procuring testimony in behalf of accused, especially in view of Const. 1902, § 8, guaranteeing a speedy trial, and Code 1919, § 4893, enacted to secure such trial.

7. Criminal law §24—Homicide §22(2), 146—Any willful, deliberate, and premeditated killing is "first degree murder" and malice implied therefrom; intent presumed from unlawful act.

Any willful, deliberate, and premeditated killing is "murder in the first degree," and the law infers malice from such a killing, and holds that a man intends that which he does, or which is the immediate or necessary consequence of his act.

[Ed. Note.—For other definitions, see Words and Phrases; First and Second Series, Murder in First Degree.]

8. Homicide §22(3)—Premeditation does not require existence of intent for definite time.

To constitute murder in the first degree it is not necessary that intent to kill shall exist for any particular length of time, but is only necessary that such intent should come into existence at the time of the killing or at any previous time.

9. Homicide §286(3)—Instruction on deliberation and premeditation held not improper.

In a prosecution for homicide, where the court gave the usual approved instruction that the infliction of mortal wound with a deadly weapon is prima facie willful, deliberate, and premeditated murder, omitting therefrom their usual conclusion that it throws on the prisoner the necessity of showing extenuating circumstances, was not improper, since the expression

prima facie shows it was susceptible of rebuttal, which could only come from accused.

Error to Circuit Court, Botetourt County.

Edmond Thompson was convicted of murder in the first degree, and he brings error. Affirmed.

Willis, Adams & Hunter, of Roanoke, for plaintiff in error.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazile, Second Asst. Atty. Gen., for the Commonwealth.

SAUNDERS, J. In this case the accused was convicted of murder in the first degree in the circuit court of Botetourt county, on an indictment charging him with the murder of one William Peck Austin, and sentenced to be electrocuted on May 6th of the same year. To this judgment a writ of error was awarded by one of the judges of this court. From the evidence in the case, giving credence to the testimony for the commonwealth, the material and pertinent facts are as follows:

The homicide occurred in the early part of the night of December 18, 1920, in the public road or street, before Bolton's store in the town of Fincastle. A gathering of white and colored boys, engaged in throwing firecrackers, were grouped in front of the store. Thompson had had no trouble with any of the boys present, and according to his own statement entertained no feeling of ill will against any of them. The defendant came to Bolton's store twice that evening. His first visit was to inquire about an axe. After leaving he returned in 5 or 10 minutes, again going into Bolton's store for some purpose not indicated. After staying in the store "for a right good little while," as stated by one of the witnesses, he came out and stood around with the boys, who were firing pop crackers. There was some bickering, or fussing between some of the white and colored boys, and Peck Austin, the boy who was killed, had taken a rock, or some rocks, from a colored boy named Otey. The boys were all standing in the street talking. The defendant Thompson walked across the street to a tree, and then moved to another tree of a diameter somewhat larger than a man's waist, and about 30 feet high. While he was standing under this tree, Peck Austin threw a pop cracker about 2 inches long into the tree. According to one of the witnesses for the state, this cracker exploded in the branches of the tree about 5 feet above the head of Thompson. Another witness states that the cracker exploded above the top of the tree. As soon as the squib exploded, the defendant stepped behind the tree, and using a 38 Smith and Wesson pistol, commenced to shoot in the direction of the boys gathered at Bolton's store. He fired four or five times, wounding four boys, Jim Bayne, Roy Gee,

Ray Young, and Peck Austin, the latter fatally. There was no shooting by any person save the defendant, and no provocation other than the squib thrown into the tree under which he was standing. Thompson promptly fled from the place of shooting, and later was arrested at his father's house. His captors started with him for the city of Roanoke, evading one crowd which sought to intercept them. Further on they were stopped by another crowd, and forcibly compelled to return to Fincastle, the county seat of Botetourt county. They were met in the town by a crowd of angry and excited men. Some of them struck at the prisoner, or struck him. The officer started to jail with his prisoner. While on his way a shot was fired at the latter, and in the confusion the prisoner escaped. A few days later Thompson was shot and captured by a posse, and taken to Roanoke for medical treatment. He was badly wounded, and his feet were frostbitten, the result of exposure in his efforts to escape. After examination in the hospital at Roanoke, the accused was taken to jail in that city, remaining there until about the middle of February, 1921, when he was returned to Fincastle for indictment and trial. Upon this trial he was convicted of murder in the first degree. There was complete unanimity among the witnesses for the state that no violence was offered to the defendant, or provocation given prior to the shooting, save the firing of a single squib in the tree over his head. Thompson states that some one said, "Let us catch him and run him out of town," but does not claim that any action was taken by the crowd to the above effect. The following questions and answers are taken from the cross-examination of the prisoner:

"* * * Now, you tell the court and this jury that until the time that somebody said 'Let us catch him and run him out of town,' no remark had been made to you by anybody up to that time?

"A. Up until when?

"Q. Until somebody said, 'Let us run him out of town'?

"A. Not any remark to me.

"Q. And absolutely nothing in the world had happened between you and this crowd of white boys up to the time of the shooting?

"A. No, sir.

"Q. And yet one of the white boys hollered, 'Let's run him out of town,' and two or three squibs popped near you, and you took out your gun, and fired immediately into this crowd of white boys?

"A. Yes, sir.

"Q. So all the justification in the world that you claim for firing these shots into this crowd of white boys was the remark that somebody made, 'Let's run him out of town,' and the popping of two or three firecrackers. That is the only justification you tell this jury you had for firing into this crowd?

"A. That was the only thing I had reference to.

"Q. And that was the only thing that made you shoot, was it?

"A. Yes, sir.

"Q. I believe you told Mr. Willis that you shot because you were scared?

"A. Yes, sir.

"Q. Did you have to shoot five times because you were scared?

"A. Really I don't know how many times I shot.

"Q. And you tell the jury you shot to scare them, when you were 30 feet away from the boys, and they were not coming near you at all?

"A. One of the boys were coming near me.

"Q. Who was he?

"A. One of them that was in here.

"Q. Which one?

"A. I don't know them by name.

"Q. One of these boys that testified?

"A. Yes, sir.

"Q. Which was it; a good sized boy?

"A. Yes, sir.

"Q. What color of his eyes and hair?

"A. I don't know.

"Q. How far was he from you when you shot?

"A. About as far as from here to that door.

"Q. About 15 feet?

"A. Yes, sir.

"Q. So, in order to scare him, you shot four or five times into a crowd of white boys?

"A. Yes, sir."

The defendant stated that he "got behind the tree for protection," thinking that perhaps some one of the boys would shoot at him. When asked why he kept on shooting after he fired the first time, he replied that he was "just scared and kept on pulling the trigger." He stated further that his pistol was outside his father's house, and he got it before the shooting when he came up town. Nothing was said to defendant by the boys before he went into Bolton's store. When he came out of the store, according to his testimony, he went across the street because the boys began to throw these squibs. These squibs, he states were 4 inches long, and three or four were thrown at him, coming in 7 or 8 inches of his head. This was in contradiction of all the other evidence on this point, which was that only one squib was thrown, and that one into the tree over defendant's head. This squib, according to a witness for the state, as stated supra, was 2 inches long. The witness was well aware that he was shooting towards a crowd of boys:

"Q. So you started shooting because you were scared?

"A. Yes, sir.

"Q. And you immediately pulled your gun and pointed to Bolton's store, and commenced shooting?

"A. Yes, sir.

"Q. And you knew there was a crowd of white boys across the street at Bolton's store?

"A. Yes, sir; right there in my sight.

"Q. And there was quite a crowd of them there?

"A. Yes, sir."

The witness, in response to the question, "Why he didn't run down the street towards the picture show, or Thompson's house, if he was afraid of the boys at Bolton's store," replied that he "didn't think that he had any right to run down the street." He added that he "wasn't aiming to shoot anybody; that he shot towards them, but wasn't aiming to hit none of them; that he was shooting above them."

When arrested by Mr. Godwin and Mr. Caldwell, defendant stated that "he had never done any shooting; that he was at the picture show." Later, when brought back from Roanoke for indictment, he stated to Dr. Breckenridge, and repeated this statement to Mr. Caldwell, that he had not done any shooting; "that he was at home at the time." He explained subsequently that he made these statements "because he was afraid of the mob; that he was scared, and thought the mob was coming up there and get him, that they had made an attempt before."

Defendant identified Tom Jones as the boy who had made the statement about running him out of town. The latter was put on the stand, and denied making the statement, or that he had heard it made. The defendant's testimony as to the remark supra was not corroborated by that of any witness either for him or for the state. The witness Jones also denied that he was approaching the defendant, or was in 15 feet of him. For the state it was proved by Ernest Dillon that before the shooting he heard the accused say: "Just let them throw one on me." This was 10 or 15 minutes before the shooting. The same witness heard the defendant say to Charley Hays, a colored boy, some little while before the pistol was fired, "Go on, and keep quiet," and stated that he (Thompson) was "then trying to smooth things over; keep things quiet." It may be added that, while no one heard the remark about running Thompson out of town, Garfield Brown (colored), a witness for the state, testifies that before the shooting, when most, if not all, of the colored boys were on the other side of the street from Bolton's store, some one in the direction of Bolton's store called out in general terms: "You had better go on down the street." That thereupon Thompson stopped. Witness adds:

"Somebody then threwed a squib over there, and it popped pretty close, and I never seen it, but it sounded like it was close to Edmond's head, but I never seen it."

The shooting immediately followed "towards the boys in front of Bolton's store."

For the purpose of a sufficient understand-

ing of the material features of this case, the foregoing is an adequate abridgment of the testimony submitted to the jury on behalf of the state, and of the prisoner. If there is anything in the case in the way of mitigation, or defense of the prisoner's action, it is contained in the foregoing recitals and excerpts from the record. The defendant in his petition assigns four errors:

First: The court erred in overruling petitioner's motion for a change of venue.

Second: The court erred in overruling petitioner's motion for a continuance.

Third: The court erred in giving instructions which permitted the jury to find a verdict of murder in the first degree.

Fourth: The court specifically erred in giving the following instruction for the commonwealth:

"The court instructs the jury that a mortal wound given with a deadly weapon in the previous possession of the slayer, without any, or upon very slight provocation, is prima facie willful, deliberate, and premeditated murder."

The motion for a change of venue was made on the ground that, by reason of local prejudice and excitement against the prisoner, it would be impossible for him to secure a fair and impartial trial in Botetourt county. This motion was brought before the court by a petition sworn to by the defendant. The petition recited defendant's arrest, the excitement and rage engendered in the town of Fincastle by his act, the first attempt to intercept the officers on their way to Roanoke, the second and successful attempt, the crowd that met prisoner and accompanying officers on their arrival at Fincastle, the shot at the prisoner, the prisoner's escape, and subsequent wounding and arrest, his removal to the city of Roanoke, and lodgment in jail in said city, the unsuccessful effort of his father to employ counsel for his son's defense in Botetourt county, though he was able and willing to pay a fee, or fees, and petitioner's inability on account of the alleged public feeling to secure affidavits in support of his petition. In connection with his petition, and to support the allegations of same, the prisoner put on the stand Shelby Caldwell, the deputy who arrested him, Turner McDowell, the clerk of the circuit court of the county, who assisted in the arrest, and Charles Thompson, father of the defendant. The deputy sheriff testified that after the arrest he and others started to Roanoke with the prisoner to avoid mob violence; that they avoided one crowd armed with pistols who fired a number of shots; that they were intercepted about 8 miles from Fincastle by another armed crowd who compelled them to return to Fincastle after one of the crowd had attempted to shoot the prisoner; that one of the crowd returned with them; that they were met at Fincastle on their return by a crowd of

people who gathered around with guns and pistols, but that he did not hear any threats, nor was any demand made on the officers to give up the prisoner, though one or more persons struck him; that he started to jail with prisoner, and on the way some one fired a shot at the prisoner, and in the confusion he escaped, to be later recaptured. On cross-examination witness stated that the prisoner was taken to Roanoke "to find out the extent of his wounds" inflicted at the time of recapture; that he had never seen a mob, or anything resembling a mob, since the night of the shooting, or heard of "anything resembling a mob." Further the witness stated that he thought he was familiar with public sentiment about Fincastle; that in his opinion sentiment was that the prisoner could have a fair and impartial trial in the county; that the prisoner was brought back from Roanoke on February 18, 1921, and had been in jail until March 2, 1921; that there had been no "demonstration of anything resembling a mob" since he had been brought back; that he did not think the then public sentiment towards the prisoner was bitter, or that there was any feeling on the part of the white people towards the colored people. On re-examination witness stated that he had not said that "there was no feeling against the prisoner," and that there had been nothing to allay sentiment against him, but "a little time"; that the prisoner was not brought back sooner from Roanoke because the doctor who was with them said that he could not stand the trip.

The father of the prisoner stated that, late in the night of the shooting, after the arrest and escape of the defendant, a crowd came to his house, and threatened to set fire to the house and burn him up "if he did not come clean"; that he did not know where the accused was, and told the crowd so; that about two weeks after the shooting he endeavored to secure counsel for his son at the Botetourt bar; that they told him that "the feelings that had been caused by this occurrence, and widespread relations with the sons who got wounded—I will be frank with you, Charles, I would rather not serve"; that the attitude of a number of white people had not been as friendly towards him since the shooting as before; that he did not know positively what the public sentiment against the boy was; that the people did not talk to him about it; that he had had a colored man summoned to testify as to alleged statements that he had heard as to what would be done with his son if he was not properly dealt with, and that he declined to go on the stand on the ground that he was afraid.

Turner McDowell, clerk of the county, testified to the arrest of the boy, the firing at the car, and the second crowd at Daleville toll gate which compelled them to return to Fincastle; that he reasoned with the crowd

against mob violence, and that at their insistence, accompanied with a display of fire-arms, they returned to Fincastle; that they put the prisoner down at the corner, 75 yards from the jail, as they had promised; that 25 or 50 people were there—he did not know how many; that there was a great deal of excitement, though he did not recall that any one said they would lynch him; that the crowd, when asked, said that “they did not know what they were going to do with the prisoner”; that he came into touch with a lot of people from different portions of the county in consequence of his office; that there was a decided feeling about the case; that he consulted about bringing the prisoner to Fincastle for several weeks before it was done, and it was decided that it was safe; that there was a very decided opinion about the prisoner, and possibly that carried some prejudice; that he knew the general sentiment, and that since the shooting everybody was glad that nothing happened to the man; that there had been no mob since the day of the shooting, and no threats against the prisoner, so far as he knew; that the general sentiment was for the law to take its course. The following is from the examination of this witness:

“By Mr. Willis:

“Q. Mr. McDowell, in regard to prejudice, or other feeling, there is a very intense interest in this county in this trial, is there not?

“A. There is in this section.

“Q. Isn't it true that on yesterday, when the grand jury met, and to-day, that the courtroom is absolutely jammed with people from all over the county?

“A. Yes, sir. This is the third case of this kind in the last three terms of this court, and people from all over the county have been here who were interested in these different cases.”

The state introduced several witnesses to controvert the allegations of the petition for a change of venue. Mr. Woodson, an attorney at Fincastle, testified that he had been approached by the father of the defendant to represent his son, and had declined; that he had many reasons for declining; that the state of local feeling entered into his action; that he did not want to defend prisoner either for compensation or by appointment of the court; that—

“His association for years with the people who were connected with the matter, their relatives and friends, and one of the boys being in his Sunday school class, made him feel that he could not take the case and do the prisoner justice.”

E. M. Stull, a citizen of Botetourt, living at Eagle Rock, 13 miles north of Fincastle, stated that his work put him in touch with the people of Eagle Rock and the country intervening between that place and the courthouse; that so far as he knew there was no

feeling of prejudice, or resentment on the part of the public towards the prisoner.

Mr. W. G. Noftsinger, a citizen of Troutville, 7 miles south of Fincastle, stated that he was generally acquainted with the people “around in Fincastle”; that there was no “more prejudice or feeling against defendant than there would be in any other section for the same crime with which he was accused”; that there was no particular prejudice against him; that he had never heard of any threats of violence against him in the Troutville section, and that so far as he knew the sentiment in his section was that they were willing for the law to take its course; that there was a good deal of excitement when the crime was committed.

Mr. Lackland, a member of the board of supervisors, testified that he lived near Buchanan, 10 miles from Fincastle, and had lived in that section all his life; that there was no prejudice or ill will on the part of the public towards the accused, and that there was nothing to indicate that the public was not willing for the law to take its course.

Mr. C. M. Lunsford, a member of the Fincastle bar, stated that he had been approached by Thompson, Sr. in the matter of representing his son; that he had declined; that his wife was in bed at the time, and fatally ill; that she had requested him to have nothing to do with the case, and for that reason he had declined employment; that he did not fear violence if he accepted, and that public sentiment would never prevent him from defending a man.

Dr. W. N. Breckenridge, the mayor of Fincastle, testified that he participated in the rearrest of the boy, and, as the boy had been severely shot; that he took him to Roanoke for an X-ray; that the accused had been badly frostbitten, and he went to see him several times in Roanoke in respect of medical treatment; that he believed when the accused was returned to Fincastle that his little boy could have brought him down and put him in jail; that there had been no demonstration since the night of the shooting; that before the prisoner was rearrested every man concerned agreed that the law should take its course; that two months and a half had elapsed since the shooting took place, and that he had talked practically to every man who had a son in the shooting, and they were all agreed to the above effect; that he thinks the feeling against prisoner existing at the time of the homicide had disappeared; that there was now a general feeling for the law to take its course; that there was no disposition so far as he knew on the part of anybody for any action other than for legal and orderly procedure; that the statement of defendant's father that there was feeling against his son was a mistake. On cross-examination witness stated that there was no “feeling of violence” against accused, but that he “did not

think there was any love for him"; that the people were very patient, and wanted the negro tried.

[1, 2] This completed the testimony for and against the motion for a change of venue, and the same was thereupon overruled. This motion in the instant case was not made on the ground of difficulty in obtaining jurors in the county free from exception. Hence various cases cited in the brief for the state are not in point, they having been held in the Uzzle Case, 107 Va. 919, 60 S. E. 52, not to apply to a motion for change of venue based on the ground that the degree of prejudice and excitement existing in a community against a prisoner is such that the fairness and impartiality of a trial conducted in the county concerned is endangered. But the mere apprehension of a prisoner that he cannot secure a fair trial in a county is not sufficient to support a motion for a change of venue. He must establish by "independent and disinterested testimony such facts as make it appear probable, at least, that his fears and belief are well founded." Moreover, the testimony should establish the condition of the public mind at the time of the trial. See Bowles' Case, 103 Va. 816, 48 S. E. 527, and Wormeley's Case, 10 Grat. (51 Va.) 672.

The affidavits in the Bowles Case set out a more striking and impressive situation than that relied upon to support a change of venue in the instant case. These affidavits represented that it was impossible for the prisoner to have a fair and impartial trial in Alleghany county; that he had been carried to Lynchburg jail because it was considered unsafe to carry him through Alleghany county; that on account of this feeling it was considered unsafe to carry him to said county, save under the protection of the military forces of the state; that the judge of the court refused to try him in the presence of the military; that then a public meeting was held to give assurance to the officers that the prisoner could be brought to Covington for trial; that this feeling against the prisoner continued to be so bitter and widespread that predictions were then being made and threats uttered that, if the jury should find the prisoner guilty of less than murder in the first degree, the latter would be lynched before he could be carried from the courthouse to the jail. A change of venue was refused by the trial court, and this action was sustained by this court.

The following is taken from the syllabus in Looney's Case, 78 S. E. 625, 115 Va. 921:

"A motion under" the Code "for a change of venue on the ground of prejudice against accused is addressed to the discretion of the trial court, and its ruling will not be disturbed unless it plainly appears that the discretion has been improperly exercised."

In the case *ubi supra* the motion for a change of venue was based on the ground

that great prejudice and ill will existed against defendant throughout the entire county on account of the homicide, and of numerous other difficulties in which accused had been involved. Moreover, that he had been informed of threats to lynch him in the event of his acquittal. The affidavits of 5 persons were submitted in support of the motion, and of 20 persons in opposition. The trial court overruled the motion, and this action was sustained.

[3] A motion for a change of venue on the ground of prejudice against the accused depends on conditions existing at the time of the trial, and the trial court acting on a motion for change of venue must of necessity be allowed a wide discretion. Looney's Case, 115 Va. 921, 78 S. E. 625.

The motion in question was made under Code, § 4914, which empowers the trial court for good cause shown to order a change of venue on the motion either of the commonwealth, or of the accused.

"To support a motion for a change of venue, the accused must show such facts as will make it appear probable at least that his fears and belief are well founded." Wormeley's Case, 10 Grat. (51 Va.) 658, 672.

See, also, Wright's Case, 114 Va. 872, 77 S. E. 503, to the effect that "facts and circumstances should be established satisfying the court that a fair trial cannot be had."

In Uzzle's Case, *supra*, this court overruled the trial court, and awarded a change of venue on the following state of facts: The military forces had been sent to the scene of the crime in the first instance. When later the sheriff was sent to Norfolk for the prisoners for trial, a posse was furnished him to protect the accused persons from mob violence, and to preserve public peace. The excited state of feeling continued down to and through the trial of the prisoner. After conviction of the accused, he had to be confined in the jail of another county, pending his efforts to have the judgment of the trial court reversed. Under such circumstances, this court considered that good cause for a change of venue had been shown.

[4] In the instant case it appears that on the night of the shooting the public feeling in the town of Fincastle was at high tension, and at different periods of the night the life of the accused was really in danger on the part of some members of the excited crowds. Still there does not appear to have been any agreed, concerted movement to take defendant's life. The crowd at Daleville that caused the automobile containing the prisoner and accompanying officers to return to Fincastle was armed, and large enough to carry out at that point any generally concerted plan of lynching. The same was true of the still larger and more excited crowd that met the automobile on its arrival in Fincastle. The members of that crowd, acting in concert,

could easily have taken the prisoner by force from the deputy sheriff, and executed him. Some such purpose may have existed on the part of individuals in the crowd, but it appears to have been an uncertain, half-formed purpose, so far as the aggregate of the mob was concerned. This appears not only from what actually took place in the course of the sheriff's progress with his prisoner from the automobile to the jail, but from a statement made by some one in the crowd that "they did not know what they were going to do with him" (i. e., the accused). The exciting happenings described in the testimony, supra, occurred over two months before the trial, and followed hard upon the killing of one boy and the wounding of three others. Excitement and angry feeling under such circumstances is readily understood, and it may be said to be almost inevitable. The witnesses who testify as to the feeling existing at the time of the trial are agreed that the general sentiment was that "the law should take its course." The prisoner was taken from Roanoke to the Fincastle jail two weeks before his indictment and trial. The mayor of Fincastle testifies that in his opinion his little son would have been a sufficient guard to insure the prisoner's safe delivery on that occasion. Testimony of witnesses outside of Fincastle is to the effect that no threats of violence have been made against the prisoner, and that there was no evidence of prevailing prejudice or ill will. The correct view of the situation was probably given by Mr. McDowell, when he stated that there was an intense interest in the county in the trial, and that the general sentiment was one of relief that nothing "had happened" to the accused on the night of the homicide.

In view of the precedents cited and of the evidence in the instant case, this court is not prepared to say that the trial court exercised its discretion improperly when it overruled the motion for a change of venue. The assignment of error in this respect is not sustained.

The second assignment is to the action of the trial court overruling the motion for a continuance, which was made by counsel for the prisoner, and is in the following terms:

"We wish to move the court for a continuance of this case. The boy was just indicted on yesterday, and we have had great difficulty in getting the names of the witnesses he has given us to talk to, to get information from them. We had hoped the court would see fit to grant a change of venue. We will say further that the defendant has been unable to tell us much about his case. I have been told that he had a shot in the back of his neck that has affected his speech in some way. He gave us the names of certain witnesses, and they seem to be very reluctant to tell us anything at all."

No evidence was submitted in support of this motion. It does not appear when the

prisoner had employed counsel, or for what length of time they had been acting for him prior to the time of the trial. Nor does it appear that—

The "prisoner did not have a fair and impartial trial, that he did not have all persons present as witnesses who knew anything that was favorable to him, or that his counsel did not make as good a defense for him as he could have done if his case had been continued."

[5] "A motion for a continuance is addressed to the sound discretion of the court, under all the circumstances of the case; and, whilst an appellate court will supervise the action of the trial court on such motion, it will not reverse unless such action was plainly erroneous." *Hite's Case*, 96 Va. 493, 31 S. E. 896.

The following is taken from the syllabus in *Wright's Case*, 114 Va. 872, 77 S. E. 503, as pertinent to the motion under consideration in the case in judgment:

"Where the facts" in a case "were few and simple, and public interests demanded a speedy trial, the overruling of a motion for a continuance and proceeding to trial within 48 hours was not an abuse of the trial court's discretion."

[6] Section 8 of the Constitution provides that a man accused of crime shall have a speedy trial by an impartial jury of his vicinage.

Code, § 4893, was enacted to afford the speedy trial guaranteed by the Constitution. This section provides that, when an indictment is found against a person for felony, the accused, if in custody, or if he appear according to his recognizance, shall, unless good cause be shown for a continuance, be arraigned and tried at the same term.

It is not considered that upon the situation presented the action of the court overruling the motion for a continuance was plainly erroneous.

[7, 8] The third assignment of error is that the court gave instructions which permitted the jury to find a verdict of murder in the first degree. The evidence of the commonwealth justified such instructions. Any willful, deliberate, and premeditated killing is murder in the first degree. The law infers malice from such a killing, and holds that a man must be taken to intend that which he does, or which is the immediate or necessary consequence of his act. Moreover, as frequently stated by this court, it is not necessary that the intent to kill should exist for any particular length of time prior to the actual killing to constitute a willful, deliberate, and premeditated killing. It is only necessary that such intent should come into existence at the time of the killing, or at any previous time. Many precedents to the above effect might be cited, but see *Horton's Case*, 99 Va. 853, 38 S. E. 184.

[9] The fourth assignment of error is to instruction No. 2, given at the instance of the commonwealth. This instruction is as follows:

"The court instructs the jury that a mortal wound given with a deadly weapon in the previous possession of the slayer, without any, or upon very slight provocation, is *prima facie* willful, deliberate, and premeditated murder."

The precise error assigned is that this instruction does not include the following, as a concluding sentence:

"And throws on the prisoner the necessity of showing extenuating circumstances."

This instruction is almost invariably given with the foregoing sentence as a conclusion, and it is not perceived why this was not done in the instant case. Indeed, it may be said that the trial courts are not infrequently at fault in failing to give precisely in their usual form approved instructions that in a measure have become standardized. The omissions that are sometimes made and the additions that are sometimes inserted in such instructions are the fruitful cause of trouble in many instances, and of reversals in others. In the case in judgment, the prisoner was not prejudiced by the omission of the words, "and throws on the prisoner the necessity of showing extenuating circumstances." As given, the instruction correctly propounded the law. When the jury was told that a mortal wound given under the circumstances stated was *prima facie* willful, deliberate, and premeditated murder, they were apprised that this conclusion or derivation from the evidence for the state, being *prima facie*, was susceptible of rebuttal. Such rebuttal could come from the prisoner alone, and the burden of affording same rested upon him. The failure to insert the omitted clause does not relieve the state from the necessity of affording any evidence that would be required if it had been inserted, nor does its omission deprive the accused of the opportunity to establish extenuating circumstances.

Plaintiff in error cites the case of *State v. Hertzog*, 55 W. Va. 74, 46 S. E. 792, as authority for the contention that under the circumstances indicated, *supra*, it was error to omit the words, "the burden was cast upon the accused of proving extenuating circumstances." But such was not the decision in the *Hertzog* Case. The real vice of the instruction in that case, and the one upon which the decision of the court rested, was the concluding words, "As they appear from the case made by the state, Grant G. Hertzog is guilty of murder in the first degree." The appellate court held that the instruction told the jury that the accused was guilty of murder in the first degree, and was therefore erroneous. "Fairly construed," said the court, "the instruction has no other mean-

ing." Of course, such an instruction was improper.

The instructions prayed by the accused were given as asked. They fully and fairly presented the defendant's theory of the case, correctly stated the burden upon the state, and called attention to the reasonable doubt to which a defendant is entitled on all material points. Instruction 5 for the accused advised the jury of the humane principle of law that a homicide committed in a sudden heat of passion, upon reasonable provocation, and before time is given for the passions thus excited to cool, is not murder, but voluntary manslaughter.

After a careful scrutiny of the evidence, and mature consideration of the questions of law presented in the instant case, we do not find in this record any errors to the prejudice of the defendant, and the action of the trial court must be affirmed.

Affirmed.

(181 Va. 456)

COFFMAN'S ADM'R v. COFFMAN et al.

(Supreme Court of Appeals of Virginia. Nov. 17, 1921.)

1. Wills §488—Extrinsic evidence admissible in aid of interpretation of ambiguous will.

Extrinsic evidence in aid of the interpretation of wills cannot be used if the will is plain and unambiguous, but where the language is susceptible of more than one interpretation, resort may be had to such evidence, subject to certain limitations.

2. Wills §487(2)—Extrinsic evidence of circumstances concerning testator's property, family relationships, etc., admissible, but not his declarations of intention.

Extrinsic evidence of facts and circumstances concerning testator, his property and family, claimants under the will, and their relation to him, etc., is admissible, in cases of disputed interpretation, to ascertain the meaning of the words as used and understood by testator.

3. Wills §487(3)—Evidence of testator's declarations of intention inadmissible, except to identify persons or things.

Evidence of testator's declarations of intention is inadmissible, except to show which of two or more persons or things equally well described was meant by him.

4. Wills §487(2, 3)—Declarations of intention to exclude collateral kindred held inadmissible, but evidence as to family relationships and attitude toward them admissible.

In a suit involving the construction of a will, where testator's sisters and brother, who were not mentioned, claimed, as heirs, property as to which they claimed he died intestate, testator's declarations as to his intent to exclude them from any share in his estate were inadmissible, but evidence showing his situa-

tion, particularly the character and value of his property, his family relationships, and his attitude toward claimants was admissible to determine his probable intent.

5. Wills §706—Exclusion of extrinsic evidence as to testator's attitude toward heirs claiming property alleged to have been undisposed of held not prejudicial.

In a suit involving the construction of a will, where testator's sisters and brother, who were not mentioned, claimed, as heirs, property as to which they claimed he died intestate, exclusion of evidence as to testator's declared purposes and intention was not prejudicial to claimants, whether or not the court intended thereby also to exclude evidence as to testator's situation and attitude toward them, where such evidence went no farther than to show his affection for his wife, the principal beneficiary, the number, names, and situation of his next of kin, the amount and kind of his property, and that owned by the other parties to the litigation.

6. Wills §487(2)—Testimony as to testator's ill will toward collateral kindred not relied on, where conflicting.

In a suit involving the construction of a will, where testator's sisters and brother, who were not mentioned, claimed, as heirs, property as to which they claimed he died intestate, testimony as to testator's ill will toward them which was so conflicting as to be of no value in arriving at his intention should not be relied on, since extrinsic facts, when necessary to aid in the construction of a will, should be clearly and satisfactorily established.

7. Wills §449—Presumption against partial intestacy intensified where general residuary clause used.

The legal presumption is that testator intended to dispose of his entire estate, especially where he has used a general residuary clause, the courts being decidedly inclined against adopting a construction which leaves him intestate as to a part of his estate.

8. Wills §449—Will construed to vest all of testator's estate in wife, subject to payment of specific legacies.

Under a will bequeathing to testator's wife, in one sentence his entire interest in the farm on which they lived, and all bonds, notes, and money as long as she lived, and, in the next, \$500 to each of her two nieces after her death, and the remainder of his effects to her to dispose of as she thought proper, it was testator's intention to give his entire interest in the farm to his wife, without limitation, and to limit her interest in the money, notes, and bonds for the sole purpose of designating a fund out of which the two legacies were to be paid, the two sentences, when read together, harmonizing perfectly with what testator might naturally have been expected to do, in view of his affection for his wife, the fact that his collateral kindred were already well provided for and advanced in years, and that none of them were referred to in the will, and avoiding the intestacy which would otherwise result.

9. Wills §616(1)—Under absolute power in devisee to dispose of remainder of testator's effects, entire residue of estate passes despite prior devise of life estate.

Where a life estate is expressly given, language of other parts of the will will not be construed to enlarge such estate into an absolute estate, unless it is very clear, but if, by other terms in the same instrument, it is manifest that devisee is vested with absolute power to dispose of the subject at his will, he is not a mere life tenant, but absolute owner, so that, under a will bequeathing testator's entire interest in a farm and all his bonds, notes, and money to his wife as long as she lived, and specific legacies to two nieces, a subsequent provision leaving to the wife the remainder of his effects, to dispose of as she thought proper, expressed in reasonably clear and natural words testator's intention that the entire residue of the estate, real and personal, in possession and in remainder, should pass to his wife.

10. Wills §575—Word "effects" as used in residuary clause of will held to embrace real estate.

Though the word "effects" ordinarily refers to personal property, such term, as used in a will bequeathing to testator's wife his entire interest in a farm, and all his bonds, notes, and money as long as she lived, with legacies to two nieces after her death, and the remainder of his "effects" to his wife to dispose of as she thought proper, may fairly be construed to embrace real estate, the meaning of the term being determined by the context and surrounding circumstances.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Effects.]

Error to Circuit Court, Page County.

Suit between Rebecca S. Coffman and others and H. M. Coffman's administrator, to construe a will. From the decree, the administrator brings error. Reversed and remanded.

Geo. N. Conrad, of Harrisonburg, for plaintiff in error.

Wm. F. Keyser and H. V. Strayer, both of Luray, for defendants in error.

KELLY, P. This suit involves the construction of the will of H. M. Coffman, deceased, which, omitting the formal parts, was as follows:

"I give and bequeath unto my beloved wife, Rebecca S. Coffman, my entire interest in the farm that we now live on and all bonds, notes, and money that I possess or may be coming to me as long as she, Rebecca, lives. After her death I will and bequeath unto Martha M. Zirkle, Maud O. Zirkle, five hundred dollars each, making \$1,000 divided between the two of my nieces for living with us and comforting us during our sad bereavement in losing our dear son, the remainder of my effects I leave with my wife to dispose of as she thinks proper."

The controversy in the case is between Mrs. Rebecca S. Coffman, the widow, who claims the whole estate, subject to the payment of the two legacies of \$500 each, and the heirs and distributees of the testator, who claim that he died intestate as to certain of his real and personal property. The lower court sustained the latter claim.

The will was dated May 5, 1900, and the testator died in January, 1920. He left no children or descendants, his only child, a son having died in 1898, but he was survived by his widow, Rebecca S. Coffman, three sisters, Mary A. Coffman, B. Frances Coffman, and Mrs. Martha E. Modesitt, and one brother, David J. Coffman, who were his heirs and distributees.

The testator and his wife were old people. The two unmarried sisters and the brother, a man of unsound mind, were likewise advanced in years, all of them being over 70 years of age. The married sister was considerably younger. The latter, with her husband, S. H. Modesitt, owned and resided on a valuable farm which had formerly belonged to her father, and which she had acquired by deed from her brothers and sisters. The two unmarried sisters and the unmarried brother lived on the same farm, were comfortably situated, and their support was reasonably well provided for.

The testator and his wife had resided for nearly 40 years prior to his death on a farm which had been conveyed to them jointly shortly after their marriage. The consideration for that conveyance was \$3,205, \$1,000 of which was paid for Mr. Coffman by his mother, \$2,000 of which was paid for Mrs. Coffman by her father, and the residue of which, \$205, the grantees perhaps paid jointly. Subsequently Mrs. Coffman, out of money realized from her father's estate, contributed \$3,000, which went into the place in the way of improvements. Mr. Coffman was a good farmer, and his wife was industrious and frugal. They kept the farm in good condition, continuing to improve it, and that fact, together with the advance in the market price of farming land, made it worth perhaps \$20,000 at the time of the testator's death. When the will was written the property of the testator consisted of his interest in the farm and of a considerable amount of personal property, made up of household furniture, farming implements, live stock, money, notes, bonds, and stock in various corporations. At the time of his death his indebtedness was very small, and the amount of his personal property of every kind had been increased to an aggregate amount of something more than \$9,000. He had also acquired subsequent to the execution of the will two tracts of mountain land of somewhat uncertain value, but worth perhaps \$2,000.

Before undertaking to construe the will,

we may dispose of a preliminary question raised by one of the assignments of error, and discussed at considerable length in the oral and written arguments in this case. A good deal of testimony was introduced for the purpose of showing that the testator did not want any of his property to go to his brother and sisters. The evidence relied on for this purpose was of two kinds or classes: First, evidence of a general nature tending to show that he did not feel kindly towards them; and, second, evidence of particular alleged declarations by him that he would exclude them or had excluded them by his will from any share in his estate. Some of this evidence of both classes was objected to, and some of it was introduced without objection. In rebuttal of such evidence, without waiving objection thereto, the heirs produced witnesses who testified to the contrary, some of them being offered to show that the testator was on good terms with his brother and sisters, and others to show that they had heard him make declarations indicating that he intended his estate to go to his own relations in blood.

In a memorandum opinion the learned judge of the circuit court says:

"Declarations of intention, etc., not admissible to aid in the construction of will. Objections of that character sustained."

[1] It is contended that the court excluded "all evidence relating to the situation, and declared purposes and intentions of the testator in the disposal of his property." We do not understand that the court went this far. It excluded evidence of the testator's declarations of intention, but not evidence of his situation, and this ruling was in accord with the law as applied to the facts of this case. The proper use of extrinsic evidence in aid of the interpretation of wills may be regarded as reasonably well settled. It cannot be used at all if the will is plain and unambiguous, for "it is not permitted to interpret that which has no need of interpretation." But there are many different ways of expressing the same thought; there are many varying shades of meaning which a group of words may have; men differ much in their knowledge of lexicography and grammar, and in their facility of expression; and the necessary result is that in many cases language is to be found in a will which appears to be susceptible of more than one interpretation. In such cases resort may be had to extrinsic evidence, subject to certain reasonably well defined limitations.

[2, 3] Professor Charles A. Graves made a valuable contribution to the law on this subject in a paper which he read at the annual meeting of the Virginia State Bar Association in 1893, published in volume 4 of the Bar Association Reports, page 183 et seq.; also published in 14 Va. Law Reg. p. 913 et seq.

He divides the extrinsic evidence which may be offered in aid of the interpretation of a will into two classes, and says:

"Of these the first consists of material facts, and these may concern the testator, his property, his family, the claimant or claimants under the will, their relations to the testator, etc. The second class, on the other hand, is confined to direct evidence of the testator's actual intention, such as his declarations of intention, his informal memoranda for his will, his instructions for its preparation, and his statements to the scrivener or others as to the meaning of its language. And this division of extrinsic evidence not only exists in the nature of the case, but is of the utmost practical importance in the interpretation of wills, as the rules for the admissibility of the two kinds of evidence are not the same. Let us call the first kind the facts and circumstances, and use the expression 'declaration of intention' to describe all extrinsic statements by the testator as to his actual testamentary intentions—i. e., as to what he has done, or designs to do, by his will, or as to the meaning of its words as used by him."

Having made this classification, Professor Graves proceeds to show that evidence of the first kind, "the facts and circumstances," is always admissible in a case of disputed interpretation, saying:

"For the object of interpretation is to ascertain the meaning of the words as used by the testator; what the words represented in his mind; what he understood to be signified by them; and for this purpose it is indispensable that the expositor should know the situation of the testator; the state of his family and property; his relations to persons and things; his opinions and beliefs; his hopes and fears; his habits of thought and of language; in a word, that the interpreter should identify himself with the testator as to knowledge, feeling, and speech, and thus, scanning the words of the will from the testator's point of view, decide as to their meaning as used by him."

In support of this conclusion the learned author cites *Smith v. Bell*, 6 Pet. 74, 8 L. Ed. 322, *Colton v. Colton*, 127 U. S. 300, 8 Sup. Ct. 1164, 32 L. Ed. 138, *Hatcher v. Hatcher*, 80 Va. 169, and *Miller v. Potterfield*, 86 Va. 876, 11 S. E. 486, 19 Am. St. Rep. 919; to which we may add, from a number of recent Virginia decisions to the same effect, *Stark v. Berry*, 118 Va. 706, 711, 88 S. E. 68, and *Penick's Ex'r v. Walker*, 125 Va. 274, 278, 99 S. E. 559. In the last-named case we said:

"The primary consideration and rule of construction is to determine the intention of the testator from the language which he has used. If the meaning of that language is plain, the will must be given effect accordingly. This rule is familiar and elementary, and to it all others are subordinate and subservient. If there be doubt as to the meaning, then the auxiliary or subordinate rule to be first applied, and the one of most usefulness and importance, is for the court to place itself as

With reference to the second of the two classes of extrinsic evidence dealt with in the paper by Professor Graves, "testator's declarations of intention," he says:

"There is but one situation in which the judicial expositor has the right to invoke the aid of declarations of intention, and that is where the words in the will describe well, but equally well, two or more persons or two or more things, and such declarations are offered to show which person or which thing was meant by the testator—i. e., by the words in the will as used by him."

This situation he describes as a case of "equivocation," and his conclusion with respect thereto is fortified by citation of authorities, and is followed by a most instructive and interesting discussion and explanation of what will constitute equivocation, and the reasons why the evidence of the testator's declarations, as contrasted with evidence of the facts and circumstances surrounding him is so narrowly restricted in its use.

[4] In the instant case there is no "equivocation" involved, but there is a use of language which fails to make the testator's meaning altogether clear, with the result that the widow on the one hand and the heirs and distributees on the other, represented before us by able and reputable counsel, take diametrically opposing views as to what the testator meant by the language which he used. It follows that his declarations, so far as they purported to describe the intention he meant to express in the will, were inadmissible, but that evidence of facts showing his situation, including in particular the character and value of his property, his family and family relationships, the claimants under the will, and his attitude with reference to them, was admissible for the purpose of determining his probable intent. And this, we think, is just what the lower court held. He expressly excluded the declarations, but it is clear that he did not mean to exclude the other class of extrinsic evidence, the facts and circumstances. Indeed, his memorandum opinion necessarily shows that he did consider these facts and circumstances, for he specifically states that "the beneficiary of the residuary clause (widow) is manifestly the prime object of the testator's bounty," and that "his two sisters and insane brother (are) already well provided for in life and are advanced in years." These statements are necessarily based upon extrinsic evidence.

[5, 6] Whatever may have been the view of the trial court, however, upon the questions we have discussed, the result in this case is the same. The declarations of intention were properly ruled out, and the balance of the extrinsic evidence, when duly appraised

and weighed, cannot be held to have gone further than to show his affection and solicitude for his wife, the number and names and situation of his next of kin, and the amount and kind of his property, and of that owned by the other parties to this litigation. As to his alleged ill will for any of his collateral kindred, there was a good deal of evidence on both sides, and it is too conflicting to be of value in arriving at his intention. When the necessity arises to go outside of a will and call in the aid of extrinsic facts, such facts ought to be clearly and satisfactorily established. If the evidence with respect to them leaves the court in serious doubt, they ought not to be relied on, and in this case it does leave the court in doubt as to whether the testator felt unkindly towards any of the parties who are here claiming adversely to the widow.

We come now to the interpretation of the will. The circuit court held: First, that the widow took a life estate in the testator's interest in the farm, leaving him intestate as to the reversion; second, that the widow also took a life estate in the bonds, notes and money, the remainder in which, after the payment therefrom, of the two legacies of \$500 each to Martha and Maud Zirkle, would go to the testator's distributees, thus leaving him intestate as to such remainder; third, that the corporate stock did not pass under the description of "bonds, notes and money," but went to the widow as "effects" under the residuary clause; and, fourth, that the mountain land was not embraced in the term "effects" in the residuary clause, and that as to this land also the testator died intestate.

It must be admitted that there is much to be said in support of each of the holdings above outlined, but upon a careful view of the language of the will as a whole, viewed in the light of the material surrounding facts and circumstances, and of the legal presumption applicable to the case, we have reached the conclusion that, as to holdings 1, 2, and 4 above noted, the circuit court was in error.

[7, 8] We start out with the legal presumption that the testator intended to dispose of his entire estate. There is a strong presumption against partial intestacy, intensified where, as here, the testator has used a general residuary clause, and the courts have for a long time inclined very decidedly against adopting any construction of wills which leaves the testator intestate as to a part of his estate, unless that result is absolutely unescapable. *Prison Association v. Russell*, 103 Va. 563, 576, 49 S. E. 966. It is further to be especially observed that the testator's wife in this case was, as stated by the learned judge below, manifestly the prime object of his bounty. She had contributed largely by her management and frugality, and by the contribution of her own funds, to her husband's success in improving the farm and in

accumulating other effects. They had lost their only child. His affection for his wife is apparent both from the extrinsic evidence and from the terms of the will itself. No other beneficiary is named in the will except two of her nieces (not his), who had comforted them in the loss of their son, and to whom he gave \$500 each. His married sister was well off, and his two unmarried sisters and his brother, a man of unsound mind, were well provided for, and were advanced in years. None of these were referred to in the will, either by name or by any general designation.

The dispositive clause of the will contains only two sentences. The first is so phrased and punctuated as to indicate a purpose to give the widow only a life estate in his interest in the farm and in the bonds, notes, and money. It is this:

"I give and bequeath to my beloved wife, Rebecca S. Coffman, my entire interest in the farm that we now live on and all bonds, notes, and money that I possess or may be coming to me as long as she, Rebecca, lives."

Standing alone, this sentence is perhaps most fairly and naturally to be interpreted as giving only a life estate to the widow in the property therein mentioned, with no provision as to a reversion in any part thereof. There is a contention, however, and we do not think it is altogether without plausibility, that in view of the affection and solicitude of the testator for his wife, and of the history of their ownership and management of the farm, the sentence standing alone might be susceptible of the meaning that the testator was giving to his wife absolutely his "entire interest in the farm," and that the words "as long as she, Rebecca, lives" were intended to place a limitation only upon the bonds, notes and money. Whether this latter view of the sentence, standing alone, is tenable or not, it seems to us quite clear, when both sentences of the will are construed together, that the testator did mean to give his entire interest in the farm to his wife without limitation, and merely to limit her interest in the money, notes, and bonds for the sole and single purpose of designating a fund out of which the two \$500 legacies were to be paid. The second sentence is as follows:

"After her death I will and bequeath unto Martha M. Zirkle, Maud O. Zirkle, five hundred dollars each, making \$1,000 divided between the two of my nieces for living with and comforting us during our sad bereavement in losing our dear son, the remainder of my effects I leave with my wife to dispose of as she thinks proper."

These two sentences, when read together, can be harmonized perfectly with what the testator might naturally have been expected to do, and with his total omission of any reference, either specific or general, to his brother and sisters, and can, without resort to any

strained construction, be made to avoid the intestacy which otherwise results, and which we think the testator clearly did not contemplate.

The will, viewed as a whole, in the light of the facts and circumstances proper to be considered, shows a complete testamentary plan by which Mr. Coffman intended to give everything he had to his wife, subject only to the requirement that at her death the two legacies should be paid out of the money, notes and bonds.

It is earnestly contended, and much authority is cited in alleged support of the contention, that the limitation to a life estate in the widow by the first sentence is not enlarged to an absolute estate by anything to be found in the second sentence; and, further, that the word "effects" in the residuary clause cannot be made to embrace real estate.

[9] The general rule undoubtedly is that, where an estate for life is given in express terms, the language in other parts of the will relied on to enlarge that into an absolute estate ought not to be given such effect unless the language is very clear indeed. See note by Judge E. C. Burks, *Farris v. Wayman*, 1st Va. Law Reg., p. 219. This, however, is merely the counterpart of, if not indeed an exception to, the equally well settled rule stated by Judge Burks in the note just cited as follows:

"It cannot be doubted that, though property is devised or bequeathed to one for life, even in the most express terms, yet if, by other terms in the same instrument, it is manifest that the devisee or legatee is invested with absolute power to dispose of the subject at his will and pleasure, he is not a mere life tenant, but absolute owner; for there can be no better definition of absolute ownership than absolute dominion."

In this case we are not prepared to say that the testator did give a life estate to his wife in express terms. He did it in express terms, of course, if he did it at all, but can we say that the words as used by him cannot fairly be interpreted as expressing an intention on his part to give to his wife his "entire interest in the farm?"

But if it be conceded that the only fair interpretation is that the language of the first sentence expressly and plainly gave only a life estate in the farm to the widow, then the first rule above mentioned must yield to the second. The will says: "The remainder of my effects I leave with my wife to dispose of as she thinks proper." We think this language in the light of the circumstances, and taken with the context, must be held to express in reasonably clear and natural words just what might have been perhaps more clearly expressed if the will had in more technically correct and accurate language described the entire residue of his estate, both

real and personal, in possession and in remainder.

[10] But it is said, and the lower court expressly so held, that the word "effects" does not embrace real estate. We do not take this view of the case. The general rule is that effects means personal property, but that depends on the context, the subject-matter and the circumstances. The definition of the word, as given in Webster's New International Dictionary, is:

"Goods; movables; personal estate; as, the people escaped from the town with their effects; sometimes used to embrace real as well as personal property."

To illustrate: If we should say, "Mr. A. took all of his effects out of his house before it was destroyed by fire," we would, of course, be understood to refer to personal property. On the other hand, if, knowing that Mr. A. owned the house in fee-simple, we should say, "Mr. A. died, leaving all of his effects to his wife, except two legacies of \$500 each to his nieces," we would with equal certainty be understood to mean that the house and its contents would go to the widow, notwithstanding the fact that the house was real estate.

A good many authorities have been cited to show that the word "effects" ordinarily refers to personal property, and these authorities go far enough to hold that the term has acquired a certain technical meaning of that kind, but none of them in any way impinge upon the further general rule that, whether the term includes the one or the other or both species of property must be determined by the context, and by the surrounding circumstances. This will appear from the authorities principally relied upon to support the decree complained of. See, for example, note to *Andrews v. Applegate*, 12 L. R. A. (N. S.) 661; 8 Words & Phrases, p. 2320; 40 Cyc. 1527, and note; Schouler on Wills and Administration, § 509, and cases cited. We do not deem it necessary to quote from these authorities, or to multiply, as we might do, citations of others to the same effect. No new question or principle of construction is involved.

We have no doubt that the testator, by the general and sweeping residuary clause, intended to give the widow everything he had, except the \$1,000 given to her nieces; and this, we think, under the circumstances, may fairly be said to be the meaning of the words used by him.

This conclusion renders it unnecessary for us to discuss certain other questions which would present themselves if we took a different view of the meaning of the testator's will, including in particular the cross assignment of error filed by the appellees.

For the reasons stated, the decree complained of will be reversed, and the cause

remanded to the circuit court for further proceedings to be had therein not in conflict with the views herein expressed.

Reversed.

(131 Va. 302)

RICHARDSON v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Nov. 17, 1921.)

1. Criminal law \S 982—Court does not lose control over accused under suspended sentence.

The rule that a court cannot, after adjournment of the term, alter or amend a final judgment or order because it becomes irrevocable upon such final adjournment, has no application to an order suspending sentence of an accused, especially in view of Act March 16, 1918 (Laws 1918, c. 349) \S 2.

2. Constitutional law \S 74—Statutes conferring power on courts to suspend a sentence valid.

Statutes which confer a power on court to suspend sentences, such as Act March 16, 1918 (Laws 1918, c. 349) \S 2, do not contravene constitutional provisions vesting the pardoning power in the executive.

3. Criminal law \S 273, 982—Court cannot by suspending sentence excuse accused from penalty.

The judge of a trial court may not enter into a binding agreement with a prisoner to excuse him forever from the penalties of his crime if he pleads guilty by giving him a suspended sentence, the purpose of a suspended sentence being to afford accused only an opportunity to repent and reform; nor can attorneys for the commonwealth make a contract with an accused which will bind the trial judge, and one who pleads guilty can thereafter only ask for mercy.

4. Criminal law \S 978—Statute permitting suspended sentences liberally construed.

Act March 16, 1918 (Laws 1918, c. 349) \S 2, providing for probation and a suspension of sentences in criminal and juvenile courts, is highly remedial and should be liberally construed.

5. Criminal law \S 982—Trial court may revoke suspension of sentence.

In cases in which court fails to prescribe a period of probation definitely, the alternative clause of Act March 16, 1918 (Laws 1918, c. 349) \S 2, separates and limits the power of revocation of order suspending sentence to "the maximum period for which the defendant might originally have been sentenced to be imprisoned," and after the expiration of such period the court loses jurisdiction.

Error to Corporation Court of Radford.

John Richardson was convicted for violation of the prohibition statute. From an order annulling an order suspending sentence, he brings error. Reversed.

R. L. Jordan, of Radford, and John S. Draper, Jr., of Pulaski, for plaintiff in error.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazile, Second Asst. Atty. Gen., for the Commonwealth.

PRENTIS, J. John W. Richardson, who was prosecuted under the name of John Richardson, assigns error in the final judgment of the trial court committing him to jail for 30 days for a violation of the prohibition statute.

These facts appear: On November 10, 1919, the accused having pleaded guilty, the following order was entered:

"This day the commonwealth by its attorney and the accused by his attorney, by and with the consent of the attorney for the commonwealth and the accused pleaded guilty to the indictment against him; whereupon the court imposed a fine of \$50 and fixed the period of his confinement in this city jail at 30 days. But the court doth suspend said jail sentence, during good behavior of the accused, and upon the payment of said fine and the taxable costs of this prosecution, the accused is discharged from custody until the further order of this court."

Thereafter, he was indicted in the circuit court of the county of Pulaski for unlawfully transporting ardent spirits, to which charge he also pleaded guilty on September 14, 1920, and a fine of \$50 was imposed on him therefor. Following this second conviction, a rule was issued in the corporation court of the city of Radford on December 14, 1921, requiring him to show cause why the suspension of execution of sentence under the original conviction of November 10, 1919, should not be revoked and he be required to serve 30 days in jail in accordance with the original conviction. To this rule there was an answer, denying the facts suggested in the rule, and a demurrer to the evidence. Thereupon the court, without passing upon any of the questions thereby raised, entered the following order February 14, 1921:

"This day came again the commonwealth by its attorney, and the defendant John W. Richardson, by his attorney, and the court without passing upon the sufficiency of the evidence submitted by the commonwealth in support of the rule and the motion for commitment thereunder, upon such evidence, and without passing upon the sufficiency of the answer of John W. Richardson to the rule, and without passing upon the demurrer to the evidence offered in support of the rule, which questions and motions were submitted to the corporation court of the city of Radford, Va., at its December, 1920, term, is of the opinion and doth decide that the court was in error in suspending the jail sentence imposed upon the defendant, John W. Richardson, by its order of November 10, 1919, and that the court

was without jurisdiction or power to suspend said jail sentence fixed in said order of November 10, 1919; the court, therefore, doth now annul and set aside so much of the order entered November 10, 1919, as suspended the jail sentence provided for in said order; and doth now order, direct and command the sergeant of the city of Radford, Va., to take charge of the defendant, John W. Richardson, and commit him to the jail of the city of Radford, Va., there to serve a period of 30 days, the time fixed and provided in the order of November 10, 1919, to which ruling of the court the defendant excepts."

To this order this writ of error was allowed.

It is certified as a part of the facts that—

Upon the first indictment there was a jury trial at the October, 1919, term of court, at which trial the jury disagreed, and at the succeeding November term the accused "agreed by and with the commonwealth's attorney, and the consent of the court to be obtained, that if the court would suspend the jail sentence attached to a conviction under said indictment, and would impose only the minimum fine of \$50, that he, the said John W. Richardson, would plead guilty to the indictment. This agreement was in good faith entered into between the defendant and the commonwealth's attorney, and the agreement was approved by the court, in that the court consented to impose the minimum fine and suspend the said jail sentence. Upon the agreement and upon those conditions, the said John W. Richardson withdrew his former plea of 'not guilty' and pleaded guilty to the indictment upon which he had once been tried, and upon which trial a jury had disagreed as to whether he was guilty or not."

It is observed that in the judgment of February 24, 1921, committing the accused to jail, the court bases its action upon the opinion that it was without jurisdiction or power to suspend the execution of the jail sentence imposed by the order of November 10, 1919, and for that reason only annulled and set aside the suspending order.

[1] Our attention is directed to the lack of power or authority in a court, after the adjournment of the term, to alter or amend a final judgment or order, because it becomes irrevocable upon such final adjournment, and it is claimed that, for this reason the court had no jurisdiction or power to revoke the suspending order and commit the accused to jail under the original conviction. This assignment is without merit, not because the doctrine is not fully recognized and enforced in Virginia, but because in this case there was no final judgment, and the execution of the sentence was suspended and the accused discharged from custody until the further order of the court. When the execution of a sentence is thus suspended, under the Virginia statute, the case remains pending and the court does not thereby lose its control over the accused or his case. Indeed, the

statute presently to be quoted expressly confers upon the court in such cases ample jurisdiction over the accused and control over such orders, with power to revoke them, and to require such suspended sentences to be fully executed, if exercised within the period prescribed by law.

The question presented depends upon the proper construction of section 2 of the act approved March 16, 1918 (Laws 1918, c. 349), providing for probation and suspension of sentences in criminal and juvenile courts. This section reads thus:

"After a plea or a verdict of guilty in any court having jurisdiction to hear and determine the offense with which the prisoner at the bar is charged, if there be circumstances in mitigation of the offense, and if it appear compatible with the public interest, or in any case after a child has been declared delinquent or dependent, the court may suspend the imposition or the execution of sentence, or commitment and may also place the defendant on probation under the supervision of a probation officer, during good behavior, for such time and under such conditions of probation as the court shall determine. The court may subsequently increase or decrease the probation period and may revoke or modify any condition of probation. While on probation the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation, or may be required to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had, or may be required to provide for the support of his wife or others for whose support he may be legally responsible.

"The court may revoke the suspension of sentence and cause the defendant to be arrested and brought before the court at any time within the probation period, or within the maximum period for which the defendant might originally have been sentenced to be imprisoned, whereupon, in case the imposition of sentence has been suspended, the court may pronounce whatever sentence might have been originally imposed; and in case the execution of the sentence has been suspended, the original sentence shall be in full force and effect, and the time of probation shall not be taken into account to diminish the original sentence. In the event that any person placed on probation shall leave the jurisdiction of the court without the consent of the judge, or having obtained leave to remove to another locality violates any of the terms of his probation, he may be apprehended and returned to said court and dealt with as provided above."

[2] The power of courts to suspend sentence, this phrase being frequently employed as meaning either delay in the imposition of a sentence for crime or the staying of execution of the sentence imposed, has been much discussed. The weight of authority appears to be that, under the common law, courts do not possess the power to delay the

imposition or execution of sentences for crime, except temporarily, as, for instance, in order to give time for motions for new trial, writs of error, or to determine the precise sentence to be imposed. It is, however, generally held that statutes which confer such power are valid, and that they do not contravene the constitutional provisions vesting the pardoning power in the executive. Among the cases upholding the validity of such statutes are *People ex rel. Forsyth v. Court of Sessions*, 141 N. Y. 288, 36 N. E. 886, 23 L. R. A. 856; *People ex rel. Sullivan v. Flynn*, 55 Misc. Rep. 639, 106 N. Y. Supp. 925; *People v. Stickle*, 156 Mich. 557, 121 N. W. 497; *State v. Mallahan*, 65 Wash. 287, 118 Pac. 42; *Ex parte Glannini*, 18 Cal. App. 166, 122 Pac. 831; *Belden v. Hugo*, 88 Conn. 500, 91 Atl. 369; 8 R. C. L. 247 et seq.; note to *State v. Abbott*, 87 S. C. 466, 70 S. E. 6, 33 L. R. A. (N. S.) 116; *Fuller v. Mississippi* (Miss.) 57 South. 6, 39 L. R. A. (N. S.) 243; note to *Re Hart*, 29 N. D. 38, 149 N. W. 568, L. R. A. 1915C, 1171.

In *Ex parte United States*, 242 U. S. 27, 37 Sup. Ct. 72, 61 L. Ed. 129, L. R. A. 1917E, 1178, it is held that in the absence of statutory authority, the federal courts have no power to suspend the execution of sentences indefinitely, but the power of Congress to confer that authority by statute is expressly recognized.

In this state the matter is regulated by statute, and nothing has been suggested which leads us to doubt the constitutionality of such statutes. Code 1919, § 4925, expressly recognizes the power of the General Assembly to enact them in this language:

"Except where authorized by statute, no court, judge or justice shall suspend the entry or execution of a judgment in any criminal case."

Possibly the idea that such statutes constitute an invasion of the pardoning power of the governor is based upon an erroneous view of the true effect of suspending execution of a sentence. By the very term used it is not a pardon, excuse, immunity, or relief, from the punishment, but a mere suspension, or postponement, of its execution.

[3] Much of the argument in this case is based upon the assumption that the judge of a trial court may enter into a binding agreement with the prisoner to excuse him forever from the penalties of his crime. We think this a misconception, and that if judges are in the habit of making such contracts or bargains with convicted persons, the practice should be discontinued. The commonwealth, in the administration of the criminal law, desires the reformation of the criminal, and in the promotion of that purpose authorizes the probation of certain criminals and the suspension of the imposition or execution of their sentences, so that they may

not be deprived of their liberty and the power to earn their subsistence, or be morally corrupted by association with hardened criminals frequently found in the jails, but may take their places and perform some useful work in the community. When a trial judge suspends a sentence, however, he does not make a contract with the accused, but only extends to him the opportunity which the state affords him to repent and reform. It is the free gift of the commonwealth, and not a contract to relieve him from the punishment which fits his crime. In such cases the attorney for the commonwealth may properly confer with the accused and his attorney, and in appropriate cases agree to recommend to the judge the exercise of such leniency, but the appropriate action must be at last determined by the judge himself, though he will generally adopt such recommendation as satisfying the ends of justice. By this statute the commonwealth, in its benevolent effort to reform its criminals, extends, through the trial court judges, to those overtaken in their faults, a mercy which is free, but which does not rest upon contract. Courts ordained to administer justice, and charged with that duty, cannot properly make terms with crime, though under this statute they may, as a matter of grace, postpone or withhold the imposition of the prescribed penalty for the reasons indicated in the statute and upon conditions thereby prescribed. The attorneys for the commonwealth can make no contract with an accused person which will bind the judge, and the judge can make no agreement which will bind either himself or his successors in office. When the accused pleads guilty, he can thereafter only ask for mercy, and if he receives it, it comes to him as a gift and not by purchase.

It is also urged in this case that the commitment of the accused to jail in this proceeding is invalid because the maximum period for which he might originally have been sentenced had elapsed before the rule was issued, and that therefore the court had no power under the statute to revoke the suspension of sentence. This presents a more difficult question.

[4, 5] The statute is highly remedial and should be liberally construed, but it is most important that the General Assembly shall clarify it by amendment. Clarifying its obscurities as best we can, it is manifest that the authority either to suspend the imposition or the execution of sentence is committed to the trial court judges. The draftsman of the act appears to have had in mind that in the discretion of the judge there might be two alternatives: (1) That the convicted person might be placed on probation; that is, discharged on condition that he would be of good behavior, either with or without supervision and without any express limitation of

the period during which this probation should continue. (2) There might be such a suspension of the sentence either with or without the supervision of a probation officer for a definite period until the further order of the court. The court is thereby given ample power, not only to determine the conditions to be imposed in each case, but is expressly given power to revoke the suspension and cause the defendant to be arrested and again brought before the court for punishment. This ample power of revocation, however, with its limitations, are expressed in the statute in these words:

"The court may revoke the suspension of sentence and cause the defendant to be arrested and brought before the court at any time within the probation period, or within the maximum period for which the defendant might originally have been sentenced to be imprisoned."

While the precise meaning of this clause is not perfectly apparent, its purpose to limit the period within which the suspension order can be revoked is manifest. It is clear that within such limited period the court is expressly authorized to revoke the suspension and impose the penalty, but not thereafter. This prescribed and limited period is expressed in the alternative; that is, the court may revoke the suspension either at any time within the probation period, or within the maximum period for which the defendant might originally have been sentenced to imprisonment. The clause would more clearly express its meaning if the word "or" were followed by the words, "if no probation period has been prescribed then." With this interpolation the meaning of the statute would be perfectly clear. The Legislature clearly could not have intended to make the jurisdiction of the trial court to revoke the suspension a matter of uncertainty in any particular case. The intention was to prescribe and limit the power of the court. As in this case the trial court did not prescribe a definite period during which the suspension of the sentence should continue, unless we adopt the conclusion suggested, we would be driven to conclude that the court might retain its jurisdiction over the defendant and hold him subject to its order indefinitely. While the court may fix the period of probation, a careful consideration of the language used leads us to the conclusion that in those cases in which the court fails to prescribe such period of probation definitely, the alternative clause of the statute operates and itself limits the power of revocation to "the maximum period for which the defendant might originally have been sentenced to be imprisoned."

The maximum period for which the accused could be imprisoned for this crime appears to be six months. In this case it ap-

pears that more than six months had elapsed after the original suspension of the sentence, November 10, 1919, and before the date of the issuance of the rule, December 14, 1920. As this maximum period had expired before the rule was issued, we are of opinion that the court exceeded its power in assuming further jurisdiction of the case. At any time within six months, under the statute, the court had plenary power to revoke the order of suspension and impose the penalty of imprisonment, but not after the expiration of that maximum period.

If the court fails to prescribe the period of probation in the suspending order, then the statute operates, determines the period, and limits the jurisdiction of the court to revoke the suspension to the maximum period for which the accused could originally have been imprisoned.

It follows therefore that we think the court erred in taking jurisdiction of this case after the expiration of the six months from the date when the sentence was suspended. The order will therefore be reversed, and the rule dismissed.

Reversed.

(131 Va. 496)

FOLTZ v. CONRAD REALTY CO.

(Supreme Court of Appeals of Virginia. Nov. 21, 1921.)

1. Judgment \S 184—Essentials of notice in proceeding by motion stated.

Great informality is allowed in proceeding by motion for judgment, and the notice need only give the opposing party a sufficient idea of the grounds of action relied on and state a good cause of action with requisite certainty.

2. Judgment \S 184—Notice of motion need state only legal effect of part of contract relied on.

Notice of motion for judgment need not set out the contract relied on, but only the substance and legal effect of so much of it as is required for statement of plaintiff's case.

3. Contracts \S 324(2)—Recovery sought for misconduct rendering complete performance impossible is one growing out of contract.

Recovery of damages sought for defendant's misconduct rendering impossible complete performance by plaintiff of his contract with defendant for performance of which plaintiff was to receive certain payments is a recovery growing out of the contract.

4. Brokers \S 40—Paragraphs of contract not inconsistent as to commissions.

Two paragraphs of a contract between broker and owner of lots as to commissions held not inconsistent; one being applicable if all the lots are sold by the broker; the other where part are sold by the owner.

5. Contracts ¶143—To be construed as a whole.

In construing a written contract the entire instrument is to be considered.

6. Brokers ¶87—Amount of recovery under contract where after sales of part of lots owner refuses to complete them stated.

Where contract between lot owner and broker places a price on each lot, the sum aggregating \$5,000 and agrees to pay the broker as commission the amount obtained in excess of that sum, and provides that, if any lots remain at the close of the sale, the owner will take them back at the price placed on them, the broker having made contracts of sales of over a third of them, each for more than the price fixed, and not being in fault, and being wrongfully prevented by the owner from completing the sales, is entitled to recover of the owner an amount equal to the excess of the prices in the contracts of sale over the prices fixed by the owner.

7. Evidence ¶448—Conversations of parties before executing contract as to its meaning not admissible.

A written contract may not be varied by evidence of conversation between the parties before its execution as to its meaning.

8. Brokers ¶63(1)—Generally entitled to commissions where sale negotiated by him falls through owner's fault.

Generally a broker is entitled to commissions where a sale negotiated by him in conformity to the agreement falls through by fault of the owner only.

9. Brokers ¶61(4)—Owner not relieved of liability for commissions because of defect in title not known by broker.

That the owner's reason for refusal to complete sales negotiated by a broker, by giving the stipulated good warranty deed—that is, one with general warranty—is that he had discovered his title to be defective, being a special warranty deed only, does not relieve him of liability for commissions, provided the broker proceeded in good faith to secure purchasers, not knowing of the defect when he contracted with the owner or when he performed the work.

10. Brokers ¶61(4)—Not entitled to commissions where not telling customers of information of defect in title unless showing title good.

Where a broker, employed to sell building lots into which his principal's tract was divided, was before doing any work told by a reputable lawyer whom he had consulted, that the deed to his principal omitted parts of the tract, he was put on notice, which he was bound to communicate to prospective purchasers, and not having done so, he could not recover commissions, though he made contracts of sale, unless he showed the title was good; the principal having refused to give a general warranty deed on discovery that his deed contained only a special warranty.

Error to Circuit Court, Page County.

Proceeding by motion for judgment by the Conrad Realty Company against R. P. Foltz. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Will A. Cook, of Madison, and H. V. Strayer, of Luray, for plaintiff in error.

John H. Downing, of Front Royal, and Wm. F. Keyser, of Luray, for defendant in error.

SAUNDERS, J. This is a controversy concerning commissions on a sale of land by the Conrad Realty Company for R. P. Foltz a citizen of Page county, in this state. The sale is alleged to have been made pursuant to the authority of a written contract between the parties, whereby it was agreed that the realty company should offer for sale for the plaintiff in error (defendant below) a tract of about 12 acres, situated in the suburbs of Stanley, a small village in above county. The contract provided that the realty company should put the property in first-class condition at its own expense, thoroughly advertised the sale, and furnished an experienced auctioneering force, and a band of music on the day of sale. Other features of the contract will be referred to in the discussion of the questions in issue.

After subdividing the tract into building lots, 65 in number, and incurring in this respect, and for advertising and other preliminaries, considerable expense, the realty company advertised the lots for sale on November 1, 1919. Twenty-one lots were sold on that date. At that stage, and on account of the interruption caused by a heavy and protracted rain, it was agreed that the sale of the remaining lots should be postponed. The purchasers paid one-third of the purchase money for their respective lots, and executed bonds or notes as required for the deferred payments. An agreed price had been placed upon these lots before sale. After the sale of said lots, aggregating \$3,342.50, defendant was called upon to accept the amount of the agreed price of the lots sold. He refused to do this, and declined to give receipts, execute deeds, or to sanction a sale of the remaining lots, although the realty company advised him that they were ready to go ahead and complete the sales according to the terms of the contract. Being unable to make further sales, or effect a settlement of sales actually made, owing to the attitude of the defendant, the plaintiff (the realty company) filed a notice of motion in the circuit court of Page county against the defendant for \$1,067.50, the same being the difference between the sales price of the lots sold (\$3,342.50) and the contract price (\$2,285) agreed on between the parties. The motion was demurred to, and the demurrer sus-

tained in part and overruled in part. An amended notice was then filed, which was also demurred to, but this demurrer was overruled. Thereupon issue was joined, evidence taken, and under the instructions of the court the case was submitted to the jury, which returned a verdict for the full amount claimed. At the instance of the defendant, a writ of error was awarded by one of the judges of this court. The plaintiff in error will be hereafter referred to as the defendant, and the defendant in error as the plaintiff.

The defendant assigns several errors:

First. "The court erred in not sustaining the demurrers to the original, and the amended notice of motion, respectively."

Second. "The court erred in striking out the evidence of Cane, Foltz and Pool, relating to conversations between these witnesses and the plaintiff in reference to the meaning of the contract of employment both before and after its execution, and in giving plaintiff's instructions."

Third. "The court erred in striking out the evidence of R. F. Leedy, and the letter introduced as a part thereof."

Fourth. "The court erred in refusing defendant's instructions Nos. 2, 3, 4, 5, and 6."

Fifth. "The court erred in allowing Chas. Conrad to be recalled 'after all but one of the instructions were in, and permitting him to testify that the plaintiff was a duly licensed land broker.'"

Sixth. "The court erred in overruling defendant's motion to set aside the verdict, and grant a new trial on the grounds that said verdict was contrary to the law and the evidence."

The grounds of demurrer assigned to the first notice of motion were: (1) That the notice "did not set forth the contract of employment"; (2) that it did not aver facts showing a full performance of the plaintiff's duty, and a performance of all it undertook to do under the contract.

The grounds assigned to the second notice were the same as the foregoing, and the following additional ground:

"The amended notice is not sufficient in law in this, that the said notice on its face, shows that the plaintiff did not perform the contract alleged."

[1-3] The court sustained the first demurrer in so far as to require allegations of performance, but refused to require the plaintiff to set out the contract in full. The procedure in this case was by motion for judgment, a procedure destitute of formalities. All that is required in the notice is to give the opposing party a sufficient idea of the grounds of action relied on, and to state a good cause of action. Great informality is allowed, but the notice must state a case, and must have the requisite certainty. Burks' Pleading and Practice (2d Ed.) pp. 223, 224.

It is not necessary to set out in a notice, in *hæc verba*, the instrument relied upon, but so much of the same as is essential may

be set out according to its legal effect. This principle is stated in *Buster v. Wallace*, 4 H. & M. (Va.) 82, as follows:

"In declaring on a covenant, it is sufficient to set out the substance and legal effect only of such parts of the deed as are necessary to entitle the plaintiff to recover."

See, also, *Reynolds v. Hurst*, 18 W. Va. p. 654, and cases cited, and 9 Cyc. Contracts, p. 714.

In the instant case the notice sufficiently advised the defendant of the amount claimed, the nature of the claim, and the ground on which it was made, and of the instrument under which the claim was asserted. While the notice does not set out the contract, it does set out according to its legal effect so much of the same as is required for a statement of the plaintiff's case. The objection that the notice was "insufficient in that it shows on its face that the plaintiff did not perform the contract alleged" is not well taken. Recovery is not dependent in all cases upon a complete performance of a contract. The defendant's misconduct may render a complete performance impossible. In such a case the party not in fault is entitled to recover damages. This will be a recovery growing out of the contract. The notice afforded the following details: (1) That the plaintiff claimed a specific sum of money; (2) that it was due as compensation for selling certain lots for the defendant; (3) that the work was done under, and pursuant to, a designated contract between the parties, giving the legal effect of that portion of the contract relating to compensation for sales made by the plaintiff. If more details were required, a bill of particulars should have been demanded. The demurrers were properly overruled.

[4] Defendant insists that clauses 4 and 5 of the contract are conflicting, rendering that portion of the instrument "ambiguous or uncertain, and on that account the evidence of the defendant and his witnesses, Cane and Pool, relating to conversations between these witnesses, and the plaintiff, before and after its execution," should have been admitted on the trial. These clauses are as follows:

"Fourth. The party of the first part does agree to pay to the party of the second part at the close of the sale all excess above \$5,000.00 in cash of the gross receipts of the sale, as evidenced by contracts signed by the purchaser arising from the sale.

"Fifth. The party of the first part agrees to place a minimum price on each lot or tract, so that the sum total will aggregate \$5,000.00, and agrees to pay to party of the second part — per cent. commissions in cash at the close of sale, and 100 per cent. of excess over and above the price placed on any particular tract or lot."

There is no conflict between sections 4 and 5, and no ambiguity patent, or latent, nor do these sections "mutually destroy each oth-

er, and render the instrument void." Section 4 contemplates a complete execution of the contract, and a sale of all the lots. In that event the party of the first part is to receive the agreed price on the lots—that is \$5,000—and the party of the second part is to receive the excess over the agreed aggregate. Should the aggregate sales price be equal to or fall below the agreed price, the party of the second part would receive nothing. In that respect the contract was one of hazard, quoad the realty company. Section 5 is not altogether clear with respect to the 100 per cent. of the excess over and above the price paid to the party of the second part. Manifestly, however, it does not mean that in event the lots were completely sold the realty company should receive the excess, if any, over the agreed values of \$5,000, and in addition the full amount of the excess of the sale price of each lot over the agreed valuation of same. Conceivably the lots might bring over \$5,000, say, for illustration, \$7,000. This would give the realty company \$2,000 as commissions. Some of the individual lots might bring more, others less, than the agreed valuation. The aggregate excess of the lots selling above the agreed valuation might be, say, \$2,500. Manifestly, as stated supra, the realty company would not be entitled to this \$2,500, in addition to the \$2,000, of excess over the agreed aggregate valuation of \$5,000. The explanation of the provision for the payment to the realty company of the excess over the price placed on any particular tract will be found in the following extract from section 7 of the contract:

"Sec. 7. * * * In the event the party of the first part sells, or conveys any part of the lots hereinbefore mentioned before the expiration of the agreement, then the party of the first part agrees to pay to the party of the second part, the commission as set forth in this agreement."

Should the party of the first part exercise his right under section 7 to sell a lot or lots before the expiration of the agreement, selling the same for an amount exceeding the valuation price, the realty company would be entitled to the excess, since in such case the said company is to receive "the commission as set forth in this agreement," and obviously this could not refer to anything but the provision for "100 per cent. of the excess over and above the price placed on any particular tract or lot" contained in section 5.

[5, 6] It is the function of the court to construe a written contract, looking to the entire instrument in the discharge of that function. In the case in judgment the trial court appears to have properly construed the instrument in question, when in view of the facts relating to the breach of the contract

it instructed the jury that the amount of recovery to which the plaintiff was entitled, in the event they believed from the evidence that the plaintiff sold certain lots embraced in the contract, and the purchasers executed the bonds, and paid the cash payment required by the contract, was such a sum as would equal the aggregate of the excess realized on the sales, over and above the prices placed on the lots. The contract did not in express language provide the terms of compensation of the party of the second part in the event that a complete sale under the contract was made impossible of execution by the improper and illegal conduct of the party of the first part. But it would seem to follow from the contract, and particularly from the provisions of sections 4 and 8, when a sale of the lots was in progress, and the party of the second part was not at fault, and the lots already sold, constituting about one-third of the lots listed, had brought one and all a price in excess of the agreed valuation (a considerable number of them as much as 50 per cent. in excess of such valuation), and under such circumstances the sale was not completed by reason of the untenable attitude of defendant, that the proper amount to which the plaintiff would be entitled in an action for compensation would be the amount indicated by the instruction of the trial court. The valuation of the lots sold was \$2,285, and of the unsold lots \$2,715. Section 8 of the contract provides that, should any lots remain at the close of the sale, the party of the first part should take them back at the price placed upon them. This section would apply both when some of the lots offered were not taken by the bidders, and in a case in which the failure to complete a sale was due to the party of the first part. Hence in the case in judgment, under the ruling of the court, the defendant would take back 44 unsold lots, valued at \$2,715 so that he would have these lots, and, if he allowed the sales made to stand, bonds and cash aggregating \$3,342.50, subject to a deduction in favor of the plaintiff for the excess amounting to \$1,057.50. The trial court properly construed the contract in the respect complained of.

[7] The defendant claims that prior to the execution of the contract of employment with the realty company he had a conversation with Chas. Conrad, president of said company, in relation to the meaning of same. He sought at the trial to prove this conversation, and thereby establish said meaning by his own testimony and that of the witnesses Cane and Pool: in other words, he sought to give a meaning to the contract other than that to be derived by legal construction. This was an impingement upon the rule forbidding the use of parol evidence to vary a written instrument. Subsequent to the alleged conversation, the parties entered into a

valid written agreement. The well-established principle is that, where there is such an agreement, the whole sense of the parties is presumed to be contained in it, and parol evidence is not admitted to vary or contradict same. There are some definite exceptions to this rule, but, upon the facts presented in the instant case, this is not one of them. It is not considered that the court erred in excluding the testimony of Foltz and others relating to the above conversation with Conrad.

[8] The plaintiff rests his claim to commissions in the instant case upon the ground that it had discharged its undertakings under the contract, fulfilling the same in all respects, and that the failure to complete the sale and sell all of the lots was due to the misconduct of the defendant.

Conceding that this was all of the case, it would undoubtedly be true that the default of the defendant would not defeat the plaintiff's right of recovery. The general principle is that, if a broker performs his part of a contract empowering him to sell the lands of a principal, and does all that he is required to do, and the sale is not consummated by reason of the default of the principal, the broker is entitled to his commissions, as the principal cannot wrongfully interfere with the broker and escape liability. See 43 L. R. A. note p. 606.

When a broker has effected a bargain and sale by a contract which is mutually obligatory on the vendor and the vendee, he is entitled to his commission whether the vendor chooses to comply with, or enforce the contract, or not. *Love v. Miller*, 53 Ind. 294, 21 Am. Rep. 192.

If the testimony adduced on behalf of the broker shows that he produced a purchaser acceptable to the owner, able and willing to purchase on the terms offered by the owner, and that the failure to consummate the sale was due entirely to the failure of the owner to enter into a binding contract with such purchaser, the broker will still be entitled to his commissions. *Woodall v. Foster*, 91 Tenn. 195-197, 18 S. W. 241; *Chatham v. Yarbrough*, 90 Tenn. 77, 15 S. W. 1076.

To the same effect is the following: The refusal of a principal to accept a purchaser found by the broker will not defeat the broker's right to commissions where such purchaser is ready, willing, and able to purchase on the principal's terms. *Wright v. Brown*, 68 Mo. App. 577-583; *Chipley v. Leathe*, 60 Mo. App. 20.

The effect of the foregoing rulings is that, once a broker negotiates a sale which conforms to the agreement of the parties, it rests with the vendor to complete the transaction and make the deed, and if he fails to do so, and the sale falls through by reason of the failure of the principal, the broker,

being without default, is entitled to his commissions. The precedents are in full accord with reason in respect to the plaintiff's right of recovery upon the facts supposed supra.

[9] The defendant, however, insists that he did not arbitrarily refuse to carry out the contract between him and the realty company, but declined to do so in good faith, for the reason that he had discovered his title to be defective. Even that defense, if supported by the facts, was not sufficient to defeat the broker's right to his commissions, provided the latter had proceeded in good faith to secure purchasers who were willing and able to purchase the property, upon the terms of the contract. When a vendor undertakes to make a good title to prospective purchasers, and a broker in conformity with the contract proceeds to secure purchasers, and tender them, but the vendor, in consequence of supervening information as to his title, ascertains that the same is bad, and on that account declines to make conveyances, such action on his part will not defeat the broker's right to compensation, the latter being in nowise at fault.

When the title of the principal is defective, so that the sale cannot be carried out, the general doctrine is as follows:

"If the broker has acted in good faith, performed his contract, and done all that he was bound to do, and the sale with the purchaser procured by the broker is not carried out, or falls through owing to the defective title of the principal (the vendor), the broker will be entitled to his commissions in the absence of evidence showing that the broker had knowledge of such defect." (Italics supplied.) See cases cited in note 1, 43 L. R. A. 609.

When the broker has done all that he is bound to do under the contract, and secured purchasers, he is entitled to his commissions, and his right to compensation does not depend upon the validity or invalidity of the principal's title. The broker is not responsible for the condition of the principal's title, and it is no part of his duty, as a general proposition, to look to the same.

If the broker does not know of defects in the principal's title at the time he enters into the contract, or at the time he performs the work, he has the right to assume that the title to the property is free from infirmity, and in such case he is entitled to commissions. *Berg v. San Antonio Street R. Co.*, 17 Tex. Civ. App. 291, 42 S. W. 647, 43 S. W. 929; *Gibson v. Gray*, 17 Tex. Civ. App. 646, 43 S. W. 922; *Peet v. Sherwood*, 43 Minn. 447, 45 N. W. 859.

The agent by his agreement to negotiate a sale assumes no obligation or responsibility in reference to the title, and his right to commissions is not dependent upon the contingency of the principal's title being good. Ger-

hart v. Peck, 42 Mo. App. 644, 651; Davis v. Morgan, 96 Ga. 519, 520, 23 S. E. 417.

Hence defendant's refusal to make general warranty deeds to the purchasers who complied with the terms of the sale conducted by the plaintiff, on the ground that he had discovered that his deed was a special warranty deed, and that "he could only give the kind of deed he had, i. e., all the right and title the boom company had," was a failure on his part to carry out the written contract, which provided for "a good warranty deed to all purchasers complying with the terms of the sale." Defendant's default in the above respect would not relieve him from liability to the plaintiff for commissions on account of sales made. To permit him to do so would be to allow him to take advantage of his own wrong to the prejudice of another who was without fault.

So far we have found no contentions of the defendant sufficient to constitute a defense to the plaintiff's claim.

[10] But there is another assignment of error, which presents a more serious question, to wit: That the plaintiff was aware that the plaintiff's title was defective, or at least had information which would put him, or any intending purchaser, on inquiry, and, with this information in his exclusive possession, had proceeded to conduct the sale and receive bids.

On the trial of the case the defendant put Col. R. F. Leedy, a lawyer of Luray, Page county, on the stand. This witness was allowed to testify as follows:

"Am a practicing lawyer at Luray. Conrad, not less than six days, nor more than ten days, after the contract in question was entered into, asked me to advise him as to the title of the 12 acres of land mentioned in these proceedings. I advised him by letter October 23d, giving my opinion of title, that it was bad, and gave reasons. Conrad had asked me to be present at the sale, and, as I was a candidate for nomination in the primaries at that time, make a speech, but I didn't attend the sale."

The defendant asked the witness to produce and read to the jury the letter or report on the title of the 12-acre tract, of date October 23d, referred to in his evidence. Said letter is as follows:

"Oct. 23, 1921.

"C. C. Conrad, Harrisonburg, Va.—Dear Charley: I have looked into the R. P. Foltz land title, and find that his conveyance, while prescribing a boundary of some 14 acres and 125 poles, giving the metes and bounds, only attempts to convey certain lots within the same, viz, blocks 29, 30, and 33, and lots 501, 502, 503, 508, 507, 509, and 510, in block 31, and lots 201 to 206, 207, 208, 209, in block 36 in section 1, upon a certain map entitled 'Plan of Stanley, Page County, Va.' It will be seen, therefore, that while Mr. Foltz holds the entire inclusive survey in possession, there are a number of lots within it to which he took no title. They

are so interspersed through the survey that there are bound to be many lots in a new layout as to which there would in some cases be part, and possibly in some cases all, without title in Mr. Foltz. It is easy to see, therefore, that I could not be present at such a sale, as my presence would be construed as some sort of sanction of the validity of the title. I am sorry that such is the case, as I should be very glad to serve you at any time.

"Sincerely yours."

The court refused to permit this letter to be read. Later, on motion of the plaintiff, the court struck out Col. Leedy's evidence. To this action of the court, and also to its action refusing to allow the letter to be read, the defendant duly excepted.

The court refused to admit the letter of Col. Leedy, and ordered his testimony to be stricken out, doubtless upon the theory that neither his testimony or report established that the title of the defendant to the lots in question was bad. The determination of that point was a question for the court. It might well be that, after all, the judgment of Col. Leedy in respect of Foltz's title was at fault, and upon a judicial determination such title would be ascertained to be valid. But this was not the precise question intended to be raised by the testimony of Col. Leedy and the introduction of his letter. This evidence was designed to affect the plaintiff and its right to commissions by showing that it had obtained information which, as a matter of propriety and good faith, it should have submitted to intending purchasers. It was not matter that necessarily established the invalidity of defendant's title, but it was matter that would give any intending purchaser pause. Indeed we may feel assured that, if this report had been divulged on the day of sale, there would have been no purchasers. In the judgment of a reputable attorney, the title of the defendant was so defective that "there were bound to be many lots in a new layout, as to which there would in some cases be part, and possibly in some cases all without title in Mr. Foltz." So impressed was the attorney with the invalidity of the title that he was unwilling to be present at the sale, lest his presence would be construed as "some sort of sanction of the validity of the title."

The general rule stated supra that a broker is not deprived of his right to commissions by the supervening ascertainment of defects in a principal's title does not apply when the broker has notice of the defective title. If at the time a broker makes sale of property he has knowledge of or information of defects in the title, and by reason of those defects the sale cannot be made effective, he is not entitled to his commissions. See Hoyt v. Shipherd, 70 Ill. 309, 311. Once in the possession of such information, it is the broker's

duty to submit same to an intending buyer, and, before offering him as a purchaser to ascertain if the latter would take a possibly defective title. If upon communication of such information the purchaser would still be willing to buy and take the title agreed to be given by the principal's contract, for instance, a deed with general warranty, the broker would be entitled to his commissions from the principal, if the subsequent failure to make a deed is the fault of the latter.

"Where * * * the broker brings to the principal a customer who is ready, able, and willing to purchase the land upon the principal's terms, and no sale be effected, the broker is entitled to his commissions, provided the failure to make sale result from the fault of the principal." *Brackenridge v. Claridge*, 91 Tex. 527, 44 S. W. 819, 43 L. R. A. 600.

It is essential to the broker's right of commission in such cases that he himself is not at fault, and that he does not know of the defect at the time of finding a customer, but he is under no implied obligation to find out whether the owner actually has the title which he claims. 9 C. J. p. 629.

When brokers undertake to sell land with knowledge of defects in title, or reason to believe that such defects exist, it is their duty to disclose the fact to the prospective purchaser.

"A broker is not entitled to a commission on the purchase price of land when the sale fails because of a defect in the title of which defect the broker had notice, or was charged with notice at the time he entered into the contract to sell the land." *Montgomery v. Amsler*, 57 Tex. Civ. App. 216, 122 S. W. 307.

See, also *McKinnon v. Hope*, 118 Ga. 462, 45 S. E. 413.

In the case in judgment the realty company undertook to investigate the state of the defendant's title. In the course of this investigation it secured information which was certainly sufficient to put it on inquiry, and which it was as much its duty to make known to the bidders on the day of the sale as it was the duty of the broker in the case supra to communicate to a prospective purchaser the broker's knowledge of an outstanding lease. Honesty and fair dealing required that the knowledge which the realty company had secured by its independent inquiry, and which certainly would have seriously affected the bidding, should have been promulgated for the benefit of prospective

bidders. The realty company claims that it is entitled to commissions on the ground that it has secured purchasers ready and willing to purchase the principal's lots on the principal's terms, as set out in the written agreement, and that any failure of consummation was the fault of the principal. But the broker has not secured such purchasers as the law contemplates. The purchasers were entitled before bidding to the knowledge that the broker possessed, whether that knowledge was of an actual defect of title, or information that would put a bidder on inquiry before proceeding further.

In the instant case the court rejected the testimony relating to the broker's information touching the defendant's title, refused all the instructions prayed by the defendant, and gave a single instruction, practically directing the jury to find for the plaintiff. The court should have received the testimony of Col. Leedy and his report on the title in question to his client, the realty company, and, if no further evidence was submitted in that connection, should have instructed the jury that, if they believed from the evidence that the company possessed such knowledge relating to defendant's title as would have put a reasonably prudent man on inquiry, and had failed to communicate such knowledge to the bidders, it could not recover the commissions claimed. Of course, it would have been competent for the plaintiff to submit further evidence on the above line, and undertake to secure a ruling from the court that upon the whole the title which was the subject of the adverse report was a good and valid one. Such a ruling from the court would have left the broker in a position to recover commissions in spite of its failure to communicate the information in its possession. For the error of the court in respect of rejecting the testimony of the defendant, submitted to show that the plaintiff at the time of sale had information of the state of defendant's title which it should have submitted to the bidders, and in giving a peremptory instruction to the jury to find for the plaintiff, this case must be reversed, and remanded for a further trial to be had by the plaintiff, if desired, upon the principles announced and conclusions reached in this opinion. There are other assignments of error which have not been formally disposed of, but they are without merit.

Reversed.

(131 Va. 421)

BAILEY v. HINES, Director General of Railroads.

(Supreme Court of Appeals of Virginia. Nov. 17, 1921.)

1. **United States** ⇨125—Action against Director General of Railroads against railroads under federal control is in effect a suit to which the United States is a party.

An action against a Director General of Railroads and his successor in office, as agent designated by the President against whom suits against railroads should be brought is, in substance and effect, a suit against the United States.

2. **United States** ⇨125—Conditions prescribed by government for bringing suit against it must be complied with.

Federal government had power to deny the right of suing it for acts growing out of its management of railroads or to prescribe terms and conditions for such suits, and when so prescribed they must be complied with.

3. **Railroads** ⇨5½, New, vol. 6A Key-No. Series—Director General suable without naming him.

Under General Order No. 50A, issued by the Director General of Railroads concerning suits against railroads, an action against the Director General of Railroads in his official capacity may be directed against the Director General of Railroads without naming him personally.

4. **Railroads** ⇨5½, New, vol. 6A Key-No. Series—Federal agent appointed under Transportation Act suable without naming him.

In a suit to subject to plaintiff's claim the revolving fund set apart by the government for that purpose, the designation of the defendant as Director General of Railroads and his successor in office as the agent provided for in section 206 of the Transportation Act Cong. Feb. 28, 1920 and designated under the proclamation of the President of the United States, is a sufficient designation, and the name of the incumbent of the office may be properly omitted or, if inserted, stricken out.

5. **Railroads** ⇨5½, New, vol. 6A Key-No. Series—Procedure not affected by federal control.

The Federal Control Act Cong. March 21, 1918, § 10 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 3115½j), providing that carriers under federal control shall be subject to all laws and liabilities as common carriers except in so far as might be inconsistent with such control, preserved to the public the benefit of bringing actions in the same courts, by the forms of procedure and practice in force before the roads were taken over by the government.

6. **Railroads** ⇨5½, New, vol. 6A Key-No. Series—Declaration amendable by correcting name of federal agent.

Under Code 1919, § 6104, allowing liberal rights of amending pleadings, in a suit against

an agent designated by the President to defend actions against railroads under federal control, plaintiff may amend the declaration by correcting the name of the agent.

7. **Pleading** ⇨230—Statute allowing amendment liberally construed.

Code 1919, § 6104, providing for amendment of pleadings, should be liberally construed.

Error to Circuit Court, Clarke County.

Action by Bailey against Walker D. Hines, Director General of Railroads. From judgment for defendant, plaintiff brings error. Reversed.

Charles & Duncan Curry, of Staunton, and W. T. Lewis, of Berryville, for plaintiff in error.

Wm. F. Keyser, of Luray, and W. R. Staples, of Roanoke, for defendant in error.

BURKS, J. This action was brought on August 17, 1920, for a personal injury alleged to have been inflicted upon the plaintiff on August 21, 1919, by the Norfolk & Western Railway Company, while the same was under federal control. The defendant named in the writ was Walker D. Hines, Director General of Railroads, and his successor in office, as the agent provided for in section 206 of the Transportation Act, approved February 28, 1920 (41 Stat. 461), and designated under the proclamation of the President of the United States of America, March 11, 1920. The defendant, designating himself as "sometime Director General of Railroads and agent designated by the President under section 206 of an act of Congress entitled the 'Transportation Act,'" appeared at rules, in proper person, and pleaded in abatement that, before the institution of the action, he had resigned as such Director General of Railroads and agent, and that John Barton Payne had been appointed in his room and stead, and was at the time of the institution of said action and at the time of the filing of said plea such Director General and agent. The defendant at the same time moved the court to quash the writ in said cause on the same grounds stated in his plea in abatement and because said writ was without authority of law and was hence invalid. The plaintiff thereupon asked leave to amend his declaration and writ by substituting the name of John Barton Payne for that of Walker D. Hines, and also moved the court to reject the defendant's plea in abatement, and to dismiss his motion to quash, which request the court declined, and also overruled said motions. The plaintiff then tendered a special replication that the action was not against Walker D. Hines in his individual capacity, but against the presidential agent under the transportation act, but the court declined to receive it. It having developed since the fil-

ing of defendant's plea that John Barton Payne had resigned as such Director General of Railroads and presidential agent, and that James C. Davis had been appointed in his room and stead, the plaintiff moved the court for liberty to amend his declaration and writ by substituting the name of James C. Davis for that of Walker D. Hines, and that the cause be remanded to rules for that purpose, but the court overruled said motion and entered judgment that the action of the plaintiff be dismissed. It is manifest from these proceedings that no relief is asked against the defendant, Hines, in either a personal or official capacity; that he has no interest in this litigation; and that the relief sought is against the presidential agent with a view to obtaining compensation from the fund set apart by the government of the United States for that purpose.

[1, 2] The plaintiff's objection to commencing a new action is that it would be barred by the statute of limitations. The action is in substance and effect a suit against the United States. Such suits are controversies to which the United States are a party. "Though in name against an officer, in fact they assert a liability of the government, and a judgment will be paid out of its funds." *Westbrook v. Director General (D. C.)* 263 Fed. 211, 213, and cases cited.

The federal government, like all other sovereign powers, had the power to deny the right to institute any suits against itself for acts growing out of its management and operation of the railroads, or to prescribe the terms and conditions under which such suits might be brought. When so prescribed they must be complied with, whether reasonable or unreasonable, or else the suit will be dismissed. *Hans v. State of Louisiana*, 134 U. S. 1, 17, 10 Sup. Ct. 504, 33 L. Ed. 842, and cases cited.

During the great World War, the United States, in the exercise of its war power, took control of practically all of the transportation companies in continental United States, including the Norfolk & Western Railway Company. This control was taken pursuant to a proclamation of the President of December 28, 1917, under authority of an act of Congress of August 29, 1916 (U. S. Comp. St. § 1974a). This action of the President was confirmed by an act of Congress of March 21, 1918 (known as the Federal Control Act [U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 3115½a-3115½p]), by which it was provided, amongst other things:

"That carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers

and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the federal government. * * * But no process, mesne or final, shall be levied against any property under such federal control." Section 3115½j.

The President's proclamation of December 28, 1917, also declared:

"It is hereby directed that the possession, control and operation of such transportation systems hereby by me undertaken shall be exercised through William G. McAdoo, who is hereby appointed Director General of Railroads."

The Director General was given authority to direct how suits should be prosecuted against the carriers under his control, and by General Order No. 50 he directed that actions at law and suits in equity for causes of action arising under the federal control should be brought directly "against William G. McAdoo, Director General of Railroads, and not otherwise." After a brief service, Mr. McAdoo resigned, and Walker D. Hines was appointed in his room and stead, and soon after his appointment issued General Order No. 50a, by which he directed that all such actions at law and suits in equity should be brought against the "Director General of Railroads and not otherwise," omitting the name of the incumbent.

So matters continued until federal control was terminated by the act of Congress of February 28, 1920 (known as the Transportation Act). Section 206, paragraph (a), of that section is as follows:

"Actions at law, suits in equity and proceedings in admiralty, based on causes of action arising out of the possession, use, or operation by the President of railroad or system of transportation of any carrier (under the provisions of the Federal Control Act, or of the act of August 29, 1916) of such character as prior to federal control could have been brought against such carrier, may, after the termination of federal control, be brought against an agent designated by the President for such purpose, which agent shall be designated by the President within thirty days after the passage of this act. Such actions, suits, or proceedings may, within the periods of limitation now prescribed by state or federal statutes but not later than two years from the date of the passage of this act, be brought in any court which but for federal control would have had jurisdiction of the cause of action had it arisen against such carrier."

Pursuant to this section, the President by proclamation bearing date March 11, 1920, designated and appointed "Walker D. Hines, Director General of Railroads, and his successor in office, as the agent provided for in section 206 of said act, approved February 28, 1920." The two positions of Director General of Railroads and of agent were thus

united in the same person, although such union was not required. Not only so, but the Director General of Railroads, not named, but whoever he might be, and his successor in office, was to be presidential agent under the act, so that in future the Director General of Railroads would also be agent, unless a different person was designated and appointed as such agent. Thereafter, Walker D. Hines, by separate resignations, resigned as Director General of Railroads and as agent, effective May 18, 1920. These resignations were accepted, and the President, by one proclamation, dated May 14, 1920, appointed "John Barton Payne, of Illinois, Director General of Railroads in the stead of said Walker D. Hines as Director General of Railroads"; and by another proclamation of the same date appointed the said "John Barton Payne, Director General of Railroads, and his successor in office, as the agent provided for in section 206 of said act, approved February 28, 1920." Thus matters stood on August 17, 1920, when the present action was brought, not against John Barton Payne, in his official capacity, but against "Walker D. Hines, Director General of Railroads, and his successor in office, as the agent provided for in section 206 of the Transportation Act approved February 28, 1920, and designated under proclamation of the President of the United States of America, dated March 11, 1920."

[3] In an action against the Director General of Railroads under the Federal Control Act it was unnecessary to name the incumbent under the provision of General Order No. 50a, for the "Director General of Railroads is not here sued as an individual, or even by name, but as an officer, and stands for the United States." *Westbrook v. Director General*, supra. Relief was not sought against the incumbent of the office either personally or officially, but against the government. In *Blevins v. Hines* (D. C.) 264 Fed. 1005, 1006, it is said:

"It should also be said that the intent of General Order No. 50a is that the defendant shall be the official, and not the individual, who happens to be in office at the time of suit."

In that case the name of Walker D. Hines, preceding the words "Director General of Railroads" was stricken out as surplusage.

[4] The object of this action has been from its inception, and is still, to subject to the plaintiff's claim the "revolving rund" set apart by the government for that purpose, and the action has been and is in effect a suit against the United States to accomplish that purpose. The office of Director General of Railroads was permanent, the incumbent temporary and changeable, and in the vast extent of territory subject to the Federal Control Act it could not be expected that the citizens could be promptly apprised of the chang-

es in the personnel of these temporary incumbents, and hence the wisdom of the provision of General Order No. 50a dispensing with the name of such incumbent. This regulation had doubtless been found to work well, and so when the Transportation Act was enacted, it required suits brought thereafter to be brought against "an agent designated by the President." Nowhere is there any requirement that the name of the agent should be given in the pleadings. "The agent designated by the President" was a permanent position or office, while the incumbent would be temporary and changeable, and so by analogy to suits against the Director General of Railroads, it would seem that a suit or action against "The agent provided for in section 206 of the Transportation Act, approved February 28, 1920, and designated under the proclamation of the President of the United States of America, March 11, 1920," is a sufficient designation of the proper defendant, and that the name of the incumbent for the time being might be properly omitted, or, if inserted, stricken out as surplusage. Counsel for the defendant in error, in discussing the method by which the presidential agent should be designated, says:

"Such designation can be made in only one of two ways—by the proper name of the individual so designated, or possibly by descriptive matter clearly identifying some individual."

Strike out the name of Walker D. Hines in the declaration and writ, and there remains the description used by the President in this proclamation making the appointment, and in his language. What more could be needed? "The agent designated by the President under section 206 of the Transportation Act, approved February 28, 1920," as accurately describes the presidential agent as "Director General of Railroads" does the appointee to that position.

The government, in taking over the transportation lines for war purposes, manifestly intended to interfere with the rights and remedies of citizens against said lines as little as possible. Hence the comprehensive provision with reference to suits and actions contained in section 10 hereinbefore quoted.

"The plain purpose of the above provision was to preserve to the general public the rights and remedies against common carriers which it enjoyed at the time the railroads were taken over by the President, except in so far as such rights or remedies might interfere with the needs of federal operation. The provision applies equally to cases where suits against the carrier companies were pending in the courts on December 28, 1917, to cases where the cause of action arose before that date and the suit against the company was filed after it, and to cases where both cause of action and suit had arisen or might arise during federal operation. The government was to operate the carriers, but the usual immunity

of the sovereign from legal liability was not to prevent the enforcement of liabilities ordinarily incident to the operation of carriers. The situation was analogous to that which would exist if there were a general receivership of each transportation system. Operation was to be continued as theretofore with the old personnel, subject to change by executive order. The courts were to go on entertaining suits and entering judgments under existing law, but the property in the hands of the President for war purposes was not to be disturbed. With that exception the substantial legal rights of persons having dealings with the carriers were not to be affected by the change of control.

"This purpose Congress accomplished by providing that 'carriers while under federal control' should remain subject to all then existing laws and liabilities and that they might sue and be sued as theretofore."

Missouri Pac. R. Co. v. Ault, 256 U. S. —, —, 41 Sup. Ct. 593, 595 (65 L. Ed. —).

[5] The conditions produced by the federal control of railroads were anomalous, and it seems fairly plain that Congress did not intend to interpose technical difficulties in the way of the general public in the assertion of their rights, at least so far as the establishment of the liability was concerned, but to leave the general public free to sue in the same courts, in the same forms of procedure and to have the benefit of the same rules of pleading and practice it enjoyed before the roads were taken over by the government, even though the suit was in effect against the United States. Except as to the enforcement of the judgment after it was obtained, "the substantial legal rights of persons having dealings with the carriers were not to be affected by the change of control." Missouri Pac. R. Co. v. Ault, *supra*.

[6, 7] As already stated, this action is and has been ever since its institution substantially a suit against the United States, and the defense here made is that there was error in using the name of Walker D. Hines instead of that of John Barton Payne, as the agent designated by the President to be sued. If this change had been made, the defendant would have been described in the exact language of the President's proclamation appointing John Barton Payne as the President's agent. The defense is purely technical. The suit is none the less a suit against the United States for an injury alleged to have been inflicted by the Norfolk & Western Railway Company while under federal control, whether the agent to be sued was correctly named or not. The process was served on the identical person who would have been served if the agent had been correctly named, and the same counsel who filed the plea for Walker D. Hines in the trial court appeared and argued this case before us, although no relief against Hines,

personally or officially, is asked. This can only mean that the defense is made on behalf of the real defendant, the government, which has in this guise appeared and made defense both in this court and the court below. Even if it were necessary to give the name of the agent designated by the President who was to be the defendant in this suit, on discovery of the fact that a wrong name had been used, the trial court should have permitted the plaintiff to amend his declaration by inserting the correct name. This should have been permitted under the very liberal practice with reference to amendments prevailing in this state, but the cases need not be cited, for the Legislature has made it statutory by declaring that—

"In any suit, action, motion or other proceeding hereafter instituted, the court may at any time in furtherance of justice, and upon such terms as it may deem just, permit any pleading to be amended, or material supplemental matter to be set forth in amended or supplemental pleadings. The court shall, at every stage of the proceedings, disregard any error or defect which does not affect the substantial rights of the parties. If substantial amendment is made in pursuance of this section, the court shall make such order as to continuance and costs as shall seem fair and just." Code, § 6104.

This statute we have declared should be liberally construed. Standard Paint Co. v. Vietor, 120 Va. 595, 91 S. E. 752. It could make no difference to the government of the United States, when it had due notice of, and full opportunity to defend the action, whether the agent to be sued was rightly named or not. It was clearly "in furtherance of justice" to permit the amendment to be made, and it was error to refuse it. The substantial rights of the government are not affected by permitting the amendment to be made, but the claim of the plaintiff will be barred by the statute of limitations if it is denied. A refusal to allow the amendment would be a practical nullification of section 6104 of the Code.

After the case was argued and submitted, but before final judgment was entered, John Barton Payne resigned as Director General of Railroads and as presidential agent, and James C. Davis was appointed in his stead in each capacity, and the plaintiff asked to have his name substituted for that of Walker D. Hines in the writ and declaration, but the trial court refused to do so. Between March 10, 1920, and March 27, 1921, three different persons held the position of Director General of Railroads and presidential agent, showing how transitory was the position of incumbent, and the wisdom of permitting suits or actions against the officer or agent without the necessity of designating the name of the incumbent. No difficulty

appears to have been encountered in suing the "Director General of Railroads" without naming the incumbent, and it is not apparent how any difficulty should be encountered in suits against the agent designated by the President in like manner.

We have carefully considered the pertinent authorities cited in the briefs and in the opinion of the learned trial judge, but have not deemed it necessary to review them here, and have cited only such cases and statutes as seemed needful in support of the reasoning of the opinion. The authorities referred to in the cases we have cited, especially the Ault Case, furnish satisfactory reasons for the conclusions we have reached. The case of *Mason v. Bank*, 12 Leigh (39 Va.) 84, so confidently relied on for the defendant in error, we do not regard as applicable to the facts of this case. There certain persons were sued as a corporation who had not been incorporated, and the court very pertinently observed that—

"The essential error is that the suit is brought against defendants, who have no corporate character, and yet not against them in their individual characters."

No such question is here involved. Here a claim against the United States is sought to be enforced against it through the medium provided by it, but a mistake is made in giving the name of the agent it has designated to defend the suit. Process was duly served on the agent of the proper defendant, and the sole question is, Shall the plaintiff be allowed to amend his declaration and writ by giving the correct name of the agent in office at the time the action was brought. The amendment would seem to be fully authorized by section 6104 of the Code (first enacted in this state in 1914), if, indeed, it is necessary that the name of the agent should be stated in the pleadings. The substantial rights of the plaintiff would not be left "unaffected by the change of control" if the amendment requested were refused.

For the reasons stated, the judgment of the trial court will be reversed, and, in order to meet any possible view that may be taken of the case, and any change that may take place in the incumbent of "the agent designated by the President," the trial court will be directed to permit the plaintiff to amend his declaration by striking out the name of Walker D. Hines, and, if he shall so desire, to substitute in lieu thereof the name of whoever may at the time be the incumbent of the position of "agent designated by the President," and to make such other amendments as the plaintiff may desire and to the court shall seem proper, and also with leave to the plaintiff to sue out new or additional process, if he shall be advised that the same is necessary or proper. Reversed.

(131 Va. 471)

EWING et al. v. BOARD OF SUP'RS OF NELSON COUNTY.

(Supreme Court of Appeals of Virginia.
Nov. 17, 1921.)

1. Eminent domain §262(4)—Finding of damages in condemnation proceeding not disturbed.

Where the reviewing court is unable to say that finding as to amount of damages in eminent domain proceeding is without substantial support, it will not interfere.

2. Highways §41(4)—Proceedings to establish road held not erroneous because viewers were permitted to give opinion as to proper width.

Proceedings to establish a road were not erroneous because viewers appointed under Code 1919, § 1977, were directed to report on the question as to how wide the road should be, the width of the road as finally fixed representing the independent judgment and action of the supervisors.

3. Highways §33—County supervisors, proceeding under general law to establish road, held not required to file map or plat.

Though in proceedings under the General Road Law (Code 1919, §§ 1977-1980) commissioners appointed to condemn land are directed by section 1980 to comply with the eminent domain law so far as applicable, and section 4385 provides that the proceedings to condemn a right of way shall be according to the provisions of the eminent domain chapter, county supervisors, in proceedings to establish a road under the general law, wherein the viewers returned with their report a map or diagram contemplated by section 1978, were not required to file a map or plat showing the cuts, fills, trestles, bridges, etc., pursuant to section 4364, the direction in section 1980, relating to the oath, procedure, and report pursuant to sections 4366 to 4368, and it being evident that the viewers in such case had, and that commissioners in every case under the general law will have, the benefit of such surveying as may be necessary to determine the location, width, and grade of the road, and thus be able to determine approximately the amount of work to be done, and fix the damages accordingly.

Error to Circuit Court, Nelson County.

Proceeding by the Board of Supervisors of Nelson County to establish a road through the lands of H. and E. N. Ewing. From an order establishing the road and fixing the compensation, the landowners bring error. Affirmed.

J. T. Coleman, Jr., of Lynchburg, for plaintiffs in error.

S. B. Whitehead and L. Grafton Tucker, both of Lovington, for defendant in error.

KELLY, P. This is a case in which the board of supervisors of Nelson county have

undertaken to establish a county road through the lands of H. and H. N. Ewing in accordance with the provisions of the general road law of the state, as found in sections 1977 to 1980, inclusive, of the Code of 1919.

The proceeding was pending for more than two years prior to the date of the judgment here complained of. During that time a number of orders were entered by the supervisors, and a number of reports were made by various boards of viewers and commissioners. There was some irregularity in these orders and reports, but in the ultimate outcome of the proceedings there was a substantial compliance with all of the requirements of the general road law applicable to the case. From an order of the board of supervisors making a final adoption of the road through the premises, and allowing \$500 for compensation and damages to the Ewings, the latter appealed to the circuit court of Nelson county. That court, having heard the evidence of witnesses and the arguments of counsel, entered the order here complained of, establishing the road and fixing the compensation and damages in like manner as had been done in the final order of the board of supervisors. Thereupon the Ewings applied for and obtained this writ of error.

The appellants, in their petition for the writ, assign errors as follows:

"First, the action of the court in overruling the motion to dismiss; second, in establishing the road at the location in question; third, in not allowing the landowners or petitioners sufficient compensation for the land taken and the damages to the residue; and, fourth, the failure to comply with the provisions of the Virginia statute on the subject of establishing and constructing roads and on the power of eminent domain; the result of which noncompliance is very material to the landowners."

Following these assignments the petition says:

"These assignments of error present questions that can and will be discussed together, or as one question. The principal question and the question most material to the petitioners is: Have they received just compensation for the land taken and the damages to the residue?"

[1] 1. The evidence was conflicting as to what amount should have been allowed by the court for compensation and damages to the landowners. Several boards of view had fixed it at various amounts, none of them in excess of \$500. The court, upon a hearing de novo, saw and heard the witnesses, and fixed the amount at the latter sum. Upon a careful consideration of the evidence which was before the trial court, we are unable to say that its finding in this respect was without substantial support, and upon familiar principles we ought not to interfere unless we should

find error in some of the other rulings complained of.

[2] 2. It is insisted that the proceedings by the board of supervisors were erroneous, and ought to have been dismissed, because the viewers appointed under the provisions of section 1977 of the Code were directed to report upon the question as to how wide the road should be. That section provides that—"the right of way for any public road shall be thirty feet wide, * * * unless the board of supervisors order a different width."

It is manifest from the provisions of the section as a whole that the purpose of the appointment of viewers is to furnish the supervisors with satisfactory information as to the advisability of establishing or altering roads, and there was no impropriety whatever in directing the viewers to report, as was done in this case, "what, in their opinion, should be the width of the proposed road or any part thereof." The record discloses that at a former stage in the proceedings the circuit court had reached the conclusion that a portion of the road in question ought to be less than 30 feet wide, but was of opinion that the authority to make this change rested solely with the board of supervisors, and the matter was accordingly referred back "to the board of supervisors of Nelson county, with recommendation that the width of said roadway or right of way be reduced to 15 feet as to a portion thereof." It was after this action by the court that the last board of viewers was appointed in the case, and directed, among other things, to report with reference to the width of the road. A report by the viewers was accordingly made, and thereafter the board itself finally fixed the width of the road, not following, however, the report and recommendation of the viewers in all respects. It thus appears that the width of the road, as finally fixed, represented the independent judgment and action of the board of supervisors, and was in literal compliance with the statute.

[3] 3. The real question in the case, and the one to which the argument of counsel for the landowners was chiefly directed, is whether the board of supervisors was bound under the law to file a map or plat showing cuts, fills, trestles, and bridges, etc., as required by section 4364 of the Code, being a part of the chapter concerning the exercise of the power of eminent domain. The map or diagram contemplated by section 1978 of the general road law, under which this proceeding was taken, was returned with the report of the viewers, but it is contended that, before they acted upon the question of damages and compensation, they should have been provided with such a map or plat as is required by section 4364.

In presenting this view, it is pointed out that section 1980, a part of the general road

law, requires that "the commissioners, in the discharge of their duties, shall comply in all respects with the provisions of the chapter concerning the exercise of the power of eminent domain, so far as applicable;" and that section 4385, a part of the general law with reference to the exercise of the right of eminent domain, provides for the condemnation of a right of way for a public road by the board of supervisors of any county, and adds that "the proceedings in all such cases shall be according to the provisions of this chapter, so far as they can be applied to the same;" the contention apparently being that the county could only condemn the right of way after a compliance with the provisions of section 4364, supra.

This contention is settled adversely to the plaintiffs in error by the effect of the decision of this court in the case of the Board of Supervisors v. Proffit, 129 Va. —, 105 S. E. 666. In that case the board of supervisors of Louisa county had undertaken to condemn a right of way for a public highway under the provisions of the eminent domain law, and, while that proceeding was pending, instituted a new proceeding for substantially the same purpose under the general road law, and then dismissed the former proceeding and established the road and the compensation and damages under the latter. The landowners filed an injunction bill in the circuit court of Louisa county, which resulted in a final decree awarding a perpetual injunction restraining the supervisors from proceeding under the general road law. The case then came to this court on appeal, and was reversed, the court holding that any county has the right to acquire lands for public highways under either of the two general statutes above referred to. In that case we said:

"There are two methods, then, in Virginia, as the law now is, by which the boards of supervisors may acquire lands for public highways. They may at their election either proceed in the circuit court under the general statute authorizing the exercise of the right of eminent domain, or under the general road law, vesting jurisdiction in the boards of supervisors to exercise that power in proceedings for the establishment of highways, subject to appeal to the circuit court and ultimately to this court."

It seems clear that the reference in section 1980 of the general road law to the provisions of the chapter on eminent domain, quoted above, does not contemplate a compliance with section 4364, for the latter section directs the applicant to file the petition and accompanying map and profile, while the former (1980) merely directs the commissioners, in the exercise of their duties, to comply with the eminent domain law so far

as applicable, which of course relates to their oath, procedure, and report. Code, §§ 4366, 4367, 4368.

It is contended that, if viewers or commissioners are called upon to fix damages without a survey and plat, as provided for in section 4364, they will have insufficient information as to the cuts and fills which may be made upon the road as contemplated at the time, and, further, that if the county should, after the first location and establishment of the road, subsequently change the grade, the landowner would, in violation of the present Constitution of the state, be left without remedy for any damage resulting from such subsequent change.

It is evident that the viewers in the instant case had, and that the viewers and commissioners (if there be commissioners) in every case under the general law will have, the benefit of such surveying as may be necessary to determine the location, width, and grade of the road, and thus be able to determine approximately the amount of cutting, filling, and other construction work to be done, and fix the damages accordingly.

The physical situation in the present case is such as to render it highly improbable that any change of grade upon the road in question will ever be considered desirable. If such a change should be made, however, and the landowners should claim damages on that account, the question which we left open in *Nelson County v. Loving*, 126 Va. 283, 101 S. E. 406, would arise. It does not arise here because the compensation and damage has been fixed upon the present location and grade in the manner authorized by valid statutory proceedings. Whether the effect of this is to cut off claims for damages arising from possible future changes we do not now decide.

It may be that the general road law would be improved by a provision more nearly in conformity with section 4364 than anything now found therein; but this is a question for the Legislature.

The foregoing discussion has disposed of all the questions which were specifically adverted to or discussed in the assignments of error. It is true that the motion to dismiss, referred to in the first assignment, was accompanied by numerous grounds set out in the record of the proceedings in the circuit court, but none of these grounds was argued or adverted to in the petition for the writ of error, except those hereinbefore discussed. With respect to the residue of those grounds, we deem it sufficient to say that they have been duly considered, and are overruled.

We find no error in the judgment complained of, and the same is accordingly affirmed.

Affirmed.

(131 Va. 708)

BRYAN v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Nov. 17, 1921.)

1. Homicide \S 151(1), 254—Every homicide prima facie murder in second degree; defendant has burden of proving excuse.

Every homicide is prima facie murder in the second degree, and the burden is upon defendant to establish any justification or excuse relied upon by him.

2. Homicide \S 145, 146, 147—Law presumes malice, but not willfulness, deliberation, or premeditation.

The law presumes malice from the fact of killing, but it does not presume that the act was willful, deliberate, and premeditated.

3. Homicide \S 254—Verdict for murder in second degree sustained.

Evidence held to sustain a verdict of guilty of murder in the second degree.

4. Homicide \S 181—Previous unchastity of defendant's wife admissible.

In a prosecution for murder committed by defendant after his wife had confessed illicit relations with deceased, it was not error to admit evidence of the previous unchaste character of the wife.

5. Homicide \S 181—Proof of truth of wife's confession of illicit relations with deceased held properly excluded.

In a prosecution for murder committed by accused after his wife had confessed to him that she had been guilty of illicit relations with deceased, it was not error to exclude proof of the truth of such confession.

6. Homicide \S 181 — Defendant's esteem for his wife held proper subject of proof.

In a prosecution for murder, committed by accused after his wife had confessed to him illicit relations with deceased, evidence of suspicions entertained by accused of his wife's fidelity prior to the homicide held proper on the issue of the probable effect of the confession upon accused's mind.

7. Criminal law \S 866—Quotient verdict as to punishment for murder held not reversible error.

That the jury in a murder trial arrived at the number of years' imprisonment to be imposed by a quotient verdict held not reversible error.

8. Criminal law \S 957(1)—Evidence of jurors as to mistaken idea of punishment they could inflict properly excluded.

In a prosecution for murder, it was not error to refuse to admit testimony of jurors on the question of whether or not some of them were mistaken as to the punishment they could inflict for murder in the second degree.

9. Homicide \S 308(2)—Omission of word "premeditated" in defining first degree murder held not error.

In a prosecution for murder, an instruction held not erroneous because it omitted the word "premeditated" in defining murder in the first degree under Code 1919, \S 4393.

10. Homicide \S 340(4)—Error in instruction as to murder in first degree held immaterial on conviction of murder in second degree.

In a prosecution for murder, that an instruction omitted the word "premeditated" in defining murder in the first degree held not error, where defendant was found guilty of murder in the second degree.

Error to Circuit Court, Botetourt County.

E. B. Bryan was convicted of murder in the second degree, and he brings error. Affirmed.

Haden & Haden, of Fincastle, and Wm. R. Allen, of Buchanan, for plaintiff in error.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazile, Second Asst. Atty. Gen., for the Commonwealth.

KELLY, P. This case is here upon a writ of error to a judgment of the circuit court of Botetourt county, sentencing the defendant, E. B. Bryan, to a term of 20 years in the penitentiary upon a conviction of murder in the second degree.

About noon of the 28th day of October, 1920, Bryan walked into the office of the Virginia Western Power Company in the town of Buchanan, and, practically without warning, shot to death W. F. Headrick, an electrician employed by that company.

The evidence produced by the commonwealth, standing alone, makes a case of murder in the first degree. The defense relied upon is that the act was committed in the heat of passion, engendered a few minutes prior to the killing by a confession made to the defendant by his wife of an illicit intimacy between her and the deceased. The testimony tending to support this defense may be stated in abbreviated form, but with substantial accuracy and completeness, as follows:

The defendant and his wife had been married for 25 years. Their children were grown and away from home. The defendant was 45 and his wife 42 years of age. They lived in a second floor apartment over a restaurant in Buchanan. The night before the killing, while the defendant's wife was on a visit to her father's home in the country, he found certain letters in her room which aroused his suspicion, and which, upon some further investigation, he concluded were probably written by the deceased. He says he was greatly troubled and worried by this discovery, and spent a sleepless and miserable

night. The next morning he hired a car, went to see his wife, and asked her about the letters. She said she would go back home with him, and, after arriving there, would tell him all about them. They returned together, went immediately to their room, and, according to the testimony of both of them, they sat together on the side of the bed, with their arms around each other, while she related to him all the details of an illicit relationship and intercourse, seductively brought about by the deceased, which had existed between her and him for some weeks. The particulars of her confession may be omitted. Suffice it to say that, if the jury believed that the confession, as testified to by both of them, was made, that the defendant was actuated by no other and independent grievance against the deceased, and that the natural and normal effect of such a confession by the wife to the husband was not affected by any previous similar misconduct on the part of his wife, and known to him, then the jury would have been entirely warranted in finding (as no doubt they would have found) that he gave way to rage and indignation, caused by the confession, and killed the deceased in hot blood. The confession included the statement that the deceased had first secured complete control over the sexual passions of the defendant's wife by the surreptitious use of a certain drug, administered in wine, and that thereafter she had been wholly unable to resist him. They both testified that during the confession the defendant made only one remark, and that was, "Did he do that, darling?" and that her reply was, "He did." The commonwealth produced rebuttal evidence which will be mentioned later.

At the conclusion of this interview with his wife, the defendant immediately got his pistol, walked through the kitchen, which was on his way out, picked up in that room an electric flatiron, or smoothing iron, which he had bought from the deceased and which will be mentioned again later, and, with the pistol in his right hand, and the iron in his left, went out on the street in search of Headrick. The distance from Bryan's house to Headrick's office was about 125 yards, and he went almost immediately there, entering a drug store on the way to inquire about Headrick, saying that he was "going to kill his damn soul," and also telling Dr. C. W. Barker on the way, in answer to a question as to what he was going to do, that he was "going to kill the damned s—of a b—." On entering the Virginia Western Power Company's office, he saw Headrick sitting at a desk inside of a compartment or pen surrounded by a railing, and thereupon he pitched the electric iron into the compartment and opened fire on Headrick, saying at the same time "God damn you, I will kill you." He

fired three shots, the first two failing to take effect, the third entering Headrick's temple and producing death a few hours thereafter.

[1, 2] The first assignment of error complains of the action of the trial court in refusing to set aside the verdict of the jury as being contrary to the evidence. We are unable to say that the court erred in this respect. Every homicide is *prima facie* murder in the second degree, and the burden was upon the defendant to establish to the satisfaction of the jury any justification or excuse relied upon by him. Minor's Syn. Crim. Law, p. 57, and cases cited. The effect of the verdict in this case was to determine: (1) That the commonwealth did not successfully carry the burden of proof resting upon it to raise the grade of the offense to murder in the first degree by showing that the killing was "willful, deliberate and premeditated" (Code, § 4393); and (2) that the defendant failed to successfully carry the burden of showing that the killing was without malice on his part, and therefore a lesser crime than murder in the second degree. The law presumes malice from the fact of the killing, but it does not presume that the act was willful, deliberate, and premeditated. The sufficiency of the evidence on the one hand to establish the willful, deliberate and premeditated character of the act, or, on the other, to rebut the presumption of malice, is generally a question which lies peculiarly within the province of the jury. In this case the trial court, by refusing to interfere with the verdict, held, in effect, that the evidence was such as to warrant the jury in finding that the defendant had failed to successfully rebut the legal presumption against him as to the grade of his crime. In this finding we concur.

The books abound in cases in which convictions of even first degree murder have been sustained when the killing followed the alleged provocation more quickly than in the present case. If the evidence disclosed no circumstance at all to discredit the defendant's claim that he acted solely under the propulsion of hot blood and frenzy, engendered by his wife's confession, it is, to say the least, not at all certain that the court would not have improperly invaded the province of the jury if it had set aside the verdict as being insufficient to show that the killing was malicious. That was for the jury to decide. *Shepherd v. Commonwealth*, 119 Ky. 931, 85 S. W. 191, cited with approval in *Shipp v. Commonwealth*, 124 Ky. 643, 99 S. W. 945, 10 L. R. A. (N. S.) 335, 339.

Moreover, there were, as a matter of fact, certain circumstances in the case, as shown by the evidence, entirely proper for the consideration of the jury, and which may have influenced them in attaching less weight to the effect of the confession than was claimed

for it by the defendant. These circumstances will now be mentioned.

The alleged letters from Headrick to defendant's wife were not produced at the trial. He claimed that they had been lost, but his testimony as to their contents and as to their loss was vague and unsatisfactory. As they were alleged by him to be the beginning and basis of his original suspicion and subsequent anger, they would naturally be regarded as of much importance, and it is not entirely easy to understand the uncertainty of the testimony with respect to them.

With reference to his own account before the jury as to the details of his wife's confession, while that account is corroborative of and harmonious with practically all that his wife had previously testified to in his presence, it can hardly be characterized as a connected and convincing narrative. Due allowance must be made for the effect which the jury may have given to his manner and bearing on the stand.

Some importance may have properly been attached by the jury to the fact that the defendant carried the electric iron along and pitched in into the office by the side of the deceased before opening fire upon him. There was evidence tending to show that the iron had not been paid for; that the defendant had received one or more bills for it; that there had been some misunderstanding on the part of the bookkeeping department of the Virginia Western Power Company as to the terms upon which he was to make payment therefor; and that this misunderstanding had subsequently been the subject of an interview between him and the deceased, resulting in what seems to have been a satisfactory adjustment of the matter. The transaction and its incidents were gone into very fully in the testimony on both sides, and the jury and the trial judge were in much better position than we are to estimate the bearing of these incidents on the mental attitude of the defendant toward the deceased. We are frank to say that, as the evidence appears in type, we see nothing in the account of what had passed between the defendant and the deceased to indicate bad feeling on account of the purchase of the iron; but when the defendant undertook to explain why he had carried it with him when he started out to wreck vengeance on the deceased, his testimony is not satisfactory. Upon this latter point he was asked the following question and gave the following answer:

"Q. Now, why was it that on the morning after your wife had related these horrible relations between her and Mr. Headrick that you took your electric iron from your home to the office of the Western Electric Company? A. I thought maybe that might be some inducement for him to come around my house, and I just thought I would take the iron; I never paid for it, and I thought I would take it back and get rid of it."

And again:

"Q. You said you took the iron to keep Mr. Headrick from coming to your house any more? A. I thought maybe it might keep him from having some excuse to come back or something. I just don't know hardly exactly how it was. I was so shocked and nervous and tore all to pieces I don't know."

When it is recalled that he was then starting out with the expressed purpose and determination to kill Headrick, his explanation, made long after the killing, that he was taking the iron along for the purpose of removing any excuse for further visits from Headrick to his wife, is not very convincing. He was carrying a firearm with which to kill Headrick, and certainly, therefore, there was no need for a return of the iron to prevent Headrick's further visits. The jury might have accepted the theory that the picking up and returning of the iron was the irrational act of the frenzied man, or, on the other hand, that he had more than one grudge and grievance against the deceased when he started out to take the latter's life. Whether the one or the other was the correct theory was a question lying solely in the province of the jury.

Far more significant than the circumstances above adverted to, however, was the rebuttal evidence of the commonwealth, tending to show that Mrs. Bryan was, and had long been, a woman of unchaste character, and that the defendant knew that fact. A vital question for the jury to decide was as to the effect of the alleged confession on the defendant's mind, and, if they believed that she had previously, with his knowledge, had improper relations with other men, this fact may very naturally and properly have been given weight by them in determining the extent to which his feelings were shocked and overwrought by the revelation of her intimacy with the deceased.

[3, 4] Juries are not given to dealing lightly with the violation of the sanctity of a man's home and the destruction of his wife's virtue, and they may usually be depended upon to do full justice to any husband who takes the life of another upon that score. The learned and able judge who presided at the trial of this case, and who, like the jury, observed and heard the witnesses, saw no reason to disturb the verdict. We cannot say that this conclusion was against the evidence, and we ought not to interfere unless we find error in some of the other rulings complained of.

The second assignment of error challenges the action of the trial court in allowing evidence of the previous unchaste character of the defendant's wife. What we have already said indicates our views upon this question. Many authorities are cited to sustain this assignment, but nearly all of them relate to the rule forbidding such evidence

for the purpose of impeaching the credibility of a witness. It is, of course, well settled that, as a general rule, a witness can only be impeached by evidence of general bad character for truth and veracity in the community in which the witness resides; but the evidence here complained of was neither offered nor admitted for purposes of impeachment. It was introduced and allowed solely for the purpose of enabling the jury to properly appraise the probable effect which Mrs. Bryan's confession actually had upon the mind of her husband. The trial judge, upon the first offer of any evidence of this kind, said:

"I think the evidence is admissible. Of course I desire to state distinctly that I understand the commonwealth's attorney intends to undertake to prove that the prisoner here had knowledge of this reputation which his wife sustained in the community."

By Instruction I, he told the jury that if they believed from the evidence that the defendant did not know that the general reputation of his wife for virtue was bad on the 28th of October, 1920, then they should disregard all the evidence introduced by the commonwealth tending to show her bad character in this respect, and, further, that they must believe from the evidence beyond a reasonable doubt that the defendant did know of this general reputation of his wife before they could consider it. And, by Instruction H the jury were told that, even if they did believe that the defendant knew of his wife's bad reputation for virtue on or before October 28, 1920, they could only consider such bad reputation and the defendant's knowledge thereof in determining to what extent he was enraged and lost his power of self-control by his wife's confession of her relations with the deceased, and that they could not consider her alleged bad reputation for any other purpose whatever.

In the case of *Garlitz v. State*, 71 Md. 293, 18 Atl. 39, 4 L. R. A. 601, the accused, on trial for murder of his wife, undertook to excuse his act on the ground that he was so shocked and overcome by her confession of infidelity that his mind became frenzied, and that he lost reason and control of himself and, while in this condition, committed the crime. The state was permitted to prove that the accused had had improper relations with other women, the court holding that the evidence was admissible for the purpose of showing the prisoner's esteem and appreciation of the marital relation and the improbability that he was shocked and overcome in the manner described in his testimony. See, also, *State v. Holme*, 54 Mo. 153, 165; *Fox v. State*, 71 Tex. Cr. R. 318, 158 S. W. 1141.

We find nothing in the case of *Shipp v. Commonwealth*, *supra*, cited and relied upon by counsel for the accused, in conflict with the views we have hereinabove expressed. In that case the trial court, strange to say,

refused to permit the defendant to prove the confession of his wife as to her intimacy with the deceased, and yet, still stranger to say, allowed the commonwealth to prove that the reputation of the wife of the accused for virtue and chastity was good. The appellate court held that the former testimony was admissible, but that the latter was not, chiefly on the ground that the truthfulness or falsity of the confession had nothing to do with the defendant's conduct, and was immaterial.

[5] Under the third assignment of error it is insisted that the court erred in refusing to permit the defendant to introduce proof of the truth of his wife's confession. We have already seen that the question of the truth of her confession was in no way a material issue in the case. The question was not whether the confession was true or false, but what effect it had upon the mind of the accused. The court correctly stated the law applicable to this phase of the case by instruction G, which was as follows:

"The court instructs the jury that if they believe from the evidence that Mrs. Bryan told the defendant on the 28th day of October, 1920, of the alleged wrongful relations between herself and Headrick, as detailed by the defendant in his testimony, and that the defendant believed said account of said alleged wrongful relations to be true, then it makes no difference, so far as this case is concerned, whether or not Headrick and Mrs. Bryan did in fact have said wrongful relations."

Under the fourth assignment of error, which embraces a number of rulings, it is insisted that the court erred: (1) In admitting testimony of the witness Shank, who was permitted to relate a conversation had with the defendant prior to the 28th of October, 1920, in which the latter stated that he suspected his wife of improper relations with a man named Harvey; (2) in permitting the witness Vaughan to testify as to a conversation which he had with the defendant prior to October 28, 1920, in which the latter expressed doubt about the virtue and chastity of his wife, and said she was doing things which he could not stand for; (3) in permitting the witness Rogers to testify as to a conversation which he had with the defendant prior to the 28th of October, 1920, in which the latter said that he could not put up with the way his wife was doing, and intended to leave her; and (4) in permitting the witnesses Mr. and Mrs. Manly to testify as to a conversation which they overheard between the defendant and his wife prior to October 28, 1920, in which he accused her of intimacy with another man.

[6] There was no error in the admission of this testimony. It was proper for the jury to know exactly in what esteem the defendant held his wife in order to determine the probable effect of the confession upon which the defendant claims to have based his action on the day of the killing.

It is insisted that the admission of such evidence tends to put a premium on immorality and to discourage a husband whose wife has been unchaste from defending his home against further violation. The argument is pressed upon us in this connection that a wronged husband has a right to cling to his erring wife and try to reform her, and that he might under certain circumstances feel as much outraged by a second or third invasion of his home as by the first one. This is an argument the force of which will depend in every case upon the particular circumstances, and should be addressed, as it doubtless was in this case, to the jury. It falls entirely within their province.

The next assignment arises out of this state of facts: The verdict of the jury was as follows:

"We, the jury, find the defendant guilty of murder in the second degree, as charged in the indictment, and fix his punishment at 20 years in the penitentiary."

It appears from the affidavit of the defendant filed in the cause shortly after the verdict was rendered, that after the jury retired to their room to consider the verdict their first step was to determine the grade of the offense, two or three members in the outset being in favor of murder in the first degree, but all finally agreeing to fix the grade of the crime as murder in the second degree. After this was done, they, for the first time, began a consideration of the extent of the punishment, and this was fixed at 20 years as the result of an agreement by which each juror was to set down the number of years which he thought the defendant should receive as a punishment, the sum of these figures to be divided by 12 and the quotient written into the verdict. In carrying out this agreement, several of the jurors wrote down more than 20 years as the number of years of confinement in the penitentiary which they respectively believed the defendant should receive. The affidavit further states that the jurors who used figures in excess of 20 did so under an honest mistake as to the number of years fixed by the statute as the maximum punishment for second degree murder.

The court was asked to set aside the verdict on the ground that the method of arriving at the same had been plainly prejudicial to the defendant, and had been the result of an innocent mistake on the part of some members of the jury. It was conceded that the conduct of the jurors in arriving at their verdict could not be established except by the testimony of the jurors themselves, and the court held that their evidence would not be admissible for the purpose of impeaching their verdict. The motion for a new trial on this ground was accordingly denied, and it is alleged that this was error.

[7] We find nothing in the facts as above

stated to warrant an interference with the ruling of the trial court. It is unnecessary for us to say that there are no conceivable circumstances under which the testimony of jurors themselves may be resorted to in order to impeach their verdict. This court said in *Bull's Case*, 14 Grat. (55 Va.) 613, 632:

"In view of all the authorities, and of the reason on which they are founded, we think that, as a general rule, the testimony of jurors ought not to be received to impeach their verdict, especially on the ground of their own misconduct; and, without intending to decide that there are no exceptions to the rule, we think that even in cases in which the testimony may be admissible, it ought to be received with very great caution. A contrary rule would hold out to unsuccessful parties and their friends the strongest temptation to tamper with jurors after their discharge, and would otherwise be productive of the greatest evils."

As showing the extent to which the rule against the admission of testimony by jurors to impeach their verdict has been carried in Virginia, see, also, 4 Min. Inst. (3d Ed.) 935; *Read's Case*, 22 Grat. (63 Va.) 924; *Thompson's Case*, 8 Grat. (49 Va.) 637, 650; *Washington Park Co. v. Goodrich*, 110 Va. 692, 697, 66 S. E. 977; *Manor v. Hindman*, 123 Va. 767, 777, 97 S. E. 332.

The decision of the question, as it arises and as it is presented to us in this case does not call for any extended discussion or review of the authorities. It seems to be conceded by counsel for the prisoner that under the rule as established in Virginia the testimony of jurors cannot be received to show their misconduct, the claim being that the same rule does not apply where there has been a mistake. The mistake here alleged could only have been due to the misconduct of the jury in ignoring the written instructions of the court, in which they were plainly told that murder in the second degree "is punishable by confinement in the penitentiary for not less than five nor more than twenty years."

The general rule, as approved by the United States Supreme Court and by the courts of some of our sister states, permits more latitude in the admission of evidence of this character than has generally been permitted by the rule in Virginia. *Burks' Pl. & Pr.* (2d Ed.) 554, and cases cited; *United States v. Reid*, 12 How. 361, 366, 13 L. Ed. 1023; *Mattox v. United States*, 146 U. S. 140, 147, 13 Sup. Ct. 50, 36 L. Ed. 917. But even under this more liberal application of the rule, the evidence offered in the present case was properly rejected by the trial court. In *Hendrix v. United States*, 219 U. S. 79, 90, 31 Sup. Ct. 193, 196 (55 L. Ed. 102), the court said:

"On the motion for new trial affidavits of four jurors were offered, stating with some detail that they did not understand the legal effect of

the verdict. Only one of the affidavits is in the record. The maker states that, by finding the defendant guilty, as charged in the indictment, without capital punishment, 'he did not understand what the punishment would be on such a verdict, and agreed to it on the understanding that the punishment would only be 2 years in the penitentiary.' He further states that he was in favor of a verdict for manslaughter, and would never have consented to the verdict had he thought or believed it 'would carry with it a life penalty.' The motion for new trial, as we have said, was denied. We see no error in the ruling."

[8] In the case last cited, the jury might have failed to understand the effect of their finding, because in the federal courts the punishment is fixed by the court and not by the jury, but they were not allowed to say so for the purpose of impeaching the verdict. In the instant case they necessarily understood the exact effect of their verdict. With a written instruction in their hands as to the minimum and maximum punishment, they fixed the grade of the offense as murder in the second degree, and the punishment therefor at the maximum term of imprisonment. In view of these facts, the court was clearly right in refusing to admit the testimony of the jurors as offered.

[9, 10] One other assignment of error remains to be considered Instruction A, the main purpose of which was to advise the jury as to the effect which they should ascribe to the confession made by the defendant's wife, in the concluding paragraph, said that if the killing was done "with malice, deliberate and willful, it is murder in the first degree." It is insisted that this instruction was erroneous because it omitted the word "premeditated" in defining murder in the first degree. It is true that the statute, section 4393 of the Code, does say that murder in the first degree is a "willful, deliberate, and premeditated killing"; but there are two answers, either of which is satisfactory, to the assignment of error here under consideration. The first is that instruction K, given by the court, and intended for the primary purpose of defining murder in the first degree, expressly told the jury that, to constitute murder, the killing must have been willful, deliberate, and premeditated, and we think therefore that the omission of the word "premeditated" in the former instruction could not have misled the jury. The second and conclusive answer to the alleged error here complained of is that the jury, as a matter of fact, found the defendant guilty of murder in the second degree, not of murder in the first degree; and, even if the omission of the word "premeditated" from the first instruction was error, it was plainly harmless.

For the reasons stated, the judgment of the trial court must be affirmed.

Affirmed.

(134 Va. 386)

DIRECTOR GENERAL OF RAILROADS v. BLUE.

(Supreme Court of Appeals of Virginia. Nov. 17, 1921.)

1. Railroads ⇨313, 317—Violation of ordinances negligence.

Violation of ordinances limiting speed and requiring the ringing of a bell on an engine approaching a crossing is negligence.

2. Railroads ⇨327(3) — Pedestrian crossing tracks held negligent.

A pedestrian crossing double tracks in clear view for 1,200 feet who was struck by a backing engine running at an unlawful speed without signal held guilty of contributory negligence in failing to observe the engine on the second track.

3. Railroads ⇨338—Last clear chance doctrine held applicable to pedestrian's injury.

Where the lookout man on a backing engine merely whistled through his teeth to warn a pedestrian approaching the danger zone line, who failed to notice the warning or hear the engine, then far enough away for blowing the whistle or tapping the bell and slackening the speed, which would have prevented injury, the railroad company was liable under the last clear chance doctrine.

Error to Corporation Court of Charlottesville.

Action by J. L. Blue against the Director General of Railroads. From judgment for plaintiff, defendant brings error. Affirmed.

In this case (an action for damages by the defendant in error as plaintiff in the court below against the plaintiff in error as defendant in the court below) there was a trial by jury, a demurrer to the evidence by the defendant, and a verdict in favor of the plaintiff, subject to the demurrer. The trial court overruled the demurrer and entered judgment in accordance with the verdict. This action of the trial court is the sole assignment of error.

The evidence, not the facts, are certified. The defendant introduced no evidence. Considering the evidence under the rule applicable upon the demurrer of the defendant thereto, the material facts are found to be as follows:

On the evening of July 4, 1919, after supper, but in full daylight, the plaintiff, a man between 65 and 66 years old, was struck and injured by an engine of the Southern Railway (being operated at the time by the Director General) at a grade crossing of a considerably used street in the city of Charlottesville. The railroad in this locality runs approximately north and south, and consists of two main line tracks, the north-bound

(199 S.E.)

track to the east, and next to that the south-bound track, to the west, those tracks being a distance of about 25 feet between the inner rails, and of about 20 feet between the tracks themselves. The street crosses these tracks somewhat obliquely in an approximately northwesterly and southeasterly direction. The plaintiff was struck on the southbound track by the engine of the railroad, running backwards, going north on that track, as the plaintiff was walking along the street from the southeasterly going in the northwesterly direction. The plaintiff was very tired from a hard day's work and was walking very slowly. He was in full possession of all of his faculties, except that he was somewhat deaf, but could at the time hear the whistle or the bell of an engine very distinctly. As he came to a point about 15 feet from the north-bound track he stopped and looked south to see if any train was approaching from the south and saw none. Both tracks were in clear view of the plaintiff from that point for a distance of about 1,200 feet, if he had looked that far south along the tracks. From the physical facts shown in evidence we must conclude that the engine was plainly within sight of the plaintiff when he stopped at the point last named and would have been seen by him had he looked as far south as he could have done. How far away from the crossing the engine then was the evidence does not definitely show, nor its exact speed, but it was some considerable distance south of the crossing, more probably at least 250 yards or 750 feet away, and was running approximately about 15 miles an hour, according to the preponderance of the evidence. The engineman was in his place, the fireman in his place, and a brakeman was standing on the lookout on a step on the end of the engine nearest to the crossing; but none of them testified in the case. There were ordinances of the city of Charlottesville which fixed the speed limit of the engine at 10 miles an hour, and which required that the engine bell should be rung continuously while the engine was approaching the crossing. The speed of the engine exceeded such speed limit, and no bell was rung at any time while the engine was approaching the crossing; nor was any whistle blown. When the engine came in sight of the crossing, about 1,200 feet away, and from that time until the engine reached the crossing and struck the plaintiff, the fireman, standing as a lookout man on the step of the end of the engine approaching and nearest to the plaintiff, was whistling through his teeth, evidently adopting that as a method of alarm in lieu of the ringing of the bell required by the city ordinance. Not observing the engine approaching from the south, the plaintiff, after stopping at the place aforesaid, then started on, looking toward the north as he crossed the north-bound track, to see if anything was approaching from that direction,

and, after crossing the north-bound track, continued on, with his gaze turned northward along the south-bound track, as he was not accustomed, as he testified, to seeing any train moving north on the south-bound track, and so felt safe from trains going north after he had crossed the north-bound track. He continued, without again stopping or again looking south, without hearing the engine or the whistling of the lookout man, steadily walking on, until, just as he came upon the south-bound track, the engine, without slackening its speed at all until the impact occurred, struck him, causing the injuries complained of. The engine knocked the plaintiff along the track only about 22 feet, however, throwing him to the east of the track, and not upon it, and the engine passed partly beyond where he lay on the ground and was stopped within its own length (which was 184 feet), after it struck the plaintiff. During the whole time that the plaintiff was walking steadily onward from the place at which he stopped, as aforesaid, until he came within 2½ feet of the eastern rail of the south-bound track, which the testimony shows was the line of overhang of the engine, and hence the zone of danger from it (a distance of 40 feet), the failure of the plaintiff to notice the alarm of the whistling through the teeth, or the noise of the moving engine, and the continuous looking of the plaintiff toward the north as he moved, with his face turned practically entirely away from the approaching engine, obviously absorbed in looking for any train which might be coming from that direction, and obviously unconscious of the noise of the engine and the whistling of the lookout man, and also obviously intending to continue on crossing the south-bound track, unless some louder warning were given him, was all in plain view of the lookout man aforesaid. And there is no evidence that any duty of the latter engaged his attention at the time, other than that of keeping a lookout and signaling to the engineman and fireman if a man was on or apparently was about to go on the track. The evidence further shows specifically that when the plaintiff had come within the danger zone aforesaid and was still walking on, and it became certain that he would be struck unless some louder warning was given him so that he might step back out of the zone of danger, the engine was still at least 184 feet away from him. The irresistible inference of fact which must be drawn from the above-mentioned circumstances shown in evidence is that the lookout man saw the plaintiff at the time, and that the plaintiff was obviously in peril before he actually crossed the danger zone line, when he was a few steps therefrom, and that the engine was then amply far enough away for a tap of the bell or a sound of the whistle to have been given and for the engine to have been then stopped, or at least its speed slackened, before it reached

the plaintiff. And yet the lookout man gave no warning to the engineman or fireman of the perilous position of the plaintiff, no bell was rung or attempted to be rung, nor whistle blown or attempted to be blown, the engine was not then stopped nor attempted to be stopped, its speed was not slackened nor attempted to be slackened; only the obviously unheard whistling through the teeth continued as the sole warning given the plaintiff until he was run down by the engine and injured as aforesaid.

Robert B. Tunstall, of Norfolk, and Perkins, Walker & Battle, of Charlottesville, for plaintiff in error.

Fife & Pitts and F. C. Moon, all of Scottsville, for defendant in error.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court.

[1, 2] In the view we take of the case the defendant was guilty of primary negligence in running the engine at a speed in excess of the lawful speed limit and in failing to ring the bell as the engine approached the crossing as required by the ordinances of the city; and the plaintiff was guilty of negligence in failing to observe the approach of the engine before he went upon the track where he was struck and injured. That leaves for our sole consideration the following question:

Is the last clear chance doctrine applicable to the case?

[3] This question must be answered in the affirmative.

This case is ruled by the holding and principle laid down in *Gunter v. So. Ry. Co.*, 126 Va. 565, on page 595, 101 S. E. 885, on page 894. The following is there said:

"* * * *Whatever may have been the prior holdings, we are of opinion that when the engineman or other person in charge of a moving engine or car sees a person in apparent possession of his faculties on the track, or so near thereto that he will probably be injured or killed unless he changes his position, he has the right to assume that he will change his position in time for his own safety until the approach is so close that an engineman of ordinary care and prudence would be admonished of his peril, and if he then gives no evidence of consciousness of his peril, it is the duty of such engineman or person in charge to give timely and suitable warning of the approach of such engine or car, and if the warning appears to be unheeded to use all other means within his power, consistent with his higher duty to other persons, to avoid injury to one who has thus exposed himself. The failure to exercise this degree of care * * * is negligence for which the master is liable.*" (Italics supplied.)

Indeed, the instant case is stronger for the plaintiff than the *Gunter Case*, in that in the present case there was the obvious failure to

notice the signal of the whistling of the lookoutman through his teeth, as a superadded fact showing the obvious unconsciousness of the plaintiff of his peril, in addition to the other superadded facts, stated above, showing such unconsciousness. And we are of opinion that upon the facts of the instant case, before it was absolutely certain that the plaintiff would be struck, when the plaintiff was yet a few steps away from the danger zone—i. e. from the line of the overhang of the engine—it was obvious to the lookoutman on the engine that the plaintiff had not heard the noise of the engine or of the whistling through the teeth signal, and that the engine was then so close that the lookoutman, if he had exercised ordinary care and prudence, would have been admonished that the plaintiff was, under the circumstances, obviously in grave peril; that thereupon, the plaintiff having given no evidence of consciousness of his peril, it was the plain duty of the lookoutman to have notified the engineman of such peril, so that a louder alarm, by whistle blast or tap of the bell, might have been given, and, if that had been unheeded, that the engine might have been stopped or its speed slackened; that the engine was then amply far enough away for all of these things to have been done by the exercise of reasonable diligence; and that the engine was moving so slowly that if any of them had been done, the preponderance of the evidence is that the plaintiff would not have been injured.

We are therefore of opinion that the case must be affirmed.

(89 W. Va. 399)

COLLEY v. CALHOUN. (No. 4206.)

(Supreme Court of Appeals of West Virginia.
Nov. 1, 1921.)

(Syllabus by the Court.)

1. Executors and administrators §29(2) — Appointment in county where deceased did not die or leave estate cannot be collaterally attacked.

An appointment of an administrator in a county in which the intestate left no estate, and did not reside at the time of his death, is not void, and cannot be collaterally attacked. Although voidable, it is treated as valid and allowed full operation, until vacated or otherwise abrogated.

2. Executors and administrators §450—In administrator's action to recover debt, evidences of appraisal required by statute are properly admitted in evidence.

In the trial of an action by an administrator to recover money due the estate of the decedent, evidences of debt bearing the appraisal indorsement required by section 12, c. 85, Code 1913 (sec. 8999), are properly admitted,

and constitute sufficient proof of appraisal, even though the appraisers may have been appointed in a county other than that contemplated by law. The place of appraisal is not of the essence of the statutory requirement.

Error to Circuit Court, McDowell County.

Action by Alex Colley, administrator, against A. L. Calhoun. Verdict for plaintiff was set aside, a new trial awarded, and plaintiff brings error. Reversed, and judgment for plaintiff on verdict.

Cecil H. Riley, of Northfork, and Litz & Harman, of Welch, for plaintiff in error.

G. L. Counts, of Welch, for defendant in error.

POFFENBARGER, J. The argument submitted on this writ of error tacitly, if not expressly, admits that the order setting aside the verdict found for the plaintiff and awarding the defendant a new trial, of which complaint is made, stands upon the assumption of invalidity of the plaintiff's letters of administration and consequent lack of right to maintain the action brought by him for recovery of money due the estate of Wise Robinson, his intestate.

He took out his letters of administration in the county in which Robinson died, Mercer county, but it is urged that the permanent residence of the intestate was in McDowell county. Being a resident of McDowell, he went to Bluefield, in Mercer, for treatment in a hospital, and there died two or three weeks later. After his death and the appointment of his administrator, the documentary evidence of indebtedness, constituting the basis of this action, was found in his trunk at the place of his residence at the time of his departure for Bluefield.

[1] Permanent or legal residence of the decedent in McDowell county being conceded for the purposes of this inquiry, the appointment was not void, but only voidable, and cannot be collaterally attacked or assailed. For the correctness of this holding, it suffices merely to cite the following decisions applying the principle in cases dependent upon strikingly similar facts and circumstances. *Tomblin v. Peck*, 73 W. Va. 336, 80 S. E. 450; *Wells v. Simmons*, 61 W. Va. 105, 55 S. E. 990; *Findley v. Findley*, 42 W. Va. 331, 26 S. E. 433; *Starcher v. South Penn Oil Co.*, 81 W. Va. 587, 95 S. E. 28; *Cicerello v. C. & O. Ry. Co.*, 65 W. Va. 439, 64 S. E. 621; *Allen v. Linger*, 78 W. Va. 277, 88 S.

E. 837. An appointment of an administrator by the county court of a county in which the decedent left no estate is merely voidable, not void, and not open to collateral attack. *Fisher v. Bassett*, 9 Leigh (Va.) 119, 33 Am. Dec. 227; *Andrews v. Avory*, 14 Grat. (Va.) 229, 73 Am. Dec. 355. These two decisions stand upon facts of exactly the same nature as those involved in this case. It is manifestly both unnecessary and improper to inquire now whether the appointment is voidable. Being unvacated, it must be treated as valid, for the purposes of this case.

[2] The evidence of the indebtedness sued for consists of three receipts for \$160, \$50, and \$100, respectively, signed and delivered by the defendant, as evidence of the receipt of said sums for "safe-keeping." All of them were appraised and indorsed agreeably to the requirements of section 12, c. 85, Code (sec. 3999), by appraisers appointed in Mercer county. As the object of these requirements is recorded disclosure of the personal estate of the decedent, for state taxation and other general purposes, the place of the appraisal is not an essential element of the statute. Such disclosure in any county, whether the one in which the property is or not, accomplishes the legislative purpose. If a note, bond, or other evidence of debt sued upon is shown to have been appraised by appraisers appointed in the county of appointment of the administrator, the trial court cannot consistently be required to enter upon a collateral inquiry as to the regularity of the appraisal. The statute itself in express terms, dispenses with necessity of proof of listing beyond the indorsement of the appraisers.

Payment was relied upon as the defense, and some evidence thereof was adduced, but, in the opinion of the jury, it was insufficient. It included what purported to be a receipt in full, signed by Robinson, but the genuineness of the signature was denied, and a letter proved to be in the handwriting of Robinson was put in evidence for comparison. As the jury found for the plaintiff in the sum of \$300, they evidently found the receipt was not genuine. All of the apparent errors committed in the course of the trial were to the prejudice of the plaintiff, not the defendant, wherefore they afforded no ground for setting aside the verdict.

For the reasons stated, the order complained of will be reversed, the verdict reinstated, and judgment rendered thereon.

(89 W. Va. 467)

STATE v. MEADOWS. (No. 4346.)(Supreme Court of Appeals of West Virginia.
Nov. 8, 1921.)*(Syllabus by the Court.)***Forgery** §26—**Indictment for forging deed held fatally defective.**

An indictment for the forgery of a deed purporting to convey land, which does not allege the existence of the land and that the grantor named in the deed actually owned the land described, nor describing the deed as containing some covenant, or showing on its face that the grantor could have been injured or prejudiced thereby, is fatally defective, and should, on motion of the defendant, be quashed.

Error to Circuit Court, Kanawha County.

George W. Meadows was convicted of forging and uttering a forged instrument, and he brings error. Judgment reversed, verdict set aside, and cause remanded.

C. J. Vanfleet, J. F. Cork, and J. W. Kennedy, all of Charleston, for plaintiff in error.

E. T. England, Atty. Gen., and R. Dennis Steed, Asst. Atty. Gen., for the State.

MILLER, J. The indictment is in two counts. The first charges defendant with feloniously and intentionally forging, and the second with uttering and attempting to employ as true, a certain paper writing commonly called a deed, purporting to have been made on October 9, 1915, between the Rosin Coal Land Company, a corporation organized and existing under the laws of West Virginia as party of the first part, and Clara Meadows, wife of Geo. W. Meadows, party of the second part, and purporting to convey to her a certain lot of land situate west of Brooks' Hollow and north of the county road, in Malden District, Kanawha County, West Virginia, a short distance above the city of Charleston, and described as containing twenty-one acres, for a certain cash consideration and ten negotiable notes of the grantee, payable to said corporation, and negotiable and payable at a certain bank, and purporting to bear the corporate seal of said company, and to have been acknowledged before a certain notary public, with intent to defraud against the peace and dignity of the state.

Defendant's demurrer and motion to quash the indictment were overruled, and this action of the court is the first point of error relied on to reverse the judgment of imprisonment against him, founded upon the verdict finding him guilty.

The indictment does not describe the deed in *hæc verba*, and contains no averment that the Rosin Coal Land Company, the grantor named, in fact owned the land described,

nor any land, nor that the deed alleged to have been forged contained any covenant, which on its face and unaided by extrinsic facts, not averred, would render the said grantor liable thereon, nor any averment showing that the said grantor would have been injured or prejudiced thereby.

We recently decided in *State v. Davis*, 87 W. Va. 184, 104 S. E. 484, that when the fraudulent character of an alleged forged writing does not appear on its face, but can only be made to appear by innuendoes introducing extraneous facts and circumstances necessary to show the fraudulent character of the writing so as to give it a proper setting with relation to that which it purports to affect not otherwise discernible, the indictment will be regarded as fatally defective, and should be quashed. In that case the subject of the forgery was an alleged release of a deed of trust, described but averring nothing to show the existence of any such deed of trust, nor how nor in what way the parties to any such deed would have been injuriously affected by such release if it had been genuine, wherefore the indictment was held to be fatally defective and insufficient to support a verdict, and that the judgment thereon should have been arrested on motion of the defendant.

So in this case, the instrument not setting out in full the deed alleged to have been forged, which, when introduced in evidence, disclosed that it contained covenants of general warranty, and, if it had been fully set out in the indictment, might have shown on its face that the purported grantor might have been prejudiced and injured thereby, was defective in the same particular as that in the case of *State v. Davis*. It was lacking in averment of such outside facts as would show prejudice or injury to the rights of either party to the alleged deed.

In many cases, perhaps in most, the forged instrument, when described, will disclose on its face that it is capable of being used to defraud. Bonds, notes, checks and other instruments for the payment of money or creation of other duties or obligations, are of that character. *Goodman v. People*, 228 Ill. 154, 157, 81 N. E. 830; *Arnold v. Cost*, 3 Gill & J. (Md.) 219, 22 Am. Dec. 302, and note 314. And such was the character of the order involved in *State v. Tingle*, 32 W. Va. 546, 9 S. E. 935, 25 Am. St. Rep. 830. But such is not the character of the instrument—the deed—described in the indictment in this case. In *People v. Wright*, 9 Wend. (N. Y.) 193, 197, the court says:

"Now although the mortgage, which is set out in *hæc verba*, purports to embrace a part of lot No. 21, in Dryden, yet for aught appearing in the indictment, there may not be such a lot or tract of land in existence; it may be wholly imaginary, and for that reason its existence

ought to have been averred and proved upon the trial, in order to show that the instrument purported to be a charge upon the land within the meaning of the section. If it was not, it was wholly inoperative. Neither is it alleged in the count that Shafer, the mortgagor, whom the prisoner intended to defraud, had any interest in the land the mortgage purported to affect; and if he had not, it is difficult to discover how he could be defrauded."

Some cases are cited by the attorney general from code states where the forms of indictment for forgery are prescribed by statute, and which are for this reason inapplicable.

Our conclusion is that the indictment in this case is fatally defective and should have been quashed on defendant's motion. We therefore reverse the judgment, set aside the verdict, and remand the case to the circuit court.

(89 W. Va. 481)

INDIAN REFINING CO. v. CHILTON.
(No. 4338.)

(Supreme Court of Appeals of West Virginia.
Nov. 8, 1921.)

(Syllabus by the Court.)

1. Damages ¶208(1)—Where plaintiff is shown entitled to nominal damages, it is error to direct verdict for defendant.

Where, upon the trial of an action for damages, the competent evidence shows that the plaintiff is entitled to recover nominal damages, it is error for the court to instruct the jury to find for the defendant.

2. Appeal and error ¶177(7)—Where plaintiff is entitled to nominal damages and procurable evidence may show substantial damages, directed verdict for defendant set aside.

Where, upon the trial of a suit for damages, the trial court directs the jury to find a verdict for the defendant, when the competent evidence shows that plaintiff is entitled to recover nominal damages, and it appears in the case that substantial injury has been inflicted resulting in damages amounting to more than \$100, competent evidence of which was not produced because the plaintiff misjudged the character of the evidence offered, or from some other adventitious cause, and that in all probability competent evidence can be introduced upon another trial to prove such damages, this court will take jurisdiction to reverse the judgment of the trial court denying the plaintiff any recovery.

Error to Circuit Court, Kanawha County.

Action by the Indian Refining Company against W. E. Chilton in the justice court, and upon appeal to the intermediate court of Kanawha county, a verdict was directed

for the defendant, and on appeal therefrom, the circuit court refused to review said judgment, and plaintiff brings error. Judgment reversed, verdict set aside, and cause remanded for new trial.

Morgan Owen, of Charleston, for plaintiff in error.

Townsend & Bock, of Charleston, for defendant in error.

RITZ, P. On a trial of this case in the intermediate court of Kanawha county, upon an appeal from the judgment of a justice of the peace, the court struck out the plaintiff's evidence, and directed a verdict for the defendant, which verdict being accordingly returned, a judgment of nil capiat was rendered thereon. The circuit court of Kanawha county refused to review said judgment, and the plaintiff prosecutes this writ of error for that purpose.

The purpose of the suit is to recover for an injury to an automobile truck owned by the plaintiff, caused by a collision between said truck and a touring car of the defendant. Upon the trial the plaintiff introduced evidence to show that its truck was being driven east on Kanawha street on the right side thereof when the driver observed the automobile of the defendant coming west on said street, at a very high rate of speed, and on the wrong side thereof. Plaintiff's driver testifies that in order to avoid the collision, if it were possible, he immediately applied his brakes and stopped the truck, but notwithstanding this defendant's automobile ran into the truck, and so injured it that it had to be shoved out of the street to prevent interference with traffic. This state of facts testified to by the driver is corroborated by other witnesses. The local manager of the plaintiff then went on the witness stand and testified that the books of the company showed that the sum of \$95.36 had been paid by the company for the repairs necessary to the truck, and the sum of \$84 as rent for another truck to take the place of the injured one while it was being repaired. He did not know anything about the injury to the truck. In fact, he knew nothing except that there were entries in the book as above indicated. The book itself was not produced, nor was there any testimony that these entries were correct and based upon the facts. The defendant thereupon made a motion to exclude the evidence and direct a verdict in his favor, which motion was sustained, and the judgment complained of rendered upon the verdict so directed.

[1] The plaintiff's contention is that this action of the court in directing a verdict in favor of the defendant was error, for the reason that under the facts proven, and which were not at all denied, it was entitled

to recover at least nominal damages, conceding that the evidence as to the cost of the repairs and the amount paid for hiring a truck to take the place of the injured one was not competent. Manifestly this contention is correct. The evidence as it stood at the time the motion was made showed a clear right in the plaintiff to recover in the case. The only difficulty was that there was no competent evidence showing the extent of the injury inflicted and the damages suffered thereby. This failure, however, did not justify the court in directing a verdict for the defendant. Plaintiff was entitled to recover at least nominal damages. If the defendant at this stage of the proceedings had, instead of moving for a directed verdict, rested his case and moved for an instruction to the jury to find for the plaintiff nominal damages, and the jury had so found, and judgment had been entered upon such verdict, there would have been no error.

[2] The defendant contends that, even though the plaintiff was entitled to recover nominal damages, this court cannot review the judgment for this error, for the reason that the jurisdictional amount is not involved. If it appeared in this case that no injury had been done to the plaintiff's truck, and that no more than nominal damages could be recovered in any event, of course this contention would be correct. It must be borne in mind that the plaintiff is seeking to get rid of a manifestly erroneous judgment. What is the amount involved so far as the plaintiff is concerned? It is true that, under the competent evidence introduced upon the former trial, only nominal damages could have been recovered, but it is equally evident that a substantial injury was inflicted, and that competent evidence exists as to the extent of this injury, and the amount of damages suffered by the defendant therefrom. The test of the jurisdiction is, What amount will be involved upon a retrial? and if it is apparent that an amount will be involved sufficient to invoke the jurisdiction of this court, then plaintiff's writ of error will not be dis-

missed for want of jurisdiction. It sufficiently appears in this case from the evidence of the driver that the truck, as a result of the collision, was so damaged that it would not run, for it is shown that it had to be shoved out of the street to prevent obstruction to traffic. It also appears from the evidence of the local manager that the books of the company show that an amount was paid out by the company for repairs to the truck due to this injury, and as rent for another truck to take its place while it was being repaired, in excess of \$100. It is quite apparent that competent evidence exists to establish these items, and to properly connect them with the injury done to plaintiff's truck in the collision. Where an erroneous judgment has been entered denying the plaintiff even nominal damages when the evidence clearly warranted the same, this court will not refuse to take jurisdiction of a writ of error to reverse such erroneous judgment where it appears that the plaintiff in all probability is entitled to recover, if at all, more than \$100, but by inadvertence, or by misconceiving the nature of the evidence necessary to establish his rights, failed to properly present the case at the hearing. 1 Sutherland on Damages, § 11; 1 Joyce on Damages, § 79; Thompson-Houston Electric Co. v. Durant Land Improvement Co., 144 N. Y. 34, 39 N. E. 7; Morris v. Vulgamott, 158 Ill. App. 434; Harman v. Washington Fuel Co., 228 Ill. 298, 81 N. E. 1017.

In this case, however, it appears that the failure to properly present the case to the jury in the first instance was due to the fact that the plaintiff either misconceived the force of the evidence presented by it, or by neglect or inadvertence failed to produce the evidence which it is patent exists, and can be produced. In such case it cannot be said that it substantially prevails in this court so as to entitle it to recover costs.

We will reverse the judgment complained of, set aside the verdict of the jury, and remand the cause for a new trial.

(29 W. Va. 470)

NESBEN v. JACKSON. (No. 4303.)(Supreme Court of Appeals of West Virginia.
Nov. 8, 1921.)*(Syllabus by the Court.)*

1. Appeal and error \S 94(2)—Fact issue involving conflicting evidence and witnesses' credibility is for the jury.

An issue of fact involved in conflicting oral evidence, and dependent upon the credibility of the witnesses, lies clearly within the province of the jury for determination.

2. Appeal and error \S 1003—Evidence held not sufficiently preponderative to take disputed question from jury.

Upon an issue as to whether an innkeeper had statutory notices posted in his office, lobby, and guest chambers, his testimony, and that of a clerk and two guests, that they were posted and in position before and after the loss, contradicted by that of a guest whose money had been stolen, to the effect that he had seen no notice in the room he had occupied, the positive testimony of plaintiff's attorney that, upon careful investigation, made a few days after the loss, he had found none, and the testimony of the same witness to admissions by the defendant that he had relied solely upon a notice printed in his register, and had no other, is not sufficiently preponderative to take it from the jury.

3. Innkeepers \S 11(10)—Guest with actual notice to deposit property at office or be personally responsible is negligent barring recovery in keeping it in his room.

If a guest of a hotel has actual notice of a requirement that he deposit his money and jewelry at the office, or be personally responsible for its safety, his failure to make such deposit is negligence barring recovery for loss of such property by theft from his room in the hotel.

4. Innkeepers \S 11(12)—Guest depositing money and jewelry on previous occasions, and presence of printed notice on hotel register, held not conclusive evidence of his knowledge of rule.

But such deposits made by him on several previous occasions, and the presence of a printed notice of such requirement in the hotel register, not shown to have been brought to his attention, are not conclusive evidence of such knowledge; wherefore a finding of a jury against it cannot be disturbed by the court.

Appeal from Circuit Court, Kanawha County.

Action by Alexander Nesben against E. F. Jackson. Judgment for plaintiff, and defendant appeals. Affirmed.

Morgan Owen and E. B. Dyer, both of Charleston, for plaintiff in error.

B. J. Pettigrew and J. Raymond Gordon, both of Charleston, for defendant in error.

POFFENBARGER, J. The judgment under review on this writ of error is one recovered against an innkeeper by a guest, for money stolen from the latter while he slept in his host's hotel. The case went to a jury upon the evidence and without instructions. Reversal is sought upon the theory of a finding contrary to the law and the evidence.

Section 33 of chapter 145, Code (sec. 5236), absolves the keepers of hotels, inns, and lodging and boarding houses from liability for loss of the jewelry, money, and other valuables of their guests, if and when they have posted in the rooms of their guests, and boarders, and in their offices and reception rooms, notices requiring such articles to be deposited in their offices, except in the case of loss from such offices after deposit therein. Compliance with the requirements of this statute is asserted by the defendants and denied by the plaintiff, and as to it there is conflict in the evidence.

[1, 2] On or about October 12, 1919, the plaintiff registered at the hotel of the defendant, and was assigned to an improvised room in a hall, known as room No. 110. Although he had been a guest at the hotel on several previous occasions, and had sometimes deposited money in the office, he said nothing about his money on the occasion in question. The room consisted of the end of a hall cut off by a partition lower than the ceiling, wherefore it was susceptible of access over the partition. While the guest slept, a thief took from his coat pocket \$210, and carried it away.

He does not claim he inspected the room to ascertain whether it contained a posted notice. Interrogated as to whether he had seen a notice in it, he said he had not. Being asked whether there was one in it, he replied:

"No, I see no notice like that in my room—no sign of paper; no kind of paper."

The defendant testified that he had kept the lobby and rooms of his house posted, but was unable to say there was a notice in room No. 110, on the night of the theft, although he was in it the next morning. He stated positively, however, that he had personally placed a notice in that room and most of the others, before the loss. He also testified that, before and after the theft, he had maintained a notice on a partition by the side of a door in the lobby, the door opening into the baggage room. His clerk at the time of the occurrence testified that there was a notice in room No. 110, on the morning after the loss, and also that there was one in the lobby and in every room and bathroom in the house. L. C. Dills testified that he had roomed in the house in October, 1919, and had seen notices in the lobby and the rooms he had been in, both before and after the occurrence in question. Ed Perkins, a cook, swore he had

slept in room No. 110 one day in the summer of 1919, and had then seen a notice posted in it, and that there was one in the lobby. A few days after the loss, one of plaintiff's attorneys visited the hotel, in company with him, inspected it to some extent, and claims to have interviewed the proprietor. He testified that he had looked "at what is called the office or public reception room," and had found no notice in it. Though he did not say he had been in room No. 110, he said there was no notice in it. He asked the defendant, on cross-examination, if he had not testified in a justice's court in which the case was first tried that a notice printed on each page of the hotel register was the only notice he had, and that he had depended solely upon it. A negative answer having been given, the attorney took the stand and said such an admission had been made in the testimony before the justice and in conversations with himself on two or three occasions.

Nothing conclusive is perceived in this evidence. No doubt the plaintiff's own testimony is clearly negative in character, since he does not claim to have looked for notices. This might be legally overthrown by the positive evidence adduced by the defendant and the uncontradicted fact that the plaintiff had previously made deposits, a circumstance tending to prove his knowledge of the requirement. But Mr. Gordon's positive and direct testimony to the effect that there was no notice in the room nor in the lobby, a few days after the loss, and that the defendant had admitted sole reliance upon the notice printed in the register, completely covers this phase of the case, and makes the issue turn altogether upon the credibility of the witnesses. It is neither inadmissible nor devoid of evidential value, by reason of lapse of time between the loss and his visit to the hotel. He contradicted the witnesses who said notices were up after as well as before the loss, and impeached the defendant as to practically all of his evidence. Under such circumstances, neither a trial court nor an appellate court can disturb a verdict. *Harman v. Appalachian Power Co.*, 77 W. Va. 48, 86 S. E. 917.

[3] An inn guest's actual knowledge that his host requires a deposit of his jewelry, money, and other valuables in the office, as a condition of liability, is obviously binding upon him. Actual notice is always more potent than merely constructive notice. The statute binding him by constructive notice

simply extends a common-law principle, which exonerated the host in case of the refusal of his guest to make the deposit upon request, or his failure to do so with knowledge of a rule requiring it, and consequent loss of the property. Such failure is negligence, barring right of recovery. *Purvis v. Coleman*, 21 N. Y. 111; *Fuller v. Coats*, 18 Ohio St. 343; *Berkshire Woollen Co. v. Proctor*, 7 Cush. (Mass.) 417; *Jalie v. Cardinal*, 35 Wis. 118; *Richmond v. Smith*, 8 Barn. & Cress. 10; *Cashill v. Wright*, 6 Bl. & Bl. 891; *Beale, Innkeepers & Hotels*, § 213.

[4] No conclusive evidence of actual notice of the requirement in question is found in the record. Though testimony to the fact that the plaintiff, on previous occasions, had deposited his money at the office, is uncontradicted, it merely tends to prove knowledge of a rule requiring him to do so. Notwithstanding such tendency, the jury could have attributed the act to timidity or unusual caution on his part. Neither the defendant nor any other witness testified to any express notification to him of such a rule, custom, or specific requirement. As to the reason for the deposits, the plaintiff was not interrogated, nor did he say anything. The utmost value that can be given them, as evidence of actual knowledge of the rule in question, is that of mere tendency to prove it. From them, an inference of such knowledge may arise, but it is manifestly not a necessary nor a conclusive one. Others probative of a different reason for the acts just as readily arise from them. Moreover, his failure to deposit on other occasions argues as strongly against knowledge as the deposits argue in favor of it. The plaintiff may have seen the notice printed in the register, but there is no proof that he did. As to that, he was not interrogated. The jury might have combined two circumstances, presence of the notice in the register and the deposits, and based a finding of knowledge on them, but they were clearly not bound to do so, and they did not. A guest, in signing a hotel register, is not bound to assume that he is signing a contract, and read everything printed in the register or on the page he signs. *Murchison v. Sergeant*, 69 Ga. 206, 47 Am. Rep. 754; *Olson v. Crossman*, 81 Minn. 222, 17 N. W. 375. Our conclusion is that the issue as to knowledge on the part of the plaintiff was one for jury determination.

For the reasons stated, the judgment complained of will be affirmed.

(89 W. Va. 475)

(109 S.E.)

STAR PIANO CO. v. BURGNER. (No. 4376.)

(Supreme Court of Appeals of West Virginia.
Nov. 8, 1921.)*(Syllabus by the Court.)*

1. Judgment \S 153(4)—Default judgment may not be set aside after adjournment of term except for errors appearing upon the record.

A default judgment may not be set aside under the provisions of section 5 of chapter 134 of the Code of 1913 (sec. 4979) after the adjournment of the term at which it is rendered, except for errors appearing upon the record.

2. Courts \S 78—Have inherent power to establish reasonable rules for conducting business.

Courts have inherent power to establish reasonable rules for the conduct of their business not inconsistent with organic or statutory law.

3. Courts \S 85(1)—Rules have the effect of law as to proceedings.

Rules adopted by a court not in excess of its authority have the effect of law as to proceedings conducted in such court.

4. Judgment \S 144—Judgment rendered in violation of valid court rule should be set aside on motion of party injured.

Where a court has adopted valid rules for the conduct of its business, litigants may rely upon the court conducting its proceedings in conformity with such rules, and a judgment rendered in violation of a valid rule is properly set aside upon motion of the party injuriously affected thereby.

5. Courts \S 85(2)—Interpretation of rule by court promulgating it will be followed by Supreme Court.

The interpretation placed upon a rule by the court adopting and promulgating it will be followed by this court, unless such construction is in violation of the plain terms of the rule, or of some organic or statutory law.

6. Trial \S 9(2)—Where court rule provides for trial calendar, it is error to try case not placed thereon, without parties' agreement.

A rule of court providing that the clerk of the court shall, before each regular term, make up a "trial calendar docket," upon which shall be placed all cases expected to be tried at the term, and further providing that the parties or their counsel desiring a case to be tried shall give notice to the clerk thereof, and that only cases in which such notice is given shall be placed upon such trial calendar, and that all other cases shall stand continued, is a reasonable and proper rule for the orderly conduct of the business of the court, and it is error for the court to proceed with the trial of a case not so placed upon such trial calendar without the agreement of the parties thereto.

7. Judgment \S 279—Court's rules are part of the record of every case in which a default judgment is rendered.

Rules adopted and promulgated by a court within the limit of its powers are a part of the

record of every case in which a default judgment is rendered in such court.

8. Judgment \S 279—Court dockets are part of record of every case of default judgment.

The dockets of a court are a part of the record of every case in which a default judgment is rendered in such court during the terms for which such dockets are made.

9. Pleading \S 85(3)—Where affidavit is filed with declaration, and writ of inquiry of damages is necessary, office judgment at rules does not bar answer.

In an action of assumpsit, where an affidavit is filed with the declaration as provided by law, but in which it is necessary to execute a writ of inquiry of damages, the office judgment entered at rules does not become final on the last day of the next succeeding term, so as to thereafter bar defense to the action. In such case, defense may be made thereto at any time before the writ of inquiry of damages is properly executed.

Error to Circuit Court, Kanawha County.

Action by the Star Piano Company against C. C. Burgner. Default judgment for plaintiff, and from a judgment setting the same aside, the plaintiff brings error. Affirmed.

W. E. R. Byrne and John H. Linn, both of Charleston, for plaintiff in error.

Barnhart, Horan & Pettigrew, of Charleston, for defendant in error.

RITZ, P. By this writ of error reversal is sought of a judgment of the court below setting aside a default judgment in favor of the plaintiff against the defendant, upon motion under the provisions of section 5 of chapter 134 of the Code (sec. 4979).

The plaintiff instituted its action of assumpsit in the court of common pleas of Kanawha county, returnable to March rules, 1920. Process was duly served upon the defendant returnable at that time. At April rules, 1920, the declaration, together with an account and affidavit, was filed, and the case was upon the court's docket for the May term, 1920. No proceedings, however, were had therein at that term. The case was likewise upon the regular docket of the court at the September term, 1920, but no proceedings were then had therein. A special term of the court was called to begin on the 29th of November, 1920. The proclamation calling the same recited that, inasmuch as the last term of the court had adjourned without dispatching all of the business, a special term was called at which no grand or petit jury would be required. At this special term the plaintiff called up its case, and, there being no appearance by the defendant, waived a jury for the execution of the writ of inquiry, had the same executed by the court, and the

default judgment complained of rendered. After the adjournment of this special term an execution was sued out on the judgment, and the sheriff proceeded to levy the same upon the property of the defendant, who thereupon gave notice that he would, on the 5th day of March, 1921, move the court to vacate said default judgment, upon the ground, among others, that the said cause was not regularly upon the docket of the court for trial. This motion was heard by the court of common pleas, and an order entered vacating the default judgment and placing the cause on the court's docket for trial. The plaintiff prosecuted a writ of error to the circuit court of Kanawha county, which court affirmed the judgment of the lower court, and this writ of error is prosecuted to that judgment.

[1] The ground upon which the judgment was vacated is that the court of common pleas entered the default judgment in violation of one of its rules, which the said court held to be error appearing upon the face of its record, for which the judgment should be set aside under the provision of section 5, c. 134, of the Code. This rule of the court which it is contended was violated in the rendition of this judgment provides that the clerk of the court shall make up for each term thereof a "trial calendar docket," upon which shall be placed all cases which are expected to be tried at the term, and that parties litigant desiring their cases tried at any term shall notify the clerk of such intention 15 days before the term, so that the same may be placed upon this "trial calendar docket"; that, in case no such notice is given by either party to a suit, the case will stand continued at that term. This case was not upon this "trial calendar docket" at the special term at which the judgment was rendered, but this is perhaps not conclusive, in view of the fact that this special term was called to complete the work of the last regular term. The case, however, was not on the "trial calendar docket" at any term of court prior to the rendition of the judgment, and the defendant contends that he had a right to rely upon the court's rule that the same would stand continued. The plaintiff insists that this rule of the court is invalid because it is not a reasonable or proper rule, and violates the provisions of the statute; that, even if it is a proper rule, it has no application to this case; further, that it was no part of the record at the time the court below vacated the default judgment, wherefore it could not be considered upon that motion; and, further, that the court should not have set aside the judgment for the reason that the defendant can make no defense to the suit at this time, inasmuch as an affidavit was filed with the declaration, and no counter affidavit or plea was filed at the first term of court there-

after, for which reason the defendant is now barred from making any defense to the suit.

It is, of course, very well settled that a default judgment can only be set aside after the adjournment of the term at which it is rendered for error appearing upon the record as the same stood at that time. If extraneous matters are relied upon as the basis for relief against a judgment, it must be attacked by an independent suit for the purpose of setting it aside. *Helms v. Greenbrier Valley Cold Storage Co.*, 65 W. Va. 203, 63 S. E. 1069.

[2, 3] This brings us to a consideration of the question whether or not the court's rules and its docket are a part of the record of this case. It is very well established that a court has inherent power to make rules for the orderly conduct of its business, so long as such rules are not oppressive or unreasonable, and violate no provision of law. *Teter v. George*, 86 W. Va. 454, 108 S. E. 276. When such rules are adopted and promulgated, they are the law controlling proceedings in that court. They become binding upon the litigants, as well as upon the court in the conduct of its proceedings. 7 R. C. L. title "Courts," § 54; *Gist & Scott v. Drakely*, 2 Gill. (Md.) 330, 41 Am. Dec. 426; *Dunbar v. Conway*, 11 Gill. & J. (Md.) 92; *Wall v. Wall*, 2 Har. & G. (Md.) 79; *McDonald v. State*, 172 Ind. 393, 88 N. E. 673, 139 Am. St. Rep. 383, 19 Ann. Cas. 763.

[4, 7] This being the effect of a valid court rule, it follows, of course, that every such rule is a part of the record of every case tried in the court promulgating it, and must be observed by the court in the conduct of its business just as a general statute enacted by the Legislature for the conduct of its business must be complied with. *Goodwin v. Blackford*, 20 Okl. 91, 93 Pac. 548, 129 Am. St. Rep. 729; *Walla Walla Printing & Publishing Co. v. Budd*, 2 Wash. T. 336, 5 Pac. 602.

[8, 8] Is the rule relied upon a reasonable and proper rule, and one which the court had the authority to adopt for the conduct of its business? It will be observed that section 1 of chapter 131 of the Code (sec. 4905) provides that certain dockets shall be made up by the clerk before the beginning of each term of the court; and it further provides that the clerk shall, under the control of the court, set the cases for trial on certain days during the term. Apparently this rule was adopted for the purpose of furnishing to the clerk and to the court information upon which intelligent action might be had in setting the cases for trial. It does not violate the provisions of any statute, nor deprive a party of any right, but is simply a method adopted by the court for securing the information necessary to an intelligent administration of the law. Without this rule the court would have to assume that every case upon its docket would be tried at the

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term, and proceed to set the cases for trial with that view. This would result in the court being idle a large part of the time, for the reason that it is well known that many of the cases upon the court's docket which are in such a position that they might be tried are not tried. It was to avoid just such a condition as this that the rule was promulgated, and we can see that it is a very salutary one. Instead of being in violation of any positive law, it is a substantial aid to the court in the execution of the positive command of the statute.

[5] But it is said that this rule does not apply to the case we have here; that it only applies to those cases in which issue has been joined. The rule itself does not so limit its application. The court below has interpreted the rule as applying to this case, and this construction will be adopted by this court unless the same is in conflict with the positive terms of the rule or some positive rule of law. *Teter v. George*, 86 W. Va. 454, 103 S. E. 275.

The plaintiff complains also of the action of the common pleas court in entering which is termed a nunc pro tunc order. The first order entered by the common pleas court vacating the judgment stated as the reason therefor that the case was not properly upon the docket at the time the judgment was rendered. Later the court concluded that this was not an accurate statement, and entered an order reciting that, by inadvertence, the real reason had not been stated in the former order, and stated fully the ground upon which the judgment was set aside as above indicated, and recited in this order the rule relied upon, as well as the fact that the case had never been placed upon the trial calendar. This order was not, strictly speaking, a nunc pro tunc order at all, but it was an order entered for the purpose of correcting a clerical inadvertence which the court always has the power to do. Section 1, c. 134, Code.

[9] The further ground relied upon by the plaintiff for reversal of the judgment, that the defendant could not, at the time the default judgment was set aside, make any defense because he had filed no counter affidavit or plea at the first term that the case was on the court docket, is likewise without merit. In this case a writ of inquiry of damages had to be executed, and, according to our holdings, in that event the defendant may file a counter affidavit, and plead to issue at any time before the writ of inquiry is properly executed. *Philip Cary Manufacturing Co. v. Watson*, 53 W. Va. 189, 52 S. E. 515; *Federation Window Glass Co. v. Cameron Window Glass Co.*, 53 W. Va. 477, 52 S. E. 518; *Wilson v. Shrader*, 73 W. Va. 105, 79 S. E. 1063, Ann. Cas. 1916D, 886;

Rosencrance v. Kelley, 74 W. Va. 100, 81 S. E. 705.

We are therefore of opinion that the court of common pleas committed no error in setting aside the default judgment, and the judgment complained of will therefore be affirmed.

(89 W. Va. 460)

MORRIS et al. v. HALL et al. (No. 4246.)

(Supreme Court of Appeals of West Virginia.
Nov. 8, 1921.)

(Syllabus by the Court.)

1. Insane persons \S 61—Deed of insane person prior to lunacy inquisition, in absence of fraud or imposition, is voidable but not void.

The deed of an insane person, made before an inquisition of lunacy has been had, and in the absence of fraud or imposition, and without knowledge or notice to the grantee therein of such mental disability, is not void, but voidable only.

2. Insane persons \S 66—Voidable deed of insane person will not be avoided without placing affected parties in statu quo.

And such a deed by an insane person being voidable only, will not be avoided at the suit of the insane person, his committee or heirs, without restitution of the benefits secured thereby, or by placing the parties affected in statu quo.

3. Insane persons \S 66—Insane person or his representative may avoid trust deed given to cover debt of another to grantee.

But when one obtains a deed of trust from such an insane person, which is made to cover in part the debt of another to him, and for which the grantor receives no benefits, such deed of trust may be avoided at the suit of such insane person, his committee, administrator or heirs, unless the property covered has been sold and conveyed to an innocent purchaser for value, in which event the beneficiary in such trust may be required to account to his grantor, or his personal representative or heirs, for the amount covered in excess of the benefits accruing to the grantor or his estate.

Appeal from Circuit Court; Monongalia County.

Action by Jordan L. Morris, administrator of the estate of Mary D. Huggins, deceased, and others against William Hall and others, and from a decree setting aside and declaring null and void certain deeds, William Hall and certain other defendants appealed. Decree reversed and cause remanded.

Everly & Bowman, of Morgantown, for appellants.

O. C. Rose, of Morgantown, and F. E. Par-rack, of Kingwood, for appellees.

MILLER, J. The bill was filed by Jordan L. Morris, administrator of the estate of Mary

D. Huggins, deceased, and by said Morris and Charles H. Morris, his brother, in their individual rights as the only heirs at law of the said decedent, their sister, who died intestate, against the defendants William Hall, S. F. Glasscock, Trustee, Morgantown Savings & Loan Society, a corporation, I. Grant Lazzelle, Trustee, Morgantown Security & Development Company, a corporation, Joe Walls, and Bruce D. Glover.

The bill alleges that the said decedent left debts which her personal property was not sufficient to satisfy; that prior to June 20, 1912, she was seized and was owner in fee of two certain lots of land situate in Morgan District, Monongalia County; and the source of her title thereto is also set out in the bill. It is further alleged that on said 20th day of June, 1912, decedent signed and delivered to the Morgantown Savings & Loan Society a deed of trust, in which I. Grant Lazzelle was named trustee, securing a loan of \$1,040.00, but that said loan was engineered and carried through by the defendant Joe Walls, who received the money and appropriated it to his own use, and never repaid it to decedent or to any one for her; that at least the sum of \$380.00 was paid on said loan by way of dues etc., to said Morgantown Savings & Loan Society; and notwithstanding said payments said Society demanded the sum of \$1,086.00 in settlement of said loan, which was paid by the defendant William Hall; and that by reason of said payment by him, the said Hall had secured from said Mary D. Huggins another deed of trust, dated November 2, 1915, calling for the payment of the sum of \$1,500.00, and which latter deed in addition to the property covered by the deed of trust to Lazzelle, Trustee, was made to include another lot owned by decedent, the latter trust deed having been made to defendant S. F. Glasscock, Trustee; that on January 17, 1917, said lots had been sold by said Glasscock, Trustee, at which sale said Hall had become the purchaser thereof at the price of \$1,350.00, which were deeded to him on the same day; and that said Hall, on October 9, 1917, had conveyed said property to the defendant Morgantown Security & Development Company, who on August 17, 1918, conveyed it to Bruce D. Glover, the present owner thereof.

The prayer of the bill is that said two deeds of trust and all the subsequent conveyances of said property may be set aside as a cloud upon the title of said Mary D. Huggins, and for general relief.

The only grounds alleged for the relief prayed for are that the said Mary D. Huggins, on June 20, 1912, when she signed and delivered the deed of trust to Lazzelle, Trustee, and on November 2, 1915, when she signed and delivered the deed of trust to said Hall and his trustee, S. F. Glasscock, and for several years prior thereto and up until the date of

her death, was of unsound mind, not competent to execute a deed or deeds of trust; that she was then suffering from an incurable mental affliction, for which she had received treatment in an insane asylum at Dixmont, Pa., at two different times from which she had received no beneficial results, and from which she never recovered to the time of her death; that when she executed said deeds, decedent did not possess memory, understanding and mind sufficient to know and appreciate the nature, character and effect of signing and delivering the same; and the second and last amended bill alleges that the defendants well knew the mental condition of decedent at the various dates of their transactions with her, and took advantage of her mental condition to rob her of her property. This latter allegation does not apply to the Morgantown Security & Development Company and Bruce D. Glover, for they are not alleged to have had any transactions with decedent, or notice of her insanity.

It will be observed from the recital of the allegations of the bill that it is not alleged that the said Mary D. Huggins was at any time, either in the state of Pennsylvania or in this state, by any legal and competent authority adjudged to be insane, nor that any committee or trustee was appointed for her, and to whose custody and control her property was committed. In the brief of counsel for plaintiffs it is argued that she had been adjudged insane in Pennsylvania, but the fact is not alleged, nor is it proven. It is simply a matter of inference from the fact alleged and proven, that some twelve years prior to the transactions in question, she had been received for treatment in some asylum at Dixmont, Pennsylvania, but from which she had been removed prior to her coming into and residence in this state.

The demurrers of the defendants Morgantown Savings & Loan Society and I. G. Lazzelle, Trustee, to the original and amended bills were sustained, and as to them the bills were dismissed; but the demurrer of the remaining defendants was overruled. On a subsequent day, however, the court sustained defendants' demurrer to an amended bill, which being again amended, their demurrer to the bill as amended was overruled, and defendants ruled to answer, which was done, the answers admitting the recorded facts, and did not specifically deny the insanity of the decedent, but did deny that defendants had any notice thereof at the time of the several transactions with her.

On this state of the pleadings, and the depositions taken and filed in the cause, the decree complained of, pronounced on the 18th day of September, 1920, adjudged that the deed of trust from Mary D. Huggins to S. F. Glasscock, Trustee, and all the subsequent deeds, down to and including the deed from the Morgantown Security & Development

Company to Bruce D. Glover, purporting to convey the said two lots originally held by said decedent, should be and the same were set aside and declared to be null and void as against the complainants, and a writ of possession was also decreed to plaintiffs against the said Bruce D. Glover or whomsoever might be found in possession of said property.

From the final decree aforesaid the defendants William Hall, S. F. Glasscock, Trustee, Morgantown Security & Development Company, and Bruce D. Glover obtained this appeal.

The bill, as already observed, does not allege that the decedent had ever been adjudged insane by competent authority, and the answers do not deny specifically the fact of insanity. Should the bill be regarded good on demurrer? It does not allege adjudication of insanity, nor notice of the fact of insanity by any of the parties except those who had transactions with Mary D. Huggins, which would not include the Morgantown Security & Development Company or Bruce D. Glover, who are not alleged to have had any transactions with her; nor is it alleged that decedent obtained no benefit from the deeds of trust or other deeds set aside by the decree, unless the allegation that Joe Walls engineered the loans and appropriated the money to his own use amounts to such allegation; nor is there any proffer in the bill to restore to defendants any of the money obtained by the decedent upon the deeds of trust alleged to be void.

[1] While there has been some considerable conflict in the decisions on the question whether the deed of a lunatic, before inquisition of lunacy has been had, is void or only voidable, the rule is now well established in this country, by a long line of decisions, that in the absence of fraud, and when good faith has been observed on the part of those dealing with one not known to be insane, and with nothing to put them upon notice of such insanity or unsoundness of mind, the deed of such person is not void, but voidable only. The cases so holding are many, of which the following are sufficient to support the proposition: *Eaton v. Eaton*, 37 N. J. Law, 108, 18 Am. Rep. 716; *Hull v. Louth*, *Guardian*, et al., 109 Ind. 315, 10 N. E. 270, 58 Am. Rep. 405; *Abbott v. Creal*, 56 Iowa, 175, 9 N. W. 115; *Myers v. Knabe*, 51 Kan. 720, 33 Pac. 602; *Burnham v. Kidwell*, 113 Ill. 425; *Downham v. Holloway*, 158 Ind. 626, 64 N. E. 82, 92 Am. St. Rep. 830; *Wait v. Maxwell*, 5 Pick. (Mass.) 217, 16 Am. Dec. 391; *Hovey v. Hobson*, 53 Me. 451, 89 Am. Dec. 705; *Castro v. Gell*, 110 Cal. 292, 42 Pac. 804, 52 Am. St. Rep. 84; *Blinn v. Schwarz*, 177 N. Y. 252, 69 N. E. 542, 101 Am. St. Rep. 806; *Smith v. Ryan*, 191 N. Y. 452, 84 N. E. 402, 19 L. R. A. (N. S.) 461, 123 Am. St. Rep. 609, 14 Ann. Cas. 505; *Pearson v. Cox*, 71 Tex. 246, 9 S. W. 124, 10 Am. St. Rep. 740;

Studabaker v. Faylor, 170 Ind. 498, 88 N. E. 747, 127 Am. St. Rep. 397; *Allis v. Billings*, 6 Metc. (Mass.) 415, 39 Am. Dec. 744, note 749; *Riggan v. Green*, 80 N. C. 236, 30 Am. Rep. 77; *Flach v. Gottschalk Co.*, 88 Md. 368, 41 Atl. 908, 42 L. R. A. 745, 71 Am. St. Rep. 418, note 430.

[2] And being voidable only, like the deeds of infants and others under like disability, their deeds can not be avoided without restitution of benefits secured thereby, or placing the parties affected in statu quo as far as possible, this upon the principles pertaining to courts of equity, that when one comes into a court of equity for redress of supposed grievances, he will be required to do equity and will not be allowed to retain the benefits of a voidable transaction, but must make restitution as a condition of obtaining relief against his voidable act. *Odum v. Riddick*, 104 N. C. 515, 10 S. E. 609, 7 L. R. A. 118, 17 Am. St. Rep. 686; 16 Am. & Eng. Enc. Law, 625, and cases cited; *Loomis v. Spencer*, 2 Paige (N. Y.) 153; *Burnham v. Kidwell*, supra; *Abbott v. Creal*, supra; *Myers v. Knabe*, supra; *Matthiessen & Welchers Refining Co. v. McMahon's Adm'r*, 38 N. J. Law, 536. In the latter case it is said the liability of the lunatic in such cases is upheld, not on the ground of the contract, but on the fact that he has received and enjoyed an actual benefit from the contract. See, also, 14 R. C. L. 593, section 47.

[3] We think the bill as amended makes out a case for relief against Hall, for he is charged with notice of decedent's insanity. He denies such notice, and as there was no proof of notice to him, we do not think the pleadings and proof make a case against him on the fact of insanity. But as to the Morgantown Security & Development Company and Bruce D. Glover, not charged with notice, and being purchasers for value without notice, their title to the land could not be affected. The cases above cited will support this proposition. As to the defendants so situated the bill was demurrable, and their demurrer should have been sustained. *Odum v. Riddick*, supra.

As to Hall and Glasscock, his trustee, the case made by the bill is that he not only knew of decedent's insanity, but that when he took the deed of trust it was made to cover, not alone the \$1,086.00 necessary to discharge the prior loan, but the sum of \$1,500.00. The bill does not allege what the additional sum was intended to cover, but the evidence shows it was intended to cover debts due him from the plaintiff J. L. Morris and the said Joe Walls, which in no way benefited said decedent. If such was the fact, and it had been clearly alleged and proven, Hall would not be protected in that part of his debt by the deed of trust to Glasscock but should be limited to the amount advanced to pay off and dis-

charge the prior lien. As to that part of the debt the decedent's estate was benefited by the discharge of her property therefrom.

Moreover, the bill as lastly amended alleges that the plaintiffs desire a fair settlement of all the matters pertaining to all of said transactions; that each party shall receive or be permitted to retain whatever is just and right and in good conscience he should retain, but after such restitution or permission to retain the amounts to which each of said defendants are entitled, the remainder shall go and belong to plaintiffs. As the plaintiffs are the heirs at law of the decedent, the proffer of the bill should not go unheeded even on demurrer to the bill; but it leaves the bill certainly good on demurrer as to Hall, so far as it affects his right to retain or have enforced his deed of trust against the property for the debts of Morris and Walls included therein. True, the title of the innocent subsequent purchasers of the property can not be affected, but the allegations of the bill and the evidence thereon will support a decree against Hall for whatever sum was included in his deed of trust to cover the debts of Morris and Walls, not benefiting the decedent or her estate. The exact amount so included in the trust deed does not clearly appear, and it will have to be ascertained.

The case as made by the proof does not show notice of insanity to any of the parties who had transactions with the decedent, and there being no judgment of lunacy against her prior thereto, and the transactions being without such notice, and in good

faith, and not in fraud of the decedent's rights, the deeds will not be set aside nor relief of any kind granted against those dealing with her, except upon the principles of placing them in statu quo.

In this case the evidence shows that Jordan L. Morris, one of the heirs and beneficiaries of the estate of the decedent, was himself the principal actor in procuring from his sister the execution of both the deeds of trust, the one to Lazzelle, Trustee, and that executed to Hall and his trustee; that the check in the first case was made to Mrs. Huggins, and her endorsement thereon secured by him, and that he was responsible principally for the transfer of the funds to himself or to the firm of Morris and Walls; and in the second case Hall's check for the balance due the loan company, Hall thinks, was made to that company; and all this without the knowledge of any of the defendants, alleged or proven. Walls denies any complicity in the transactions relating to the borrowing of the money by Mrs. Huggins, and placed to the credit of Morris or Morris and Walls. Evidently there was disagreement and misunderstanding between the partners, which has brought about the present controversy and the effort on the part of plaintiffs to saddle the loss upon the defendants. Neither the pleadings nor proofs justify the decree, and our conclusion is to reverse it, and to remand the cause for further proceedings to be had in accordance with the principles herein affirmed, and further according to the principles governing courts of equity.

(152 Ga. 277)

(109 S.E.)

TALLEY v. SOUTHERN REAL ESTATE & INV. CO. (No. 2573.)

(Supreme Court of Georgia. Nov. 17, 1921.)

*(Syllabus by the Court.)***1. Auctions and auctioneers — Contract for land sold at auction held unilateral when signed only by purchaser.**

This is a suit brought by auctioneers against a successful bidder at an auction sale, to enforce specific performance of two contracts for the purchase of land. The petition alleges, in substance, that the auctioneers in such sale acted as agents of the designated owner of the land, and were to be compensated for their services by a stated commission on the proceeds derived from the sales; that these facts were all well known to the successful bidder; that such bidder executed two written contracts, duplicates except as to the amounts to be paid, notes to be executed, and the descriptions of the lands, one of which was as follows: "This is to certify that I have this day purchased at public auction from the Southern Real Estate & Investment Company, as agent for Buell Stark, that tract or parcel of land known as tract — as shown on map of survey made by R. L. Brown containing 80 acres, for which I agree to pay the sum of \$35.50 per acre, upon the following terms; ¼ cash, balance in three equal annual payments, deferred payments bearing interest at the rate of 8% per annum from January 1st, 1920; and I agree to execute promissory notes for the deferred payments. The purchase of this property is made subject to all existing rental contracts for the year 1920. Witness my hand and seal, this the 23d day of December, 1919. W. S. Talley." No memorandum of the auctioneer was made, so far as the record discloses. The petition further alleges that said bidder failed and refused to perform his contract, without legal excuse; that the owner had offered to perform, but refused to bring suit for specific performance. Defendant demurred to the petition, upon several grounds, among them that the contract signed by the purchaser is unilateral, the same not having been signed by the auctioneer or the owner of the land, and failing to create any obligation on the part of the vendor which could be enforced by the bidder. The demurrer was overruled, and the defendant excepted.

Held:

The court erred in refusing to sustain the demurrer to the petition, on the ground that the instrument signed by the bidder was unilateral.

2. Class of cases distinguished.

The case differs from that class of cases founded upon memorandums of the auctioneer, who, under the statute, is considered the agent of both parties so far as to dispense with any memorandum in writing other than his own entries. Civ. Code 1910, § 4107.

Error from Superior Court, Whitfield County; M. C. Tarver, Judge.

Action by the Southern Real Estate & Investment Company against Amanda Talley, administratrix. Judgment for plaintiff, and defendant brings error. Reversed.

Maddox, McCamy & Shumate, of Dalton, for plaintiff in error.

O. D. McCutchen and F. K. McCutchen, both of Dalton, for defendant in error.

GILBERT, J. Judgment reversed. All the Justices concur, except FISH, C. J., absent because of sickness.

(152 Ga. 236)

LOCHAMY v. STATE. (No. 2441.)

(Supreme Court of Georgia. Nov. 16, 1921.)

*(Syllabus by the Court.)***1. Homicide — Evidence of deceased's possession of money held material.**

The fact that the deceased had a large sum of money in his possession a short time before the homicide was a material fact tending to illustrate the circumstances under which he was killed; and the court did not err in admitting evidence to establish that fact, over the objections made.

2. Criminal law — Definition of "reasonable doubt" held not error.

On the trial of one charged with murder, it is not error for the court, in charging the jury on the law of reasonable doubt, in part to define "reasonable doubt" as such a doubt "as an upright man might entertain in an honest investigation after truth." *Peterson v. State*, 47 Ga. 524(5).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Reasonable Doubt.]

3. Criminal law — Inaccuracy in instruction held not to require new trial.

The expression by the court in his charge that "an assault is an attempt to commit a violent injury; as used in sections 85, an assault and battery is evidently contemplated"—is not an accurate expression of the law; but the inaccuracy, in view of the evidence, does not require the grant of a new trial.

4. Homicide — Striking one with club inflicting wound causing fatal disease held murder.

If one willfully, unlawfully, and with malice aforethought strikes another on the head and face with a piece of wood, inflicting a wound which, though not necessarily mortal, is the primary cause of a disease which brings about the death of the wounded person, he is guilty of murder. *Clements v. State*, 141 Ga. 667, 81 S. E. 1117.

5. Criminal law — New trial properly denied when verdict authorized.

The evidence authorized the verdict, and the court did not err in overruling the motion for new trial.

Error from Superior Court, Tift County; R. Eve, Judge.

David Lochamy was convicted of murder, and he brings error. Affirmed.

Hal Lawson, of Abbeville, and Ridgill & Mitchell and Smith & Christian, all of Tifton, for plaintiff in error.

R. S. Froy, Sol. Gen., of Sylvester, and R. A. Denny, Atty. Gen., and Graham Wright, Asst. Atty. Gen., for the State.

HILL, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent because of sickness.

(152 Ga. 276)

PEARSON et al. v. COCHRAN et al.
(No. 2566.)

(Supreme Court of Georgia. Nov. 17, 1921.)

(Syllabus by the Court.)

1. Wills \S 834(1)—Remainder to life tenant's daughter and heirs of her body held vested.

Where one bequeaths property to his wife "during her lifetime," and further provides that at her death it shall belong to a named daughter and the heirs of her body, the remainder is one limited to a certain person upon the happening of a necessary event, and such remainder is vested. Civ. Code 1910, \S 3676.

2. Wills \S 853—Vested remainder held to pass to son of deceased remainderman.

"If the remainderman dies before the time arrives for possessing his estate in remainder, his heirs are entitled to a vested remainder interest." Civ. Code 1910, \S 3677. In the present case the daughter, to whom was bequeathed the vested remainder interest in land, predeceased the testator, dying intestate, leaving one son as heir at law. On the death of the testator this son became entitled to the vested remainder interest of his mother. Civ. Code 1910, \S 3906; Cheney v. Selman, 71 Ga. 384; Smith v. Williams, 89 Ga. 9, 15 S. E. 130, 32 Am. St. Rep. 67; Sanders v. Dunson, 146 Ga. 784, 92 S. E. 531.

3. Case properly dismissed.

The plaintiffs in the court below having no interest in the land under the will, the court did not err in finding for the defendants, and in dismissing the case.

Error from Superior Court, Grady County; S. P. Cain, Judge pro hac vice.

Action by T. W. Pearson and others against J. W. Cochran and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

R. R. Terrell, of Whigham, for plaintiffs in error.

L. W. Rigsby, of Cairo, for defendants in error.

GILBERT, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent because of sickness.

(152 Ga. 287)

STEED et al. v. BENTLEY et al. (No. 2461.)

(Supreme Court of Georgia. Nov. 17, 1921.)

(Syllabus by the Court.)

1. New trial \S 42(2)—Not granted because plaintiff was a juror at the same term where improper influence not shown.

The first special ground of the motion for a new trial, in which the contention is made that the defendant did not have a trial before an impartial jury, as provided by law, in that "the plaintiff served as a traverse juror during the term of the court at which said case was tried, for several days before said case went to trial, and afterwards, and that his fellow jurors sitting upon this case were biased and prejudiced by their association with him, which prejudice is manifested by the verdict," etc., is without merit, there being no specific acts to show that the defendant in error did anything to improperly influence the jurors with whom he was associated to render a verdict in his favor.

2. Specific performance \S 120—In suit on parol contract, admission of unexecuted deed held error.

This was a suit for specific performance to compel the execution by an administrator of certain deeds to land which it was averred the administrator's intestate had agreed to convey for a stated consideration, the performance of which by the plaintiff was duly alleged; and the existence of the parol contract was a material question in issue. It was error for the court to admit in evidence certain unsigned instruments in writing, purporting to convey the land in question.

3. Specific performance \S 123—Instruction authorizing recovery if plaintiff sustained burden of showing contract without requiring showing of performance held error.

In a suit for specific performance of a parol contract for the conveyance of land, a charge in substance to the effect that the burden was on the plaintiff to establish by evidence the parol contract as alleged, to the requisite degree of certainty, and that if he did so establish the parol contract by evidence he would be entitled to a decree, was erroneous in that it stopped short of imposing also upon the plaintiff the burden of showing by evidence performance on his part of the contract, where the consideration of the conveyance was services rendered and to be rendered by the plaintiff to the intestate of the defendant administratrix.

4. No error in other ground of motion.

The other ground of the motion for a new trial shows no error requiring the grant of a new trial.

Error from Superior Court, Lincoln County; B. F. Walker, Judge.

Action by O. R. Bentley and others against Mrs. W. El. Steed, administratrix of Mrs. Grace A. Bentley, and others. Judgment

ment for plaintiffs, and defendants bring error. Reversed.

Colley & Colley, of Washington, Ga., for plaintiffs in error.

John T. West & Son, of Thomson, for defendants in error.

BECK, P. J. This was a suit for specific performance. The plaintiff prayed for a decree requiring the administratrix of his mother, Mrs. Grace A. Bentley, to execute a deed to the premises in dispute. He based his contention that he was entitled to the execution of such a deed and to specific performance on the ground that his mother had, in consideration of love and affection and the past services rendered by the plaintiff and the agreement on his part to perform certain other services set forth in the petition, made a parol contract to convey to him certain lands. The jury upon the trial of the case returned a verdict in favor of the plaintiff. The defendant made a motion for a new trial, which was overruled, and he excepted.

[1] 1. The ruling made in the first head-note requires no elaboration.

[2] 2. The court erred in admitting in evidence an unexecuted deed purporting to be a conveyance from the intestate of the defendant of the tract of land in dispute to the plaintiff in error. The fact that a deed had been drawn and purported to convey the land in question in accordance with the parol contract upon which the plaintiff bases his right to specific performance might have had weight with the jury in determining the question as to whether the parol contract alleged was actually made and entered into, when as a matter of law it is not entitled to such weight, and was irrelevant, especially in the absence of evidence that the grantor named in the unsigned paper had herself prepared the instrument; and the evidence of certain witnesses that she had intended or desired to sign such an instrument did not render the paper itself admissible in evidence.

[3] 3. Error is assigned upon the following excerpt from the charge of the court:

"The law places a certain burden on the plaintiff in this case, which he must carry before he would be entitled to have a verdict at your hands, which he now and here asks for in the case. He must show you, and that by evidence in the case, that there was a parol contract between him and his mother, as he contends, and he must show you that contract and the terms thereof. This he must establish so clearly and strongly and satisfactorily as to leave no reasonable doubt as to this contract and its terms. That burden he must carry before he would be entitled to have a verdict at your hands. I charge you that if he does carry that burden, and in the way I have explained to you, he would be entitled to have a verdict at your hands."

The defect in this charge is that it failed to instruct the jury that it would be necessary for the plaintiff, in addition to establishing by evidence the parol contract as alleged to the degree of certainty required, to show by evidence such performance on his part as would entitle him to a decree for specific performance in a court of equity. The court did in other parts of the charge clearly instruct the jury that the plaintiff was required to show performance and compliance with his part of the contract, but the instruction which we have set forth above and which we have held to be defective stands apart and separate from the other parts of the charge; and, while this court might not have reversed the judgment on this ground alone, but might have reached the opinion that in view of subsequent portions of the charge the defect in that part of it under consideration was cured or rendered harmless, nevertheless, as the judgment refusing a new trial is reversed on another ground, it is deemed best to point out the defects in the charge complained of, so that the error may be avoided upon the next trial.

[4] 4. The other portion of the charge criticized in the motion for a new trial was not error, in view of the note by the court appended to the motion.

Inasmuch as the case is remanded for a new trial, no opinion is expressed as to the sufficiency of the evidence.

Judgment reversed.

All the Justices concur, except FISH, C. J., absent because of sickness.

(152 Ga. 236)

JACKSON v. CALLAHAN. (No. 2544.)

(Supreme Court of Georgia. Nov. 16, 1921.)

(Syllabus by the Court.)

Wills §697(1)—Creditor of beneficiary before judgment cannot maintain suit for construction of will.

A nonjudgment creditor of a beneficiary under a will, who is seeking judgment against the beneficiary in a separate suit, cannot maintain an equitable action against the executor of the will, to obtain a judicial construction of the will, in order to secure an adjudication to the effect that his debtor (the devisee) took under the will an interest to which the lien of the judgment would attach if obtained.

Error from Superior Court, Taliaferro County; E. T. Shurley, Judge.

Suit by J. S. Jackson against J. H. Callahan, executor. Judgment for defendant, and plaintiff brings error. Affirmed.

J. A. Mitchell, of Crawfordville, for plaintiff in error.

Alvin G. Golucke and Hawes Cloud, both of Crawfordville, for defendant in error.

GEORGE, J. J. S. Jackson brought suit in the city court of Greensboro against R. L. Andrews, upon an account and a promissory note. While the suit was pending Jackson filed a petition in equity against J. H. Callahan as executor of the estate of J. V. Andrews, for the purpose of having the will of J. V. Andrews construed and the interest of R. L. Andrews under the will determined. To the petition the executor filed demurrers both general and special. The general demurrers were sustained, and the petition was dismissed.

The plaintiff is neither a judgment creditor of the beneficiary, nor does he assert any lien on or title to any estate devised to the beneficiary. He asserts no equitable claim or right to the estate devised to his debtor, nor does he seek any equitable remedy. The sole object of the action is to obtain a judicial construction of the will, in order to secure an adjudication to the effect that plaintiff's debtor took under the will an interest to which the lien of his judgment, if and when obtained, would attach. Only the personal representative of an estate may maintain an action having for its sole object the judicial construction of a will. Civil Code 1910, § 4597.

"The construction of a will may be invoked by a devisee or legatee, as a basis for the recovery of the devised or bequeathed property." Clay v. Clay, 149 Ga. 725(2), 101 S. E. 793.

See, also, Maneely v. Steele, 147 Ga. 399, 94 S. E. 227, and cases there cited.

"In cases of real difficulty in construing wills, * * * the personal representative of the estate may ask the direction of a court of equity; but direction of the court cannot be invoked by the legatee or heir unless such direction is essential to the protection of the legacy or distributive share, or is necessary as a foundation for the recovery by the legatee or heir of his legacy or distributive share." Morrison v. McFarland, 147 Ga. 465(5), 94 S. E. 569.

See, also, Civil Code 1910, § 4597.

Generally the power of courts of equity to construe wills is incidental to some recognized ground of equity jurisdiction; and it is clear that an action merely to construe a will cannot be brought by a person who has no lien on or title to the property disposed of by the will, and who may never have any interest in the property or in the construction of the will. See 40 Cyc. 1847. In Higgins v. Downs, 101 App. Div. 119, 91 N. Y. Supp. 937, it was held that even a judgment creditor of a beneficiary under a will had no right to maintain an action to obtain a judicial construction of the will, in order to

secure an adjudication to the effect that his debtor took an interest under the will to which the lien of the judgment attached. In view of the foregoing, the court did not err in dismissing the petition on general demurrer.

Judgment affirmed.

All the Justices concur, except FISH, C. J., absent because of sickness.

(152 Ga. 258)

WIMBERLY v. ROSS et al. (No. 2427.)

(Supreme Court of Georgia. Nov. 17, 1921.)

(Syllabus by the Court.)

1. Action \S 50(10)—Petition in suit by coheirs to establish rights and cancel deed held not multifarious.

The petition is not multifarious. Brown v. Wilcox, 147 Ga. 546(3), 94 S. E. 993; Georgia Peruvian Ochre Co. v. Cherokee Ochre Co., 152 Ga. —, 108 S. E. 609.

2. Descent and distribution \S 83—Heirs entitled to sue administratrix in her own wrong to establish rights, enjoin sale, and for accounting.

The parties plaintiff, as heirs at law of Eleanor J. Sabra, could maintain the suit under the allegations contained in the petition as amended. Allen v. Hurst, 120 Ga. 763, 48 S. E. 341; Civ. Code 1910, §§ 3929, 3983.

3. Cancellation of instruments \S 37(6)—Petition held to state cause of action for cancellation for fraud.

The petition set forth a cause of action for the cancellation of the deed from Sara Ann Ross to the defendant, Laura R. Wimberly.

4. Pleading \S 250—Petition to establish rights in property not inconsistent with amendment asking accounting and injunction against sale.

Properly construed, there was no inconsistency between the prayers of the original petition and of the amendment.

5. Equity \S 39(1)—Jurisdiction retained to grant complete relief.

Equity, having taken jurisdiction of the case for one purpose, will retain it for all purposes as made by the petition.

6. Demurrers properly overruled.

The judge did not err in overruling the demurrers, both general and special, to the petition amended.

Error from Superior Court, Bibb County; Malcolm D. Jones, Judge.

Suit by S. A. Ross and others against L. R. Wimberly. Demurrer to the petition was overruled, and defendant brings error. Affirmed.

Sara Ann Ross and Dixie V. Sabra Johnson, individually and as guardian for her two minor children, William Sabra and

James Sabra, brought a petition against Laura R. Wimberly, for the cancellation of a certain deed, for injunction, and for other relief. The petition alleged in substance the following: Plaintiffs and defendant are the only heirs at law of Eleanor J. Sabra, who died intestate in 1919, and there has been no administration on her estate; she left no debts against her estate, except a balance of about \$150 on a security deed to a certain house and lot (the property in controversy) in favor of Mrs. Wing, which indebtedness, as plaintiffs are informed and believe, has been paid off from money derived from policies of insurance due to the estate of Eleanor J. Sabra. Sara Ann Ross and Laura R. Wimberly are sisters of the deceased; and Dixie V. Sabra Johnson is the widow, and William and James Sabra are the children, of James Sabra, deceased, who was the brother of Eleanor J. Sabra. Eleanor J. Sabra died seized of a certain tract of land described in the petition, and the defendant is claiming exclusive ownership of the house and lot, and is basing such claim on a quitclaim deed alleged to have been executed by Sara Ann Ross to the defendant in June, 1919, a copy of which is attached to the petition. Sara Ann Ross charges that the quitclaim deed was fraudulently obtained by the defendant, was not authorized by plaintiff, and is a forgery. Sara Ann Ross alleges that the only instrument which she signed in the presence of James C. Estes, whose name is signed to the quitclaim deed as attesting witness, was signed in June, 1919, when she went to the office of Estes, defendant's attorney, at the special instance and request of defendant, who urged plaintiff to go there, saying she wanted her to sign a paper which her lawyer had prepared, authorizing the cancellation of the mortgage deed given by Eleanor J. Sabra to Mrs. Wing; and plaintiff Ross, not having her glasses and not being able to read without them, and placing full confidence and faith in the honesty and integrity of her sister, did sign a paper which she was told by the defendant was only an order for the cancellation of the mortgage deed aforesaid. The instrument was not read over, nor its contents explained to her, at the time she signed it, but she signed it apparently in blank, solely upon the representations previously made to her by her sister, the defendant, on whose honesty and integrity she placed implicit confidence. Defendant was fully aware that she was deceiving plaintiff in obtaining her signature to the alleged quitclaim deed, and she did it for the purpose of getting an unconscionable advantage over the plaintiff. The quitclaim deed was without any consideration. Plaintiffs prayed that the quitclaim deed be ordered to be delivered up and canceled, that plaintiffs be decreed to be tenants in common of the realty in controversy with the defendant; and that the interest of each be declared. By an

amendment to the petition the plaintiffs allege that at her death Eleanor J. Sabra was seized and possessed in her own right of the property described in the original petition, upon which she had created a lien by deed to secure a debt, with power of sale, in favor of Mrs. Laura Baker Wing, upon which at the time of her death there was a balance due of about \$150. The deceased also left as a part of her estate a certain policy of insurance for the sum of \$200 or more, and also benefits in various societies, sufficient to defray all expenses of her last illness and burial. Defendant Laura R. Wimberly, acting in her own wrong as administratrix, upon the death of Eleanor J. Sabra seized and entered upon the whole estate of the deceased, procured from Sara Ann Ross the deed by fraud, as set out in the original petition, and also collected the money on all of the policies of insurance, amounting to several hundred dollars, and with the proceeds thereof procured from Mrs. Wing a transfer to Laura R. Wimberly of the deed to secure the debt on which there was then a balance due by the deceased. Pending the hearing of this case and since it was set for final hearing and trial on January 10, 1921, the defendant by her attorneys advertised in the Macon Telegraph, on December 10, 1920, for sale under the power to sell in said deed the property described therein, being the property in controversy; and unless restrained by the court, the defendant will offer the same for sale at public outcry on January 3, 1921, and thus involve plaintiffs in further litigation with other parties who may bid on the property. Plaintiffs do not know, and have no way of learning the exact amount of money collected by the defendant on the policies of insurance; and they ask that the defendant be compelled to set out a full, itemized statement of all sums collected by her from the policies of insurance held by the deceased at her death, and the source from which same was collected, together with copies of all policies from which she collected any money. Plaintiffs charge, on information and belief, that the aggregate sum collected by the defendant amounts to between \$300 and \$400. The prayer in the amendment was that the defendant, her agents and attorneys, be enjoined from offering the property for sale as advertised, and from further seeking to becloud the title to the lands in controversy; that the defendant be compelled to come to a full and complete accounting as administratrix de son tort with petitioners, for all other acts and doings in connection with the estate; and that plaintiffs have judgment against her, together with the penalties provided by law, for whatever sum may be found to be due to plaintiffs as heirs at law of the deceased.

The defendant demurred to the petition, both generally and specially. The special grounds of the demurrer were because of a

misjoinder of parties plaintiff, and a misjoinder of causes of action, and because the petition is multifarious. The ninth paragraph of the original petition was specially demurred, to, because the reason alleged to have been given by the defendant to the plaintiff Sara Ann Ross for wanting her to sign the quitclaim deed "is irrational and incapable of deceiving any one with normal intellect; * * * further, that no sufficient reason is set forth excusing said plaintiff, Sara Ann Ross, from knowing the contents of said deed." Paragraph 10 was demurred to for a similar reason. The amendment to the petition was demurred to upon the ground that it set up a new cause of action, and upon the further ground that it contains a misjoinder of causes of action and a misjoinder of parties plaintiff; and also because the amendment and the prayers thereto are inconsistent with paragraph 4 of the original petition, which is not stricken by the amendment, which alleges that deceased left no debts against her estate except a balance of about \$150 on a mortgage deed to the house and lot in controversy, which indebtedness plaintiffs allege had been paid and satisfied from funds derived from certain policies of insurance due to the estate of the deceased. The demurrers, both general and special, were overruled, and the defendant excepted.

Walter De Fore and Jas. C. Estes, both of Macon, for plaintiff in error.

J. P. Burnett and H. F. Strohecker, both of Macon, for defendants in error.

HILL, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent because of sickness.

(152 Ga. 252)

GRANT v. STATE. (No. 2397.)

(Supreme Court of Georgia. Nov. 17, 1921.)

(Syllabus by the Court.)

1. Criminal law \S 805(1)—Proper charge not error because another appropriate instruction not given.

It is not a good assignment of error on a portion of the judge's charge which states a correct principle of law applicable to the case, that some other correct and appropriate instruction was not given. *Harvey v. State*, 121 Ga. 590(2), 49 S. E. 674; *Howell v. State*, 124 Ga. 698(2), 52 S. E. 649; *Nail v. State*, 125 Ga. 234(2), 54 S. E. 145; *Powers v. State*, 138 Ga. 624(4), 75 S. E. 651; *Hicks v. State*, 146 Ga. 221(6), 91 S. E. 57; *Holston National Bank v. Howard*, 148 Ga. 767(1), 98 S. E. 269; *Johnson v. State*, 150 Ga. 67(3a), 102 S. E. 439. Under application of the principle stated above, the criticisms of the charge made in the first, fifth, and sixth grounds of the motion for new trial show no cause for reversal.

2. Criminal law \S 786(2)—Instruction as to effect of defendant's statement held not error.

The court instructed the jury: "The defendant has made a statement. While not under oath, yet the jury may believe the statement in preference to the sworn evidence." This instruction was excepted to on the following grounds: "(1) It is an incorrect statement of the law applicable to the statement of defendant, and has the effect of minimizing the statement of the defendant in this case. Especially is this true in view of the brief manner in which this branch of the law was presented and dismissed by the court. (2) This instruction omitted and failed to inform the jury that the defendant had a 'right' to make a statement in this case. (3) This charge failed to inform the jury that the statement of the defendant was a legal right which all defendants have in criminal cases. (4) The court also failed to instruct the jury that such statement 'shall not be under oath,' and failed to instruct the jury it 'shall have such force only as the jury may think right to give it.'" *Held* that, even if the assignment of error was in good form, none of the grounds of criticism of the charge were meritorious.

3. Homicide \S 304, 309(3)—Evidence held not to require charge on accident or manslaughter in commission of unlawful act.

The evidence did not require a charge (1) on the law of misadventure or accident, (2) or on the law of involuntary manslaughter in the commission of an unlawful act.

4. Homicide \S 235—Evidence held sufficient to support conviction for murdering one person in attack on another.

The evidence was sufficient to support the verdict finding the defendant guilty, and there was no error in refusing a new trial.

Error from Superior Court, Hall County; J. B. Jones, Judge.

J. C. Grant was convicted of murder, and he brings error. *Affirmed*.

J. C. Grant, on trial for the murder of Wyley Heussey, was found guilty, and the jury recommended that he be punished by imprisonment in the state penitentiary for life. His motion for a new trial having been overruled, he excepted.

The homicide occurred on a street and near a restaurant in the business section of the city of Gainesville. The testimony of the state's witnesses tended to show that it occurred under the following circumstances: An automobile was standing parallel with the sidewalk extending along the side of a building, the left wheels resting in a shallow gutter in the street running along the edge of the sidewalk. J. B. Hale, proprietor of the car, was seated in the left front seat in a position to drive, and B. M. Farmer was in the right front seat. They were preparing to go home, and invited Wyley Heussey to go with them. Heussey was standing on

the sidewalk facing the left side of the car talking with Hale. Other persons were about the car. After testifying as above, Hale testified further: J. C. Grant came up flourishing his pistol, commanding the crowd to "hands up." After intimidating the crowd in such manner, he went around on the right side of the car and fired his pistol twice at Farmer, one shot grazing his breast and the other passing through the fleshy part of the forearm. Referring to the first shot that was fired, Hale testified that Grant, addressing Farmer, said, "You and I have had an argument to-night," and fired at Farmer; also, that when the shot was fired Hale was leaning forward over his steering wheel, and Farmer was leaning back with his hands up. Hale further testified:

"As far as I can figure it out, he [Grant] struck him [Farmer] when he came down with the gun. He hit him in the mouth with the cylinder of the gun, and the fire of the gun burnt his chest. * * * He is said to have been struck in the face at the time the shot was fired, by the doctor. I did not see him strike him."

Concerning the first shot, Farmer testified:

"Grant ran around the car and threw his pistol in my face, and struck me there [indicating] on the lip and fired. And as he threw his pistol over he says, 'You and I have had an argument before, and I guess, * * * this will settle it.' * * * He threw his gun over into me and shot, and the shot glanced me across the breast here [indicating], and then when he done it I started to jump out on him, I started to get out and reached for the front of the door, and he shot again and shot me through the arm. * * * From where he was that would have been straight across the car front. At that time Heussey would have been directly towards him. Heussey was still standing there when the first shot was fired."

At the first shot Hale jumped out of the car and ran, as did all the others except Farmer. He reached into the pocket of the right front door of the car, drew out a pistol, and proceeded to attack Grant, shooting at him twice as he ran behind the car. When the shooting was over it was ascertained that Heussey had been wounded by one shot that entered his body near the naval and came out at the back, from which wound he died in about 30 minutes. The defendant did not introduce any witness, but made a statement before the jury, in which, so far as necessary to be stated, he denied that he was the man who killed Heussey, and stated further that—

Hale shortly before had assaulted Heussey, on account of which "some of the boys came running around and says, 'We ought not to let no Atlanta man do a Gainesville boy that way,' and I ran over to my car, cut loose, and come around there. Well I reached and got my gun, 32 caliber. * * * They wasn't but one bullet. That is the ball that Mr. Summers found

in the car. I went around to where Farmer was in the car. Hale was going to go, and I ran around in front of the car, and Heussey was between the building and the car. And Farmer says, 'What the damned hell you got to do with it? Don't move now!' He had his gun in his hand, a 45. I hit him with this gun 32 caliber, my pistol, the onliest one I had; hit a stroke across there, * * * and the gun discharged by striking Farmer. I ran. I knew there wasn't but one cartridge in it. I ran around back of the car, * * * and just as I turned by the left-hand wall of this house, this man kept shooting at me; done shot me through the leg, and all of them was running down the street, and he shot at me two or three times in the crowd."

The grounds of the original motion for new trial were the usual general grounds. The grounds of the amendment to the motion were:

1. The court charged the jury as follows: "The defendant enters the trial with the presumption of innocence in his favor, and that presumption follows him until his guilt has been clearly proven under the rules which the court gives you in charge." Movant insists that said charge is error, for the following reasons: (1) It omitted to inform the jury that the testimony in the case, to overcome this presumption, must have the effect of satisfying the jury to a moral and reasonable certainty and beyond a reasonable doubt of the guilt of the defendant. (2) It failed to inform the jury that the presumption of innocence is in the nature of evidence, and avails the defendant at every stage of the trial until it is overcome by evidence which has the effect of satisfying the minds of the jury as to the defendant's guilt, to a moral and reasonable certainty and beyond a reasonable doubt.

2. The court charged the jury as follows: "The defendant has made a statement. While not under oath, yet the jury may believe the statement in preference to the sworn evidence." Movant insists that said charge is error, for the following reasons: (1) It is an incorrect statement of the law applicable to the statement of defendant, and has the effect of minimizing the statement of the defendant in this case. Especially is this true in view of the brief manner in which this branch of the law was presented and dismissed by the court. (2) This instruction omitted and failed to inform the jury that the defendant had a "right" to make a statement in this case. (3) This charge failed to inform the jury that the statement of the defendant was a legal right which all defendants have in criminal cases. (4) The court also failed to instruct the jury that such statement "shall not be under oath," and failed to instruct the jury it "shall have such force only as the jury may think right to give it."

3. The court erred in omitting and failing to charge the jury the law of misadventure or accident. This omission was error, because: (1) The facts raised this issue and required such a charge. (2) Such law, under the evidence, was directly applicable to the case, and the failure so to charge was prejudicial to the movant and his rights. (3) Under the evidence of witnesses for the state and the statement of the

accused, it was shown that accused and deceased were friends, and that the conduct of the accused, on the occasion of the homicide, was induced by a desire on his part to protect the deceased in a matter of difference which had arisen between J. B. Hale, witness for the state, and the deceased. (4) No motive on the part of defendant for the killing of the deceased was shown by the evidence.

4. The court erred in omitting and failing to charge the jury the law of involuntary manslaughter in the commission of an unlawful act. This omission was error, because the facts in this case raised this issue and required such a charge. B. M. Farmer, witness for the state, testified: "And he was between the car and Grant. Grant was out a little further in front. Then all at once he ran around the car. Came around the front end of the car. Q. Who ran around? A. Grant, and threw his pistol in my face, and struck me there on lip, and fired." Defendant stated: "Farmer says, 'What the damned hell have you got to do with it? Don't move now!'" * * * I hit him with the 32 caliber pistol, the only one I had; hit a stroke across there [indicating], and the gun discharged, striking Farmer. I ran."

5. The court charged the jury as follows: "I charge you that if Wiley Heussey, the man alleged to have been killed in this case, was shot and killed by Farmer, either purposely or accidentally, then you could not convict the defendant Grant." Movant insists that this charge was error, because, in connection with said charge, the court failed to instruct the jury that if they had, on this point, a reasonable doubt as to whether Farmer or Grant killed Heussey, then they should give the defendant the benefit of this doubt and acquit him.

6. The court charged the jury as follows: "I charge you that if Grant, without any provocation from Farmer, without any sort of mitigation or justification, shot at Farmer, intending to kill him, with malice, either expressed or implied, and that the shot that was intended for Farmer, whether it hit him or not, in some way struck and killed Wiley Heussey, it would not make any difference whether Grant had anything against Wiley Heussey or not—might have been his best friend. But if he shot at Farmer, intending to kill Farmer, if it had been murder if he had killed Farmer under the law I have given you in charge, then I charge you if that shot, or one of those shots, if there were more than one, all of which you must determine, killed Wiley Heussey, then I charge you that the defendant, J. O. Grant, would be guilty of murder. If he shot and killed Wiley Heussey, his defense depends upon whether he was justified, or whether there was any mitigation in shooting at Farmer, if he shot at him. What the circumstances are, and what the facts are, is for you to determine." Movant insists that said charge was error and prejudicial to him, for the following reasons: (1) The court failed to instruct the jury, in this connection, that the detailed facts must be believed by the jury to a moral and reasonable certainty and beyond a reasonable doubt. (2) This charge failed to instruct the jury on the law of justifiable homicide as contained in sections 70 and 71 of the Penal Code of Georgia;

the court having nowhere in the charge defined justifiable homicide or the law in reference thereto. (3) This charge failed to instruct the jury on the law of voluntary manslaughter or upon any of the grades of manslaughter, and failed to inform the jury under what circumstances and conditions a homicide might be mitigated or reduced to manslaughter, or involuntary manslaughter in the commission of an unlawful act, the court nowhere in the charge referring to or defining these branches of homicide. (4) The charge contained no suggestion as to the law in reference to justification or mitigation in cases of homicide, neither in the particular charge here excepted to, nor in the entire charge.

Wm. P. Whelchel, Ed Quillian, and B. P. Gaillard, Jr., all of Gainesville, for plaintiff in error.

J. G. Collins, Sol. Gen., of Gainesville, and R. A. Denny, Atty. Gen., and Graham Wright, Asst. Atty. Gen., for the State.

ATKINSON, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent because of sickness.

(152 Ga. 278)

DANIEL v. JOSEPH ROSENHEIM SHOE CO. (No. 2583.)

(Supreme Court of Georgia. Nov. 17, 1921.)

(Syllabus by the Court.)

1. Judgment ~~reversed~~ 407(2)—Equitable petition to amend not maintainable, there being adequate remedy at law.

Harper Daniel filed an equitable petition returnable to the December term, 1919, of the superior court, which alleged in substance as follows: In an action brought by Joseph Rosenheim Shoe Company against Harper Daniel the jury returned a verdict as follows: "We, the jury, find for the plaintiff \$839. June 9, 1915. B. D. Jones, Foreman"—upon which the following judgment was rendered: "Wherefore it is considered, ordered, and adjudged by the court that the plaintiff, Joseph Rosenheim Shoe Company, do have and recover of said defendant, Harper Daniel, the principal sum of \$839, together with interest on the same from October 1, 1909, at 7 per cent. per annum, and the further sum of \$—, costs. E. E. Cox, J. S. C. S. C." Execution was duly issued by the clerk of the superior court, "which called for the payment of \$839," which amount the defendant immediately paid to the sheriff of said county, the officer having charge of the fi. fa. for collection, and said officer marked across the face of the fi. fa. the word "Satisfied" and delivered the same to the defendant in fi. fa. The defendant in fi. fa. requested the sheriff to deliver the same to the clerk of the superior court with the request that the clerk mark the same satisfied and canceled on the general execution docket. The fi. fa. was marked "Satisfied," but the clerk failed to have the same canceled. Subsequently, in April,

1917, the sheriff levied the same *fi. fa.* for an additional sum which purported to be interest as stated on the face of the *fi. fa.*, and threatened to advertise and sell the property levied upon, to the damage and injury of the petitioner. At the time petitioner paid the amount of principal due on the judgment the words, "with interest on same from October 1, 1909, at 7 per cent. per annum" did not appear on the *fi. fa.*, but were written there after the same was paid and delivered to the sheriff to be by him delivered to the clerk of the court for the purpose of having the same canceled upon the records; and petitioner charges that the writing of the interest into the *fi. fa.* was a fraud upon him, and was so made by the plaintiff in *fi. fa.* or through its attorneys without the knowledge or consent of petitioner, and was not discovered until June, 1919; that petitioner discovered said fraud only when the sheriff made the levy complained of. Petitioner further contends that he had fully paid the amount of the "verdict" before interest accrued thereon, and that the portion of the judgment in reference to interest is null and void and a fraud on petitioner. The prayers are that the sheriff and the plaintiff in *fi. fa.* be enjoined and restrained from advertising or selling or in any way interfering with the property levied on under the said *fi. fa.* and judgment, that the judgment be vacated and declared void and canceled of record as to that portion of it which provides for interest from October 1, 1909, at the rate of 7 per cent. per annum, to be paid, and that the said judgment be declared satisfied as to the amount of the principal. The defendant demurred to the petition on several grounds, it being necessary to mention only the following: (a) The petition sets forth no cause of action. (b) The judgment sought to be set aside was rendered more than three years prior to the filing of plaintiff's petition. (c) The plaintiff has an adequate remedy at law by affidavit of illegality. *Held*:

If the plaintiff is not barred of a right to have the judgment so amended as to make it conform to the verdict in the case, under the provisions of Civil Code 1910, § 4358, relating to motions to set aside judgments, nevertheless his remedy at law for this purpose would be complete, and a resort to equity is not necessary.

2. Execution \S 171(2)—Proceedings not enjoined because of alteration there being remedy by affidavit of illegality.

In so far as the petition complains of the action in regard to amending the *fi. fa.* by or through the attorneys of the plaintiff in *fi. fa.*, the petitioner had an adequate remedy at law by affidavit of illegality; and therefore injunction is not the proper remedy. *Monroe v. Security Mutual Life Insurance Co.*, 127 Ga. 549, 56 S. E. 764; *Park v. Callaway*, 128 Ga. 119, 57 S. E. 229; *Williams v. Kennedy*, 134 Ga. 339, 341, 67 S. E. 821; *Smith v. Murphey*, 140 Ga. 80, 78 S. E. 423.

3. Petition properly dismissed.

It follows from the above rulings that the court did not err in sustaining the general demurrer and dismissing the petition.

Error from Superior Court, Calhoun County; W. M. Harrell, Judge.

Suit by Harper Daniel against the Joseph Rosenheim Shoe Company. Judgment dismissing the petition on demurrer, and plaintiff brings error. *Affirmed*.

A. L. Miller, of Edison, for plaintiff in error.

W. S. Collins and E. L. Smith, both of Edison, for defendant in error.

GILBERT, J. Judgment affirmed.

All the Justices concur, except FISH, C. J., absent because of sickness.

(152 Ga. 244)

HAM v. PRESTON. (No. 2556.)

(Supreme Court of Georgia. Nov. 16, 1921.)

(Syllabus by the Court.)

1. Appeal and error \S 670(2), 729, 1200—Exceptions, bill of \S 13, 39(1), 58(4)—Affidavit of service held sufficient; affidavit of service cannot be impeached, explained or sustained in the Supreme Court; affidavit of service can only be impeached for fraud; bill of exceptions held to comply with statute as to brief of evidence; bill of exceptions held presented to the judge in time; assignment of error to granting of nonsuit held sufficient; "proving."

Civ. Code 1910, § 6160, declares: "Within ten days after the bill of exceptions is signed and certified, the party plaintiff therein shall serve a copy thereof upon the opposite party or his attorney, and if there be several parties with different attorneys, upon each, with a return of such service (or acknowledgment of service) indorsed upon or annexed to such bill of exceptions." The affidavit of the plaintiff in error in regard to service, entered on the back of the bill of exceptions as it appears in this court, states a substantial compliance with the section of the Code above quoted. It has been held that this section, properly construed, requires personal service. This court will construe that the language of the entry of service on the back of the bill of exceptions, to wit, that the attorney for the plaintiff in error "has this day served O. M. Duke, attorney of record for the defendant in said case, with a copy of the bill of exceptions," means that the latter was personally served. The Supreme Court has no jurisdiction to hear evidence to explain, to sustain, or to impeach the verity of such an affidavit. It could be impeached only on the ground of fraud, and in the superior court. *Georgia, Florida & Alabama Ry. Co. v. Lasseter*, 122 Ga. 679, 51 S. E. 15. And see *Wade v. Watson*, 133 Ga. 608, 66 S. E. 922.

(a) The evidence which is incorporated in the bill of exceptions is a substantial compliance with section 6140(1), Civ. Code 1910, relating to the preparation of briefs of evidence. (Hill, J., dissenting.)

(b) The judgment complained of was rendered

on February 24, 1921; the bill of exceptions was presented to the judge of the superior court on March 26, 1921. It follows that the ground of the motion to dismiss, based on the contention that the bill of exceptions was not tendered to the judge within the time required by law, is without merit.

(c) The assignment of error is as follows: "To the order and judgment of the court granting said nonsuit the plaintiff excepted, now excepts, and assigns the same as error, and says that the evidence offered required the submission of the issues to a jury and authorizes a recovery for the plaintiff." This was a sufficient assignment of error. None of the grounds of the motion to dismiss the writ of error being meritorious, the motion is denied.

2. Deeds — Evidence held to make question for jury as to delivery during grantor's lifetime.

Under the evidence introduced by the plaintiff, the jury would have been authorized to find a verdict in his favor. It was error to sustain the motion for a nonsuit.

(Additional Syllabus by Editorial Staff.)

3. Deeds — Delivery during grantor's lifetime essential.

Delivery of deeds during the life of the grantor is essential to constitute a valid conveyance.

Error from Superior Court, Butts County; W. E. H. Searcy, Jr., Judge.

Suit by J. H. Ham against Mrs. W. W. Preston. Judgment of nonsuit, and plaintiff brings error. Reversed.

J. H. Ham brought suit against Mrs. W. Walker Preston, alleging, in substance, that he is the sole heir at law of Mrs. Emma G. Ham, deceased; that all of her property descended to and became his property, there being no debts against said estate; that among the property owned by Mrs. Emma G. Ham was certain described property situated in Flovilla, Ga.; that some time prior to the death of Mrs. Emma G. Ham she signed certain instruments purporting to be deeds to the said real estate, conveying the same to Mrs. W. Walker Preston, and deposited these instruments of writing into the hands of J. T. Gibson, who was cashier of the Bank of Flovilla, as her agent; that said papers remained in the hands of her said agent at the time of her death; that immediately after her death the husband of the defendant demanded said papers from Gibson, and they were delivered by Gibson to W. Walker Preston; that after the death of Mrs. Ham said deeds were recorded in the clerk's office of Butts superior court; that the record of said instruments constitutes a cloud upon the title of petitioner to the property therein described; that said instruments, purporting to be deeds, were never legally delivered to Mrs. W. Walker Preston, and

therefore passed no title to any of said property; and that said deeds were void and of no effect. The prayers are that the defendant be required to produce said instruments of writing; that they be decreed to be void and of no effect, and to constitute a cloud upon the title of petitioner; that the record of said instruments in the clerk's office be expunged; and for process.

The case proceeded to trial before a jury; and after the introduction of evidence by the plaintiff, the defendant moved for a nonsuit, which motion the court sustained. The plaintiff excepted.

On the call of the case in this court the defendant moved to dismiss the writ of error, on the following grounds:

"(1) Because plaintiff in error has not incorporated in the bill of exceptions a brief of so much of the evidence as is material to a clear understanding of the errors complained of, and has not had such brief approved by the judge, made a part of the record, and sent up by the clerk as a part thereof. (2) Because there is no sufficient assignment of error. (3) Because there is no such evidence of the service of the bill of exceptions and writ of error as is required by law. (4) Because it does not appear that the bill of exceptions was tendered to the judge within the time required by law."

In response to the motion the attorney for the plaintiff moved the court to allow him to amend his original affidavit as to service upon the defendant, written on the bill of exceptions and sworn to by him, by adding "to said affidavit that the service of the bill of exceptions was served on O. M. Duke by handing him a copy of said bill of exceptions in person, and that said bill of exceptions was personally served on said O. M. Duke." The original affidavit as to service of the bill of exceptions is as follows:

"Georgia, Butts County. In person appeared before the undersigned authority O. L. Redman, who on oath says that he is an attorney of record in the within case for plaintiff in error, and that he has this day served O. M. Duke, attorney of record for defendant in the said case, with a copy of this bill of exceptions in this case, with the certificate of the judge thereon and all entered thereon."

Mallet & Bell, of Atlanta, and O. L. Redman and H. M. Fletcher, both of Jackson, for plaintiff in error.

O. M. Duke, of Flovilla, and John R. L. Smith and Grady C. Harris, both of Macon, for defendant in error.

GILBERT, J. [1] 1. The motion to dismiss the bill of exceptions has been sufficiently dealt with in the headnotes, except that portion dealing with the sufficiency of the brief of the evidence. The only evidence submitted on the hearing of the case

is contained in the bill of exceptions, and the recital of it is as follows:

"Plaintiff introduced evidence proving that said defendant, Mrs. W. Walker Preston, is a resident of said county; that plaintiff and the said Mrs. Emma G. Ham were intermarried on the 23d day of September, 1915; and that the said Mrs. Ham died on the 14th day of December, 1918, leaving plaintiff her sole surviving heir at law; and that there were no debts against the estate of the said Mrs. Ham. That the said Mrs. Ham, at the time of her death, owned certain real estate, consisting of a dwelling house and lot and a storehouse and lot in the town of Flovilla, Ga., and that said real estate is the same as that described in Exhibits A and B, respectively, attached to plaintiff's petition; that this was the only real estate owned by the said Mrs. Ham; that she continued to collect the rents on said dwelling house and lot, and exercised other rights of ownership over said property; that, prior to her death, the said Mrs. Ham signed two instruments of writing, which were introduced in evidence with Exhibits A and B attached to plaintiff's petition, and that said Exhibits A and B were exact copies of said instruments, except that on the instrument purporting to be a warranty deed to said dwelling-house and lot there was written on said instrument the following words: 'To be delivered at my death (to Bess Preston) 7/14/16. Mrs. Emma G. Ham'—said words or notation being in the handwriting of the said Mrs. Ham; that some time prior to her death, during the fall or about September before she died in December, the said Mrs. Ham deposited with J. T. Gibson, cashier of the Bank of Flovilla, said instruments of writing together with other papers, all of which were sealed in a large envelope or wrapper, telling the said Gibson, 'Keep these papers for me; and if anything happens to me, turn them over to Bess' (meaning thereby Mrs. W. W. Preston); that the said Gibson had been acquainted with the said Mrs. Ham for '20-odd years,' and that before her marriage to plaintiff the said Mrs. Ham had operated a store next door to the bank of which the said Gibson was cashier, and that the said Mrs. Ham had often left other papers and valuables with the said Gibson for safe-keeping; that she kept money on deposit in said bank, and that the said Gibson would make deposits for the said Mrs. Ham as her agent, and often collected the rents on said dwelling house and lot and deposited the same to the credit of the said Mrs. Ham; that when the said sealed envelope was delivered to the said Gibson by Mrs. Ham there was written on the outside of the same the following words: 'Mrs. J. H. Ham's papers'—and that no other writing or notation appeared thereon.

"The said Gibson never parted with the possession of said papers, nor was he ever authorized or directed to deliver them to any one during the lifetime of the said Mrs. Ham. On the afternoon following the morning on which Mrs. Ham died, Miss Lucy Goodman called Mr. Gibson on the telephone and said 'Mrs. Ham told her (Miss Goodman) to tell him (Mr. Gibson) to deliver those papers to Mrs. Preston as soon as she died.' Miss Goodman asked Mr. Gibson if she could come and get the papers for

Mrs. Preston. Mr. Gibson replied that he didn't know exactly where they were, but that he would get them up and deliver them. The said Gibson did not deliver the papers to the said Mrs. Preston, but two days later gave them to her husband, W. W. Preston, telling him Miss Lucy Goodman said that Mrs. Ham said to deliver them to Mrs. Preston as soon as she died. When said Gibson delivered this package of papers to said W. W. Preston, he had never opened said envelope, nor did he know what the same contained. Gibson testified, on cross-examination, that he supposed, or rather his understanding was, Mrs. Ham meant for him to deliver the papers to Mrs. Preston if she died before she called for them to be returned to herself; and that she never called for them after giving them to him to keep for her. The said Mrs. Ham had sold to W. W. Preston (under bond for title) the storehouse and lot, and held his (W. W. Preston's) notes for the balance of the purchase money due. About one month before she died she told Raymond Biles, who was doing clerical work for the government in J. H. Ham's office, that she had bought a home on Mulberry street (Jackson), and she wished she could sell her house at Flovilla; she said she had sold her store to her brother-in-law, and wished he would pay his notes; that if he would pay the notes, and she could sell her house, she would be all right. About two months before her death the said Mrs. Ham told T. W. Nelson that, if she could sell her place at Flovilla, she would not have to borrow any money to pay on the place they were buying here (in Jackson). About a month before her death Mrs. Ham told John Billie Mays that she was going to sell her home at Flovilla and put the money in the place she and Judge Ham were buying in Jackson."

The defendant in error moved to dismiss the bill of exceptions, upon the ground that no brief of evidence was incorporated in either the bill of exceptions or in an approved brief of the evidence. The ruling that should be made upon this motion is not altogether free from difficulty; but, after considering the question, we are of the opinion that the bill of exceptions substantially complies with the statute which requires that the evidence, or enough of the evidence to make clear the issue involved, is set forth in the bill of exceptions. It is insisted that the recital that the plaintiff introduced evidence "proving that," etc., shows that what purports to be a brief of the evidence is nothing more than a conclusion of the judge as to what the evidence established; but we cannot agree with this contention. We think that the expression "proving," as here used, is the equivalent of "in effect," or "in substance," or "in brief," the evidence following; that, where it is recited that evidence was introduced proving certain facts stated, it is meant that there was evidence introduced as follows that expression there used. If the bill of exceptions had recited that the plaintiff introduced evidence "in effect" as follows, or "in substance" as follows, it would hardly be contended that the bill of

exceptions did not contain a brief of the evidence. Construing the expression "proving" as equivalent to "in effect" or "in substance," we reach the conclusion that what is set forth in the form of evidence is a brief of the evidence. The conclusion that we have here reached is strengthened by a reading of the entire brief of evidence. It is true that all of the evidence is connected with the evidence "proving that"; but when we read the statements following that expression, we see that it is a clear and brief recital of the facts, and is not in the form of a statement of a mere conclusion either of the judge or of counsel for the plaintiff in error.

[2, 3] 2. The evidence was sufficient to authorize the jury to find that the deeds were not delivered during the life of the grantor, which is essential to constitute a valid conveyance. *Baxter v. Chapman*, 147 Ga. 438, 94 S. E. 544. Under such a finding the plaintiff would have been entitled to a verdict and judgment in his favor; and accordingly it was error to award a nonsuit. Judgment reversed.

All the Justices concur, except HILL, J., dissenting, and FISH, O. J., absent on account of sickness.

HILL, J. I dissent from the ruling made in head-note 1 (a). I do not think that such a brief of the evidence is incorporated in the bill of exceptions as is contemplated by Civil Code 1910, § 6140. What is incorporated therein amounts to the conclusion of the presiding judge, or the attorney for the plaintiff in error. It does not appear as a brief of the evidence at all, but recites that the "plaintiff offered evidence proving that," etc. The section of the Code, *supra*, provides that the plaintiff in error "shall incorporate in the bill of exceptions a brief of so much of the written and oral evidence as is material to a clear understanding of the errors complained of." In the absence of "a brief" of the evidence in the bill of exceptions, or therein specified and shown in the record, I am unable to say whether the facts as set out were "proved" or not.

(27 Ga. App. 624)

RAGLAND v. STATE. (No. 12722.)

(Court of Appeals of Georgia, Division No. 1. Nov. 17, 1921.)

(Syllabus by the Court.)

Criminal law §935(1)—New trial properly refused when evidence authorized verdict.

The motion for a new trial contained only the usual general grounds; the verdict was authorized by the evidence, and the court did not err in refusing to grant a new trial.

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action between the State and Ben Ragland. Judgment for the State, and Ragland brings error. Affirmed.

Porter & Mebane and F. W. Copeland, all of Rome, for plaintiff in error.

E. S. Taylor, Sol. Gen., of Summerville, and J. F. Kelly, of Rome, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 668)

JOHNSON v. STATE. (No. 12640.)

(Court of Appeals of Georgia, Division No. 1. Nov. 18, 1921.)

(Syllabus by the Court.)

1. Homicide §317—Admission of dying declarations harmless where verdict indicates jury did not believe them.

Conceding, but not deciding, that the admission of the alleged dying declarations of the deceased was error, it was not error requiring a new trial, since, if the jury had believed the declarations, the only possible legal finding would have been a verdict of murder, and they convicted the defendant of voluntary manslaughter. See, in this connection *Pyle v. State*, 4 Ga. App. 817, 818, 62 S. E. 540.

2. Assignments not passed on.

Under the foregoing ruling, it is unnecessary to pass upon the assignment of error upon the charge of the court as to dying declarations.

3. Homicide §340(4)—Defendant convicted of manslaughter cannot complain of errors in charging on murder.

A ground of the motion for a new trial complains that the court erred in instructing the jury upon the subject of murder. The defendant, having been convicted of manslaughter, and not of murder, will not be heard to complain of alleged errors of the court in charging the law of murder. *Thompson v. State*, 24 Ga. App. 144(2), 99 S. E. 891, and citations.

4. Criminal law §811(1)—Stating contentions of state at greater length than those of defendant does not necessarily constitute undue stress.

The complaint made in another ground of the motion for a new trial that the judge in his charge failed to state fully and clearly the contentions of the defendant is without merit. Conceding that the contentions of the state were stated more at length than those of the defendant, "It is well settled that the mere fact that contentions of one side are stated more at length than those of the other does not show that undue stress was laid upon or undue prominence given to the contentions so stated."

Smith v. State, 24 Ga. App. 654(2a), 101 S. E. 764, and citation.

5. Criminal law \S 935(1)—New trial properly denied where evidence and statements warranted verdict.

The evidence, with the dying declarations of the deceased excluded, and the defendant's statement to the jury, authorized the verdict of voluntary manslaughter, and the court did not err in overruling the motion for a new trial.

Luke, J., dissenting.

Error from Superior Court, McDuffie County; H. C. Hammond, Judge.

Olin Johnson was convicted of manslaughter, and he brings error. Affirmed.

John T. West & Son and J. B. Burnside, all of Thomson, for plaintiff in error.

A. L. Franklin, Sol. Gen., of Augusta, and John M. Graham, of Atlanta, for the State.

BROYLES, C. J. Judgment affirmed.

BLOODWORTH, J., concurs.

LUKE, J. (dissenting). I am of the opinion that the admission of the alleged dying declarations was harmful error. Such declarations, in my opinion, were calculated and did influence the jury.

(27 Ga. App. 627)

BENNETT v. STATE. (No. 12747.)

(Court of Appeals of Georgia, Division No. 1. Nov. 17, 1921.)

(Syllabus by the Court.)

Criminal law \S 1160—Verdict authorized by evidence and approved by trial judge not disturbed.

The motion for a new trial contained only the usual general grounds, and, as the finding of the jury was authorized by the evidence and approved by the trial judge, this court is without authority to interfere.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action between the State and J. O. Bennett. Judgment for the State, and Bennett brings error. Affirmed.

C. A. Picquet and T. S. Lyons, both of Augusta, for plaintiff in error.

A. L. Franklin, Sol. Gen., of Augusta, and John M. Graham, of Atlanta, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

SOUTHERN UPHOLSTERING CO. v. LIEBERMAN. (No. 12401.)

(Court of Appeals of Georgia, Division No. 2. Nov. 18, 1921.)

(Syllabus by the Court.)

1. Frauds, statute of \S 89(1)—Oral contracts of sale not within statute when part of goods accepted and paid for.

The two contracts for the purchase and sale of merchandise, set forth in the separate counts of the petition, although each exceeded \$50 in amount, did not fall within the statute of frauds, because, under the allegations, the buyer had accepted and paid for part of the goods sold under such oral entire contracts, so as to bring the agreements within the excepting clause in subdivision 7 of section 3222 of Civil Code 1910. *Blumenthal v. Schneider*, 21 Ga. App. 435, 94 S. E. 640.

2. Sales \S 370, 384(2)—Buyer's repudiation of entire contract after partial delivery entitles seller to sue for breach; measure of damages for buyer's breach is difference between contract and market prices.

The alleged contracts being entire, although providing for monthly deliveries of specified quantities, the repudiation of such contracts by the buyer, after partial delivery of the merchandise, but before full delivery, authorized the seller to bring his suit for damages on account of the breach. The alleged measure of damages was proper, viz. the difference between the contract price and the market price at the time and place for delivery. *Robson & Evans v. Hale & Sons*, 139 Ga. 753, 78 S. E. 177; *Seabrook Coal Co. v. Moore*, 25 Ga. App. 613, 614, 103 S. E. 839; *Smith v. Harrison*, 106 S. E. 191; *Phosphate Mining Co. v. Atlanta Oil, etc., Co.*, 20 Ga. App. 660, 93 S. E. 532.

3. Sales \S 153—No tender required where buyer repudiates contract.

The buyer, under the allegations, having repudiated its contracts and refusing to be bound thereby, it was not incumbent upon the seller to make a tender of the merchandise.

4. Sales \S 11—Executory agreement to sell thing having no actual present existence is binding, if not speculative.

If a contract amounts merely to an executory agreement to sell, the parties may be bound, although the subject-matter has no actual existence, provided the agreement is not merely speculative, but contemplates an actual future delivery of the thing bargained for. *Forsyth Mfg. Co. v. Castlen*, 112 Ga. 199, 202, 37 S. E. 485, 81 Am. St. Rep. 28; *Jones v. Fuller*, 107 S. E. 545, 546.

5. Sales \S 377—Plaintiff alleging correct measure of damages need not allege abatement or mitigation.

The petition having set up the correct measure of damages under the facts alleged, it was unnecessary for the plaintiff to allege by his petition that he had undertaken to abate, mitigate, or lessen such damage.

6. Contracts ¶10(4)—Contracts requiring definite quantity to be ordered each month not unilateral.

The contracts alleged were not unilateral, in that they left to the purchaser the option of directing when and where the monthly installments of merchandise were to be delivered, the contracts further definitely providing for a specified quantity to be so ordered in each month. *Seabrook Coal Co. v. Moore, supra*, (2, 8).

7. Petition cured by amendment.

The amendment to the petition, which appears to have been allowed without objection of the defendant, cured such of the grounds of demurrer as might otherwise have been sustained.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by I. B. Lieberman against the Southern Upholstering Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Walter W. Visanska, of Atlanta, for plaintiff in error.

Rosser, Slaton, Phillips & Hopkins, of Atlanta, for defendant in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(27 Ga. App. 640)

JENKINS v. STATE. (No. 12806.)

(Court of Appeals of Georgia, Division No. 1. Nov. 17, 1921.)

(Syllabus by the Court.)

1. Criminal law ¶938(3)—Alleged newly discovered evidence held not to require new trial.

The first ground of the amendment to the motion for a new trial is based upon newly discovered evidence. An affidavit is made that the gun used by the accused at the time of the alleged assault was "what is known as 'easy on trigger' and liable to fire with slight pressure on the trigger." This fact will not now avail the plaintiff in error, because: (a) The evidence shows that he had been using the gun and had shot it a number of times on the day of the alleged assault, and necessarily knew, if such was really true, that the gun was "easy on the trigger." (b) The defense was not "bottomed" upon the idea that the gun was "easy on the trigger," and the defendant made no such claim in his statement.

2. Criminal law ¶828—Charge on evidence of good character unnecessary unless requested in writing.

The second ground of the amendment to the motion for a new trial complains that the judge erred in failing to charge on the good character of the defendant. It is true that a

number of witnesses testified as to his good character, but there was no request for a charge on this subject. "In the absence of a written request the court did not err in failing to charge on the weight to be given to evidence of good character." *Scarboro v. State*, 24 Ga. App. 29 (6), 99 S. E. 637.

3. Criminal law ¶1160—Verdict approved by trial judge not disturbed.

No error of law was committed on the trial, the jury was convinced of the guilt of the accused, the trial judge approved their finding, and this court will allow it to stand.

Error from Superior Court, Fulton County; Jno. D. Humphries, Judge.

Archie Jenkins was convicted of assault, and he brings error. Affirmed.

T. G. Lewis and H. A. Allen, both of Atlanta, for plaintiff in error.

John A. Boykin, Sol. Gen., and E. A. Stephens, both of Atlanta, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 710)

SPENCER v. NORTHWESTERN NAT. INS. CO. (No. 12648.)

(Court of Appeals of Georgia, Division No. 2. Nov. 18, 1921.)

(Syllabus by the Court.)

1. Account, action on ¶6(4) — In action against agent for premiums, demurrer properly overruled.

In a suit on an open account, the original petition alleged that the defendant was indebted to the petitioner "in the principal sum of two thousand one hundred seven & ⁹⁴/₁₀₀ dollars for the net balance of insurance premiums on policies of insurance written by the defendant in behalf of petitioner as local agent in said county," and an exhibit was attached to and made a part of the petition, showing the various amounts, the months when due, and the interest on each amount, which together made the total sum sued for. To meet a demurrer, an amendment was made, giving a minutely itemized statement of the account, and the demurrer was overruled. *Held*, no error. *Southern Ry. Co. v. Grant*, 136 Ga. 303, 71 S. E. 422, Ann. Cas. 1912C, 472.

2. Appeal and error ¶967(1)—Discretion of judge in appointing auditor not interfered with unless abused.

In all cases involving matters of account the judge may, upon the application of either party, or upon his own motion, where, in his judgment, the facts and circumstances of the case require it, appoint an auditor to investigate such matters of account. Civ. Code 1910, § 5128. This statutory discretion will not be interfered with unless abused. *Martin v. Foley*,

82 Ga. 552, 9 S. E. 582; Mayor, etc., of Gainesville v. Jaudon, 145 Ga. 303, 89 S. E. 210.

3. Reference \Leftrightarrow 8(7)—Case properly referred to auditor when long account involved and defendant denied each paragraph of petition.

An action on open account, with bill of particulars attached, consisting of several hundred items of alleged indebtedness, where the defendant denies each paragraph of the petition, making it necessary to examine the books of both plaintiff and defendant, thus constituting complex and intricate matters of account which cannot be conveniently and safely examined in a court by a jury, may be properly referred to an auditor. The present record shows clearly such a case.

Error from Superior Court, Muscogee County; Geo. P. Munro, Judge.

Action by the Northwestern National Insurance Company against R. P. Spencer, Jr. Judgment for plaintiff, and defendant brings error. Affirmed.

McCutchen & Bowden, of Columbus, for plaintiff in error.

Slade & Swift, of Columbus, for defendant in error.

HILL, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(27 Ga. App. 650)

WADE v. STATE. (No. 12858.)

(Court of Appeals of Georgia, Division No. 1, Nov. 17, 1921.)

(Syllabus by the Court.)

1. Criminal law \Leftrightarrow 797—Failure to charge that jury could recommend punishment as for misdemeanor held not error.

The accused was charged with rape and found guilty of an assault with intent to rape. The evidence showed that the female in question was under 14 years of age. Under the ruling in Todd v. State, 25 Ga. App. 411, 103 S. E. 496, the court did not err in failing to instruct the jury that they could, if they saw fit, recommend that the defendant be punished as for a misdemeanor.

2. Rape \Leftrightarrow 54(1)—Corroboration not essential to conviction for assault.

In a case where a defendant is convicted of an assault with intent to rape, it is not essential that the testimony of the female in question be corroborated. Rivers v. State, 8 Ga. App. 703 (2), 70 S. E. 50, and citation. This rule was not changed by the act of the General Assembly of Georgia approved July 31, 1918 (Ga. Laws, 1918, p. 259). That act provides that no conviction shall be had for rape on the unsupported testimony of the female in ques-

tion, but there is no such provision as to an assault with intent to rape.

3. Criminal law \Leftrightarrow 935(1)—New trial properly denied when verdict authorized.

Under the above rulings, none of the special grounds of the amendment to the motion for a new trial is meritorious. The verdict was authorized by the evidence, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Worth County; R. Eve, Judge.

Butney Wade was convicted of assault with intent to rape, and he brings error. Affirmed.

Perry & Tipton, of Sylvester, for plaintiff in error.

R. S. Foy, Sol. Gen., of Sylvester, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 591)

SHANNON v. STATE. (No. 12642.)

(Court of Appeals of Georgia, Division No. 1, Nov. 16, 1921.)

(Syllabus by the Court.)

1. Criminal law \Leftrightarrow 958(1)—Motion for new trial for newly discovered evidence without statutory affidavits not considered.

The only special ground of the motion for a new trial is based upon alleged newly discovered evidence, but no affidavits of movant, counsel, or witnesses are produced, as required by section 6088 of the Civil Code of 1910; therefore this ground of the motion is so defective that it cannot be considered.

2. Criminal law \Leftrightarrow 1160—Verdict not disturbed when approved by trial judge.

The jury passed upon the facts in a trial where no error of law has been pointed out; their verdict was not disturbed by the trial judge, and cannot be by this court.

Error from Superior Court, Pike County; W. E. H. Searcy, Jr., Judge.

Action between Berner Shannon and the State. Judgment for the State, and Shannon brings error. Affirmed.

F. L. Adams, of Zebulon, for plaintiff in error.

E. M. Owen, Sol. Gen., of Zebulon, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 639)

BARCLAY v. CITY OF ELLIJAY.
(No. 12792.)(Court of Appeals of Georgia, Division No. 1.
Nov. 17, 1921.)*(Syllabus by the Court.)***Exceptions, bill of \S 56(2)—Writ dismissed when bill, certified to be true as amended, contains note showing that it is in part false.**

"Where in a certificate to a bill of exceptions the judge certifies that the bill of exceptions 'as amended' is true, and the amendment referred to consists of a note by the judge which precedes the certificate, and which shows that the bill of exceptions is in part not true, the writ of error must be dismissed. While the judge may supply omissions in a bill of exceptions by interlineations or notes, any interlineation or note which has the effect of showing that some of the averments in the bill of exceptions are not true will work a dismissal of the writ of error, when the bill of exceptions is certified to be true only 'as amended.' *Fort v. Sheffield*, 108 Ga. 781, 33 S. E. 680, and case cited; *Sanges v. State*, 110 Ga. 260, 34 S. E. 327. See, also, *Johnson v. Equitable Security Co.*, 113 Ga. 1153, 39 S. E. 473, and cases cited." *Jarriel v. Jarriel*, 115 Ga. 23, 41 S. E. 262.

Under the above ruling and the facts of the instant case this court has no jurisdiction to consider the bill of exceptions.

Error from Superior Court, Gilmer County; D. W. Blair, Judge.

Action between W. R. Barclay and the City of Ellijay. Judgment for the latter, and the former brings error. Writ of error dismissed.

A. N. Edwards, of Ellijay, and T. A. Brown, of Blue Ridge, for plaintiff in error.

BROYLES, C. J. Writ of error dismissed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 597)

SWORDS v. STATE. (No. 12674.)(Court of Appeals of Georgia, Division No. 1.
Nov. 16, 1921.)*(Syllabus by the Court.)***1. Criminal law \S 798½—Where defendant admitted guilt of included offense, failure to give form of verdict of acquittal not error.**

The defendant was convicted of seduction, and complains in his motion for a new trial that the judge in his charge instructed the jury as to the forms of their verdict if they should find the defendant guilty of seduction or of fornication, but failed to give any form of a verdict for acquittal. There is no merit in this exception to the charge, since there was no evidence authorizing an acquittal,

and the defendant in his statement to the jury admitted that he was guilty of fornication.

2. Criminal law \S 1156(3)—Discretion in denying new trial for newly discovered impeaching evidence not interfered with.

The alleged newly discovered evidence being impeaching in its character, and it appearing from the facts of the case that it probably could have been discovered before the trial of the case if the defendant had exercised ordinary diligence, the discretion of the court in overruling that ground of the motion for a new trial, which was based upon the alleged newly discovered evidence, will not be controlled.

3. Criminal law \S 935(1)—New trial properly denied when evidence authorized.

The verdict was authorized by the evidence, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, De Kalb County; John B. Hutcheson, Judge.

C. B. Swords, alias Jack Swords, was convicted of an offense, and he brings error. Affirmed.

E. C. Buchanan of Atlanta, and L. J. Steele, of Decatur, for plaintiff in error.

A. M. Brand, Sol. Gen., of Lithonia, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 607)

FRONEBARGER v. STATE. (No. 12703.)(Court of Appeals of Georgia, Division No. 1.
Nov. 16, 1921.)*(Syllabus by the Court.)***Indictment and information \S 192—Conviction for assault unauthorized when offense, if any, was other assault and battery or assault with intent to rape.**

It is well settled that upon the trial of one charged with assault with intent to rape, where the undisputed evidence shows that if any offense was committed it was either assault with intent to rape or assault and battery, a verdict, finding the defendant guilty of a mere assault, is contrary to the law and the evidence. *Harris v. State*, 8 Ga. App. 457, 60 S. E. 127; *Owens v. State*, 9 Ga. App. 441 (2), 71 S. E. 680.

(a) In the instant case the evidence showed one or more assaults by the defendant on the female in question, but the evidence further showed that each assault was consummated by a battery, either at the time of the assault or almost immediately thereafter. It follows that the defendant's conviction of a simple assault was contrary to law and the evidence, and the court erred in overruling the motion for a new trial.

Error from Superior Court, Cherokee County; D. W. Blair, Judge.

Frank Fronebarger was convicted of assault, and he brings error. Reversed.

Anderson & Roberts and Morris & Hawkins, all of Marietta, for plaintiff in error.

Jno. S. Wood, Sol. Gen., of Canton, and Lindley W. Camp, of Marietta, for the State.

BROYLES, C. J. Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 691)

STANDARD PAINT & LEAD WORKS v. POWELL. (No. 12368.)

(Court of Appeals of Georgia, Division No. 2, Nov. 18, 1921.)

(Syllabus by the Court.)

1. Trial \S 252(13)—Where pleading and evidence showed only implied warranty, charge properly limited accordingly.

The defendant's plea does not set up an express warranty governing the quality of the goods purchased, but relies merely upon a breach of the warranty implied by law, and alleges that the goods were totally worthless. Neither does the testimony relative to the terms and conditions of the trade disclose any express agreement, such as would exclude the warranty implied by law. *Elgin Jewelry Co. v. Estes*, 122 Ga. 807, 810, 50 S. E. 939; *Lovvorn v. Eldorado Jewelry Co.*, 1 Ga. App. 349, 57 S. E. 926; *White v. Mercantile Jewelry Co.*, 6 Ga. App. 860, 65 S. E. 1075. The court, therefore, did not err in limiting the charge accordingly. *New South Rubber Co. v. Muse*, 27 Ga. App. —, 109 S. E. 296.

2. Evidence \S 91—Trial \S 255(3)—Burden on plaintiff, except where defendant admits prima facie case entitling plaintiff to recover, without more; instruction on shifting of burden need not be given without request, when prima facie case not admitted.

Except in cases where the defendant by his plea admits a prima facie case as alleged in the petition, so that the plaintiff, without more, could recover in the amount sued for, or where the defendant in open court makes such an admission and thereby assumes the burden of proof, the burden in all cases brought ex contractu lies upon the plaintiff, and it is incumbent upon him to establish all of the unadmitted material allegations as laid in the petition. Since the plea in the instant case does not admit a prima facie case, upon which the plaintiff, without more, could recover in the amount sued for, the general burden remained upon the plaintiff; and in the absence of a timely request, it was not incumbent upon the court to charge upon the shifting of the burden under the development of the evidence. *Western & Atlantic Ry. Co. v. Brown*, 102 Ga. 13, 29 S. E. 130; *Brunswick R. Co. v. Wiggins*, 113 Ga. 842, 845,

39 S. E. 551, 61 L. R. A. 513; *Askew v. Amos*, 147 Ga. 613, 95 S. E. 5; *Lazenby v. Citizens' Bank*, 20 Ga. App. 53, 55(2), 92 S. E. 391.

3. Evidence \S 129(1)—Trial \S 85—General exception to evidence not well taken, when some was not subject to objection made; evidence of quality and durability of paint and cement similar to that involved held inadmissible for want of sufficient foundation.

One general exception based on several grounds is made as to the admissibility of certain quoted portions of the evidence of four named witnesses, each of whom testified as to the quality and durability of similar paint and cement, which had been used by them, and which it was shown had been bought of the same company, through the same agents, about the same time as the goods sued for. The objections made to this testimony as a whole were that it was irrelevant and hearsay, and consisted of mere statements of opinion. Held: (a) While a small part of the testimony objected to is subject to the last two objections, the exception thus taken to the evidence as a whole is not well taken, under the general rule that an assignment of error upon the admission of specified evidence as a whole is inadequate, when some of it is not subject to the criticism made. *Brunswick, etc., R. Co. v. Hoodenpyle*, 129 Ga. 174, 175(4), 58 S. E. 705; *Burkhart v. Fitzgerald*, 137 Ga. 366(2), 73 S. E. 583; *Higgs v. State*, 145 Ga. 414, 415(2), 89 S. E. 361; *Ga. R., etc., Co. v. Decatur*, 129 Ga. 502(2), 59 S. E. 217; *Jones v. Teasley*, 25 Ga. App. 784 (1, b), 105 S. E. 46. (b) Since the record fails to disclose any evidence showing that the similar paint testified about was properly applied, with reasonable and ordinary skill and under proper and suitable conditions, the foundation laid for the introduction of such evidence was insufficient, and for this reason it should have been excluded. *Dunn v. Beck*, 144 Ga. 148(2), 86 S. E. 385; 22 Corpus Juris, 751(2).

Error from City Court of Nashville; T. N. Henson, Judge.

Action by the Standard Paint & Lead Works against J. W. E. Powell. Judgment for defendant, and plaintiff brings error. Reversed.

The evidence admitted over objection, referred to in the decision, is as follows:

J. W. E. Powell: "I had reasons to believe that my lot of paint was just like those that were not at all satisfactory. I have not heard of but one lot that was used that was satisfactory; the men that put the paint on the hotel told men that it was no account. It seems from the court calendar that there was a good many people that thought that it was no good. All I know about the paint put on my house is what my little boy said."

Jim McKinnon: "I put some of this liquid cement on Mr. J. H. Anderson's house. I do not know it was this Goodyear cement paint. It was some Mr. Yates sold."

Mallie Shaw: "I bought some paint from Standard Paint & Lead Works, through Mr. Yates and Mr. Bean. They told me that 55 gal-

lons of the paint would cover my house and it would not cover but little more than half of it. In order to finish it, I had to send for another shipment. Before the last shipment came, I saw it was coming off of the roof; I would not open the last shipment. This shingle I hold come off of my roof. The paint come off of the shingles, and left more cracks than there was before. It made my house look worse than it did before it was put on it. It was worthless and damaged my house."

Joas A. Alexander: "The liquid cement I placed on my roof was of absolutely no benefit. If you were to give me the paint and hire a man to put it on free of charge, I would not let him put it on. It was the most worthless stuff I ever saw in my life. I come in an ace paying for mine."

Story & Story, of Nashville, for plaintiff in error.

Jas. A. Alexander and W. D. Bule, both of Nashville, for defendant in error.

JENKINS, P. J. Judgment reversed.

STEPHENS and HILL, JJ., concur.

(27 Ga. App. 642)

McNATT v. STATE. (No. 12828.)

(Court of Appeals of Georgia, Division No. 1.
Nov. 17, 1921.)

(Syllabus by the Court.)

1. Criminal law §753(1)—Refusal to direct verdict not error.

There is no merit in the first ground of the amendment to the motion for a new trial, which complains that the court refused to direct a verdict in favor of the accused. It is never error for the court to refuse to direct a verdict.

2. Ground of motion not considered.

The remaining special ground of the motion for a new trial is merely an amplification of the general grounds.

3. Larceny §14(1)—When property obtained by trick or fraud with intent to appropriate, subsequent appropriation held simple larceny.

Where one obtains possession of money by trick or fraud with intent to appropriate it to his own use, and the owner intends to part with the possession only, and not with the property, the possession of the money is obtained unlawfully, and the subsequent appropriation of it in pursuance of the original intent is simple larceny. *Martin v. State*, 123 Ga. 478, 51 S. E. 334, and authorities cited. In the instant case the evidence authorized a finding that the defendant obtained possession of the money of the prosecutor by a trick or fraud with intent to appropriate it to his own use, and that the own-

er intended to part with the possession of the money only, and that subsequently the accused appropriated the money to his own use in pursuance of his original intent.

4. Larceny §30(10), 40(8)—Indictment for stealing money not demurrable as not describing kind of money; testimony held to show sufficiently that bills stolen were bank bills.

The indictment charged the accused with simple larceny, alleging that he stole \$130 in paper money, the same being in the denominations of five \$20 bills and three \$10 bills, of the personal goods of B. F. Morris and of the value of \$130. This indictment was good in substance, and was not even subject to special demurrer on the ground that it did not disclose what kind of money was stolen. *Johnson v. State*, 119 Ga. 257, 45 S. E. 960. Upon the trial B. F. Morris testified that he was the owner of the money stolen, and that it was paper money of the denominations of five \$20 bills and three \$10 bills. As "the ordinary meaning of a \$5 bill is a bank bill for the payment of \$5" (*Allen v. State*, 86 Ga. 400, 12 S. E. 651), the testimony of the owner of the money that it consisted of five \$20 bills and three \$10 bills was sufficient proof that the money was bank bills, in the absence of anything to the contrary, and the verdict finding the defendant guilty of simple larceny was not contrary to law and the evidence. This ruling is not in conflict with any holding in *Johnson v. State*, supra, for in that case the indictment charged the accused with stealing "\$120 in paper money, to wit, two \$20 bills, five \$10 bills, and six \$5 bills," and upon the trial the only evidence as to the kind of money stolen was that it was "paper money." There was no evidence in that case that the money stolen consisted of \$20 bills, \$10 bills, and \$5 bills, as alleged in the indictment, and it was accordingly held that the state had failed to prove the charge as laid, and the judgment overruling the motion for a new trial was reversed. In the instant case every material averment in the indictment was sustained by the proof.

5. Criminal law §935(1)—New trial properly denied when evidence ample.

The verdict was amply authorized by the evidence, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Montgomery County; Eschoe Graham, Judge.

J. H. McNatt was convicted of simple larceny, and he brings error. Affirmed.

M. B. Calhoun, of Mt. Vernon, and W. B. Kent, of Alamo, for plaintiff in error.

M. H. Boyer, Sol. Gen., of Hawkinsville, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 666)

POWELL et al. v. STATE. (No. 11964.)(Court of Appeals of Georgia, Division No. 1.
Nov. 18, 1921.)*(Syllabus by the Court.)***1. Joint bill of exceptions held warranted.**

"Where a rule nisi for contempt of court was brought against two defendants jointly, and they made a joint answer thereto, and were tried together, and the judge, sitting both as a court and jury, after hearing evidence, rendered two separate judgments, in one of which he adjudged one of the defendants to be in contempt of court and sentenced him to pay \$100 and to serve 20 days in jail, and in the other he adjudged the other defendant to be in contempt of court and sentenced him to pay \$100, the two defendants in these circumstances may bring a joint bill of exceptions from such judgment to the court having jurisdiction thereof. Nothing in the foregoing ruling is to be construed as preventing each of the defendants from excepting to the judgment in his own case."

2. City court held authorized to punish for contempt.

Conceding, without deciding, that the city court of Miller county "has no inherent power to define contempts of court," still, under section 4643 of the Civil Code of 1910, the city court of Miller county has authority to issue attachments against, and inflict summary punishment for contempt of court on, any person who bribes or attempts to bribe a witness not to appear and testify in obedience to his subpoena, even though the bribery is completed or the attempt to bribe is made in a county different from that in which the case is pending.

Error from City Court of Miller County;
W. I. Geer, Judge.

H. C. Powell and another were convicted of contempt, and they bring error. Affirmed, in conformity to answer of Supreme Court to certified questions (108 S. E. 464).

G. B. Cowart, of Colquitt, Benton Odom, of Newton, and E. E. Cox, of Camilla, for plaintiffs in error.

N. L. Stapleton, Sol., of Colquitt, for the State.

BLOODWORTH, J. [1, 2] This case was certified by this court to the Supreme Court, and the full opinion of that court will be found in 108 S. E. 464. The first of the headnotes to this case is in the exact language of the first headnote of the Supreme Court, while the second is in substance the same as the second headnote to the opinion of that court. Under the first of these rulings there is no merit in the motion to dismiss the writ of error. The ruling in the second headnote is controlling as to the issues raised, and

shows that the judge who presided in the trial court did not err in his findings.

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 574)

JONES v. STATE. (No. 12602.)(Court of Appeals of Georgia, Division No. 1.
Nov. 16, 1921.)*(Syllabus by the Court.)***1. Criminal law §252(1)—Accusation in city court may be amended by solicitor before defendant pleads.**

"The solicitor of a city court, before the trial of a criminal case and before the selection of a jury, can at any time amend the accusation as he may deem proper." Conley v. State, 88 Ga. 496, 499, 10 S. E. 123; Goldsmith v. State, 2 Ga. App. 283, 286, 58 S. E. 486.

"(a) The solicitor of a city court may amend an accusation at any time before the defendant therein has pleaded to the merits, provided the affidavit of the prosecutor will support the accusation as amended, unless such amendment is forbidden by the act creating the court. Goldsmith v. State, supra." Bishop v. State, 22 Ga. App. 784, 97 S. E. 251.

2. Criminal law §252(1)—Allowance of amendment of accusation not error though there was no written order.

Conceding, but not deciding, that the accusation as originally drawn was subject to the demurrer interposed, the amendment to the accusation cured the defect, and it was not error for the court to allow the amendment before the accused had pleaded to the merits, even though there was no written order allowing the amendment. "While the proper procedure would have been for the judge to sign a formal order amending the affidavit and accusation, the slight irregularity in the form and method of the amendment in this case was not error." Bishop v. State, supra.

(a) It is not disclosed by the bill of exceptions or the record that the accusation as amended was not supported by the affidavit of the prosecutor, and this question was not raised by the demurrer.

3. Criminal law §1064(4)—Ground of motion for new trial not considered when not complete in itself without reference to brief of evidence.

The first ground of the amendment to the motion for a new trial cannot be considered, as it is not complete and understandable within itself, and to ascertain whether the evidence objected to and admitted was material, this court would have to refer to the brief of evidence.

4. Criminal law §1170(4)—Exclusion of questions held harmless, where substantially the same questions were answered.

The refusal of the court to allow counsel for the accused to ask certain character wit-

nesses for the defense whether they had ever, "until this case came up against him," heard anything bad about the defendant, or anything against his character for honesty, was not harmful error (if error at all), since the brief of the evidence discloses that substantially the same questions were elsewhere answered by the witnesses.

5. Criminal law §825(4)—Instruction as to effect of character evidence held sufficient in absence of request for fuller charge.

In the absence of a request for a fuller charge upon the subject of good character, the following instruction was sufficient: "Proof of character may be of itself sufficient to generate in the minds of the jury a reasonable doubt of the defendant's guilt"—the court, elsewhere in the charge, having fully instructed the jury upon the subject of a reasonable doubt.

6. Criminal law §510, 1160—Conviction of misdemeanor may rest on accomplice's uncorroborated testimony; verdict not disturbed when supported by evidence and approved by trial judge.

In a misdemeanor case the defendant can be lawfully convicted on the uncorroborated testimony of an accomplice. The evidence in this case authorized the verdict, and, the trial judge having approved the finding of the jury, and no error of law appearing, this court is without authority to interfere.

Error from City Court of Albany; Clayton Jones, Judge.

Ike Jones was convicted of a misdemeanor, and he brings error. Affirmed.

Claude Payton, of Albany, for plaintiff in error.

Cruger Westbrook, Sol., of Albany, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(17 Ga. App. 591)

PATTERSON v. STATE. (No. 12641.)

(Court of Appeals of Georgia, Division No. 1. Nov. 18, 1921.)

(Syllabus by the Court.)

Criminal law §935(1)—Denial of new trial not error when evidence sufficient.

Patterson was convicted of voluntary manslaughter. No error of law upon the trial of the case is assigned. The only complaint of the verdict is upon the ground that the evidence does not authorize the conviction. A careful reading of the entire record shows abundant evidence to authorize the conviction. It was not error to overrule the motion for a new trial.

Error from Superior Court, Chattooga County; Moses Wright, Judge.

Clarence Patterson was convicted of voluntary manslaughter, and he brings error. Affirmed.

B. E. Neal, of Summerville, and Porter & Mebane, of Rome, for plaintiff in error.

E. S. Taylor, Sol. Gen., of Summerville, and J. F. Kelly, of Rome, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(27 Ga. App. 637)

THOMPSON v. STATE. (No. 12784.)

(Court of Appeals of Georgia, Division No. 1. Nov. 17, 1921.)

(Syllabus by the Court.)

Criminal law §723(5)—Argument as to purpose and necessity of county police held inflammatory and improper.

The defendant was convicted of violating the Prohibition Statute (Laws [Ex. Sess.] 1917, p. 7). The only assignment of error that we consider of merit is that the court failed to declare a mistrial upon the defendant's motion because state's counsel, in his concluding argument before the jury, made use of the following language: "Gentlemen of the jury, the county commissioners have legally appointed your county police, and largely for the protection of the country women and children. You know how it is out there in the country, gentlemen, that they are without police protection and exposed always to drunken, vagrant negroes; that you yourselves, as you sit here, are possessed by the haunting possibility that on your return to your home you may be confronted by the corpse of a murdered child in your door, or at your door the idiotic face of a ruined wife." At the conclusion of this argument, timely motion for mistrial was made. The court, in overruling the motion for a mistrial, said, in the presence and hearing of the jury, "I hold that it is proper argument." State's counsel turned to the jury and said: "Gentlemen of the jury, his honor says that is proper stuff." We think that the defendant's motion to declare a mistrial should have prevailed. The statement of the attorney for the state was inflammatory in character, and the court should have admonished the jury not to be influenced by such argument. The error is not cured by the note of the trial judge, wherein the judge states that the assignment of error shows upon its face that the argument was based upon an effort of state's counsel to defend the use and employment of county policemen who offered to be witnesses for the state, and that the court thought the argument justifiable. The officers of court should be most careful in the use of language employed in the argument of the state's cases to the juries. It is never necessary to influence or arouse by inflammatory argument the passions of a conscientious juror. The other assignments of error are without merit. For the reason pointed

out, it was error to overrule the motion for a new trial.

Broyles, C. J., dissenting.

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Charlie Thompson was convicted of violating the Prohibition Law, and he brings error. Reversed.

Dowling, Askew & Wheelchel, of Moultrie, for plaintiff in error.

C. E. Hay, Sol. Gen., of Thomasville, and W. A. Covington, Sol. Gen., pro tem., of Moultrie, for the State.

LUKE, J. Judgment reversed.

BLOODWORTH, J., concurs.

BROYLES, C. J. (dissenting). I do not think that, under all the particular facts of this case, the refusal of the court to declare a mistrial or to rebuke the solicitor-general requires a new trial. The evidence fairly demanded the verdict, and therefore the error of the court was harmless. Furthermore, it clearly appears that the improper remarks of the solicitor did not inflame the minds of the jury since although they found the defendant guilty of a felony, they recommended a misdemeanor punishment, which was imposed by the judge.

(27 Ga. App. 596)

STRIBLING v. STATE. (No. 12665.)

(Court of Appeals of Georgia, Division No. 1.
Nov. 16, 1921.)

(Syllabus by the Court.)

Intoxicating liquors \S 236(19)—Evidence showing mere preparation for manufacturing will not support conviction.

Stribling was convicted of the offense of unlawfully distilling and manufacturing alcoholic liquors. The evidence did not sustain the conviction. At best, the evidence showed only that the defendant was getting ready to manufacture liquor. The allegation of the indictment not being sustained by the evidence, it was error to overrule the motion for a new trial.

Error from Superior Court, Wilkes County; E. T. Shurley, Judge.

R. K. Stribling was convicted of unlawfully distilling and manufacturing alcoholic liquors, and he brings error. Reversed.

H. E. Combs and Colley & Colley, all of Washington, Ga., for plaintiff in error.

M. L. Felts, Sol. Gen., of Warrenton, for the State.

LUKE, J. Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(27 Ga. App. 571)

CRAYTON v. STATE. (No. 12594.)

(Court of Appeals of Georgia, Division No. 1,
Nov. 16, 1921.)

(Syllabus by the Court.)

Criminal law \S 935(1)—New trial on general grounds properly denied when evidence ample.

The motion for a new trial contains only the usual general grounds, and the court did not err in overruling it, as the evidence amply authorized the verdict.

Error from City Court of Sparta; R. H. Lewis, Judge.

Action between the State and Charlie Crayton. Judgment for the State, and Crayton brings error. Affirmed.

Wiley & Lewis, of Sparta, for plaintiff in error.

R. L. Merritt, Sol., of Sparta, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 572)

GREEN et al. v. YOUNG ZION BAPTIST CHURCH. (No. 12598.)

(Court of Appeals of Georgia, Division No. 1.
Nov. 16, 1921.)

(Syllabus by the Court.)

Religious societies \S 7, 31(2)—Unincorporated society not subject to suit; members liable as partners or joint promisors.

"No action can be maintained against a religious society when sued as such, when such society has not been incorporated, nor had recorded its name and objects, as provided by law. The members of such society are liable on its contracts as joint promisors or partners." *Thurmond v. Cedar Spring Baptist Church*, 110 Ga. 816, 36 S. E. 221, and cases cited. It was not error for the court to dismiss the plaintiff's petition upon the grounds of demurrer urged.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by Milledge Green and others against Young Zion Baptist Church. Judgment dismissing the petition on demurrer, and plaintiffs bring error. Affirmed.

T. S. Lyons, of Augusta, for plaintiffs in error.

C. Henry & R. S. Cohen, of Augusta, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(27 Ga. App. 637)

DORSEY v. STATE. (No. 12778.)(Court of Appeals of Georgia, Division No. 1.
Nov. 17, 1921.)*(Syllabus by the Court.)***Criminal law** §1092(14)—Court without jurisdiction when certificate to bill of exceptions does not certify material fact.

This court has no jurisdiction to consider a bill of exceptions which has not been certified by the judge to be entirely true. *Fort v. Sheffield*, 108 Ga. 781, 83 S. E. 660, and citation.

(a) In the instant case the judge states, in a note which precedes his certificate, that he cannot certify as to a certain specified material fact appearing in the bill of exceptions. It follows that under the above ruling the bill of exceptions cannot be entertained by this court. See *Jarriel v. Jarriel*, 115 Ga. 23, 41 S. E. 262.

Error from Superior Court, Cherokee County; D. W. Blair, Judge.

Action between the State and Bob Dorsey. Judgment for the former, and the latter brings error. Writ of error dismissed.

John T. Dorsey, of Marietta, for plaintiff in error.

John S. Wood, Sol. Gen., of Canton, and Lindley W. Camp, of Marietta, for the State.

BROYLES, C. J. Writ of error dismissed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 685)

LARKIN v. ANDREWS. (No. 12321.)(Court of Appeals of Georgia, Division No. 2.
Nov. 18, 1921.)*(Syllabus by the Court.)***1. Negligence** §136(1, 25, 26)—Questions for jury not determined on demurrer.

Plaintiff alleged that, while walking in a public road, he was compelled by the rapid approach of an automobile to step to his left and leave the highway; that in so doing he moved not more than 20 feet from the center of the 20-foot road; that he thus came in contact with and was injured by a heavily charged electric wire, which was entirely hidden from view by a growth of weeds from two to four feet in height; that the wire, as here maintained by the defendant along the land of another, had been in this position for many weeks, on account of two posts having fallen, which fact was known or by the exercise of ordinary diligence could have been known to the defendant, but was unknown to the plaintiff. The trial judge dismissed the petition on general demurrer as failing to set out a cause of action. *Held:*

"Questions as to diligence and negligence, including contributory negligence, being questions peculiarly for the jury, the court will decline to solve them on demurrer, except in plain and indisputable cases" (*Western Union Telegraph Co. v. Spencer*, 24 Ga. App. 471, 101 S. E. 198; *Sherrod v. Atlanta, etc., R. Co.*, 108 S. E. 908); "and in the exercise of this function the question as to what constitutes the proximate cause of an injury complained of may be directly involved as one of the essential elements and disputed issues in the ascertainment of what negligence, as well as whose negligence, the injury is properly attributable to" (*Ga. Ry. & Power Co. v. Ryan*, 24 Ga. App. 288, 289, 100 S. E. 713; *Atlantic Coast Line R. Co. v. Daniels*, 8 Ga. App. 775 [2], 70 S. E. 203). It is only where it clearly appears from the petition that the negligence charged against the defendant was not the proximate and effective cause of the injury that the court may upon general demurrer as a matter of law so determine. *Gillespie v. Andrews*, 108 S. E. 906; *Southern Ry. Co. v. Barber*, 12 Ga. App. 286, 77 S. E. 172.

2. Electricity §19(2)—Petition held not to show that plaintiff was trespasser or negligent, or that negligence was proximate cause of injury.

Under the facts alleged, it cannot be taken as a matter of law, either that (a) the relation of plaintiff to defendant was that of a mere trespasser, or that (b) the fact that petitioner as a pedestrian stepped to the left instead of the right side of the road, in order to dodge the rapidly approaching vehicle, constituted negligence, or that (c) such act must be taken as the proximate cause of the injury. The court therefore erred in dismissing the petition, since it was for the jury to pass upon all questions of negligence raised by the evidence under the pleadings. *Eining v. Ga. Ry. & Electric Co.*, 133 Ga. 458, 66 S. E. 237; *Atlanta Consolidated Street Ry. Co. v. Owings*, 97 Ga. 663, 666, 667, 25 S. E. 877, 33 L. R. A. 798; *Mayor, etc., of Unadilla v. Felder*, 145 Ga. 440 (2), 89 S. E. 423; *Wallace v. Matthewson*, 143 Ga. 286, 84 S. E. 450; *City of Thomaston v. Atkinson*, 25 Ga. App. 615, 103 S. E. 876; *Savannah Lighting Co. v. Harrison*, 20 Ga. App. 8, 92 S. E. 772; *Southern Bell Tel. Co. v. Davis*, 12 Ga. App. 28, 34, 76 S. E. 786.

Error from City Court of Albany; Clayton Jones, Judge.

Action by David Larkin, by next friend, against Homer Andrews. Judgment for defendant, and plaintiff brings error. Reversed.

Claude Payton, of Albany, for plaintiff in error.

Lippitt & Burt, of Albany, for defendant in error.

JENKINS, P. J. Judgment reversed.

STEPHENS and HILL, JJ., concur.

(27 Ga. App. 687)

BROOKS v. STATE. (No. 12702.)(Court of Appeals of Georgia, Division No. 1.
Nov. 16, 1921.)*(Syllabus by the Court.)*

Criminal law §1160—Judgment affirmed when verdict supported by evidence and approved by trial judge.

The motion for a new trial contains the general grounds only, there is evidence to support the verdict, which has the approval of the trial judge, and the judgment is affirmed.

Error from City Court of Macon; Will Gunn, Judge.

Action between the State and Freddie Brooks. Judgment for the State, and Brooks brings error. Affirmed.

H. F. Rawls, of Macon, for plaintiff in error.

Roy W. Moore, Sol., of Macon, for the State.

BLOODWORTH, J. Affirmed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 575)

SCOTT v. STATE. (No. 12603.)(Court of Appeals of Georgia, Division No. 1.
Nov. 16, 1921.)*(Syllabus by the Court.)*

Criminal law §1160—Verdict, supported by conflicting evidence and approved by trial judge, not disturbed.

The case is here upon the single assignment of error that the evidence does not authorize the verdict. The defendant was charged with a violation of the prohibition statute (Laws Ex. Sess. 1917, p. 7). The evidence is abundant that he possessed corn liquor and sold corn liquor. There was some conflict in the evidence, but the jury, after being properly instructed by the court, did not believe the defendant's evidence. There being ample evidence to support the verdict, and the trial judge having approved the verdict, this court is powerless to interfere. It was not error to overrule the motion for a new trial.

Error from Superior Court, Newton County; John B. Hutcheson, Judge.

Ella (alias Hun) Scott, was convicted of a violation of the prohibition statute, and she brings error. Affirmed.

King & Johnson, of Covington, for plaintiff in error.

A. M. Brand, Sol. Gen., of Lithonia, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(27 Ga. App. 699)

DIXON et al. v. JOHNSON. (No. 12385.)(Court of Appeals of Georgia, Division No. 2.
Nov. 18, 1921.)*(Syllabus by the Court.)*

1. Master and servant §329—Petition held to show servant's act within scope of employment.

The petition is not defective for the reason assigned, that it fails to show that the alleged negligent act of the defendant's servant was done within the scope of his duties and employment. Not only would it seem that this necessary element of liability is shown by reasonable inference from the allegations made, but it is expressly alleged.

2. Highways §213(3)—In action against contractors, proximate cause of injury held for the jury.

Whether the defendants' alleged act of negligence was the proximate cause of the injury, as claimed by the plaintiff, or whether the injury was caused by the negligence of the plaintiff in failing to observe and avoid contact with the alleged obstruction, was properly left for determination by the jury.

3. Highways §197(1), 208(1)—Traveler has right to assume road is free from obstructions; petition held not to show plaintiff was a trespasser on road which was being surfaced; description of obstruction on highway with which automobile collided held sufficient.

The grounds of special demurrer are without merit.

(a) The petition alleges that the plaintiff at the time of his alleged injury was driving his car along a public highway. A traveler, in the absence of notice to the contrary, has a right to use it and to assume that it is reasonably safe and free from obstructions. Nothing shown in the petition could indicate that the plaintiff was a trespasser, on account of the county authorities having closed the highway pending the making of repairs thereon for it by the defendant. On the contrary, the petition shows that "there was no other barrier or obstruction of any kind or character or anything else to indicate that said public road was closed or to call attention to the fact that said wire was so suspended."

(b) The nature and character of the alleged obstruction, as consisting of a "small cable wire," which the petition alleged the defendants had stretched across the highway, is sufficiently described. Especially is this true since more detailed information as to its character would lie more particularly within the knowledge of the defendants, who it is alleged had strung it.

4. Demurrers properly overruled.

The court did not err in overruling the demurrer to the petition as amended.

Error from City Court of Savannah; Davis Freeman, Judge.

Action by H. S. Johnson against M. W. Dixon, Jr., and others. Demurrers to the

petition were overruled, and defendants bring error. Affirmed.

From the petition as amended, it appears that the defendants, acting under a contract made with the county authorities of Chatham county, were engaged in surfacing a portion of a public highway known as the Augusta road. For the purpose of closing the highway to traffic the defendants, through one of their servants, moved up a distance of about two miles beyond the point where the work was going on, and stretched a "small cable wire" across the road, at just such a height as would catch the top of an automobile moving along the road at that point. It is alleged that the plaintiff did not know of such obstruction and had no reason to anticipate its presence, and "there was no other barrier or obstruction of any kind or character, or anything else, to indicate that said public road was closed or to call attention in any way to the fact that said wire was so suspended," and that, not seeing the wire until too late to avoid it, he ran into it with his car, and thereby received specified injuries.

Lawrence & Abraham, of Savannah, for plaintiffs in error.

Travis & Travis, of Savannah, for defendant in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(27 Ga. App. 634)

KNIGHT v. STATE. (No. 12764.)

(Court of Appeals of Georgia, Division No. 1.
Nov. 17, 1921.)

(Syllabus by the Court.)

1. Criminal law §1064(4)—Amendment of motion for new trial not considered when not complete in itself.

The amendment to the motion for a new trial, complaining of the repelling of certain testimony offered by the accused, cannot be considered, as the amendment is not complete and understandable without a reference to other parts of the record.

2. Sufficiency of evidence.

The case was submitted to the judge without the intervention of a jury, and the evidence authorized the defendant's conviction.

Error from City Court of Miller County; W. I. Geer, Judge.

J. H. Knight was convicted of an offense, and he brings error. Affirmed.

N. L. Stapleton, of Colquitt, for plaintiff in error.

P. D. Rich, Sol. of Colquitt, for defendant in error.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 651)

NOBLES v. STATE. (No. 12868.)

(Court of Appeals of Georgia, Division No. 1.
Nov. 17, 1921.)

(Syllabus by the Court.)

1. Jury §32(2)—Error to try defendant before eight jurors and to fail to furnish full panel to strike from.

The defendant in this case was arraigned upon an accusation in the city court of Dublin, charging him with a violation of the prohibition statute. In due time the defendant stated that he "waived nothing." A full panel of jurors was not put upon him to strike from, and his case was tried before 8 jurors, instead of 12. His assignment of error is upon the ground that he was entitled to a full panel of jurors, and that therefore his conviction by 8 jurors was illegal. We agree with the contention of the defendant, and it was error for this reason to overrule his motion for a new trial. *Amerson v. State*, 18 Ga. App. 177 (5), 88 S. E. 998, and cases cited.

2. Other assignments not dealt with.

It is unnecessary to deal with the other assignments of error.

Error from City Court of Dublin; S. W. Sturgis, Judge.

D. P. Nobles was convicted of a violation of the prohibition statute, and he brings error. Reversed.

Geo. B. Davis and W. A. Dampler, both of Dublin, for plaintiff in error.

Wm. Brunson, Sol., of Dublin, for the State.

LUKE, J. Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(27 Ga. App. 639)

GUYTON v. STATE. (No. 12785.)

(Court of Appeals of Georgia, Division No. 1.
Nov. 17, 1921.)

(Syllabus by the Court.)

1. Intoxicating liquors §236(4)—Evidence held insufficient to show defendant's participation in manufacture.

Three men were at a distillery. As certain officers approached two of them ran, but the defendant remained. He gave a reasonable explanation of his presence there. It was not shown that he had any interest in the "still," or that he was making liquor, or was in any

way engaged in aiding or assisting in the manufacture of liquor. Under the evidence his conviction was unauthorized. The evidence which connected the defendant with the offense charged was entirely circumstantial, and did not exclude every reasonable hypothesis save that of his guilt. *Ward v. State*, 21 Ga. App. 655, 94 S. E. 816; *Smith v. State*, 16 Ga. App. 291, 85 S. E. 281. The court erred in overruling the motion for a new trial.

2. Amended motion not considered.

The above ruling is controlling, and it is unnecessary to consider the amendment to the motion for a new trial.

Error from Superior Court, Bartow County; M. C. Tarver, Judge.

Sid Guyton was convicted of manufacturing liquor, and he brings error. Reversed.

Fred D. Neel, of Cartersville, for plaintiff in error.

Joe M. Lang, Sol. Gen., of Calhoun, for the State.

BLOODWORTH, J. Judgment reversed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 641)

SMITH v. STATE. (No. 12807.)

(Court of Appeals of Georgia, Division No. 2, Nov. 17, 1921.)

(Syllabus by the Court.)

1. Criminal law \S 554—Homicide \S 309(4)—Charge on voluntary manslaughter proper when there is evidence raising doubt as to degree of offense; defendant's statement may be accepted or rejected or believed in part.

"It is well settled by numerous rulings of the Supreme Court and of this court that the law of voluntary manslaughter may properly be given in charge to the jury on the trial of one indicted for murder, where, from the evidence or from the defendant's statement to the jury, there is anything deducible which would tend to show that he was guilty of manslaughter, voluntary or involuntary, or which would be sufficient to raise a doubt as to whether the homicide was murder or manslaughter. *Reeves v. State*, 22 Ga. App. 629, 97 S. E. 115. It is likewise well settled that it is the prerogative of the jury to accept the defendant's statement as a whole, or to reject it as a whole, to believe it in part, or disbelieve it in part. In the exercise of this discretion they are unlimited. *Brown v. State*, 10 Ga. App. 50, 54, 55, 72 S. E. 587." *May v. State*, 24 Ga. App. 379, 382, 100 S. E. 797.

(a) Under this ruling and the facts of the instant case the court did not err in instructing the jury upon the law of manslaughter.

2. Criminal law \S 935(1)—New trial properly denied when evidence sufficient.

The verdict was authorized by the evidence, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Fulton County; John D. Humphries, Judge.

Fred Smith was convicted of criminal homicide, and he brings error. Affirmed.

H. A. Allen, of Atlanta, for plaintiff in error.

John A. Boykin, Sol. Gen., and E. A. Stephens, both of Atlanta, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 667)

KNIGHT v. METTS. (No. 12203.)

(Court of Appeals of Georgia, Division No. 1, Nov. 18, 1921.)

(Syllabus by the Court.)

1. Pleading \S 216(1)—Trove and conversion \S 32(1)—Petition held to state cause of action; oral admissions not considered in passing on demurrers.

The petition in this case alleged that the plaintiff owned certain shares of stock in a corporation, which were represented by a certificate of stock of a certain number, the value of which was stated; that this certificate of stock was loaned to the defendant for the purpose of being used as collateral by him to secure a temporary loan, and the certificate was to be returned to her when it had served its purpose, which she was assured would be in a short time; that he thus, by deception and fraud, obtained possession of her certificate of stock, appropriated it to his own use, and refused to deliver it to her on demand. The allegations of the petition made this an action of trover, and it was not subject to the general demurrer filed. *Small v. Wilson*, 20 Ga. App. 674 (2-4), 93 S. E. 518; *Harrell v. Ataway*, 18 Ga. App. 269(1), 89 S. E. 847; *Phelan v. Vestner*, 125 Ga. 825-827, 54 S. E. 697; *McNorrill v. Daniel*, 121 Ga. 78(1), 79(1), 48 S. E. 680; *Kirkpatrick Hardware Co. v. Hamlet*, 20 Ga. App. 719(1, 2), 93 S. E. 226, and cases cited.

(a) In the bill of exceptions it is stated that "according to admissions of her counsel in open court," this is "a suit for money had and received." However, in passing on demurrers, only the petition and the demurrer are to be considered, and not oral admissions. In *Hicks v. Beacham*, 131 Ga. 89(2), 62 S. E. 45, the Supreme Court held that "Oral admissions of fact by a party or his counsel are not proper matters for consideration in passing on a demurrer to pleadings, or a motion to dismiss in the nature of a demurrer." See,

also, *Griffin v. Russell*, 144 Ga. 277(1), 87 S. E. 10, L. R. A. 1916F, 216, Ann. Cas. 1917D, 994.

2. Trial \S 251(2)—Charge applicable only to action for money had and received properly refused in trover.

This being an action of trover, the judge did not err in refusing a request to charge which was applicable only to a suit for money had and received.

3. New trial \S 70—Properly denied when evidence sufficient.

There is ample evidence to support the verdict, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Laurens County; J. L. Kent, Judge.

Action by Blanche Metts against W. A. Knight. Judgment for plaintiff, and defendant brings error. Affirmed.

M. H. Blackshear, of Dublin, and J. W. Harrell, of Pensacola, Fla., for plaintiff in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 689)

HAYGOOD v. KENNEDY. (No. 12356.)

(Court of Appeals of Georgia, Division No. 2. Nov. 18, 1921.)

(Syllabus by the Court.)

Vendor and purchaser \S 334(3), 341(5)—Verdict for defendant in action to recover part payment improperly directed when evidence tended to show consent to rescission; measure of recovery after rescission of contract stated.

This was a suit to recover a part payment made on the purchase of land. Whether or not the contract of purchase was originally unenforceable under the statute of frauds is immaterial to the maintenance of plaintiff's case, since the evidence for the plaintiff showed that the seller had expressly consented to a rescission of the contract of sale, and the evidence of the seller was such as might show an implied consent to such a rescission, in that he had retaken the land in question and made a crop thereon after the purchaser had surrendered possession. It was for this reason error to direct a verdict in favor of the defendant, although the plaintiff's pleadings and evidence did not sustain her contention relating to fraud in the procurement of the original contract, and the evidence did not sustain her other contention relative to a breach of the seller's obligations in that he had failed to give possession of the premises. In a case such as this, in the absence of any agreement to the contrary in the subsequent contract of rescission, the rule governing a recovery is

that the purchaser is entitled to a return of the partial payments plus the value of any improvements made, less a deduction of the rental value of the land and any injury or damage to the property during the term of occupancy. 39 Cyc. 2002, 1358; *McDaniel v. Gray*, 69 Ga. 433, 434; *Lytle v. Scottish American Mortgage Co.*, 122 Ga. 458, 459 (9, 10, 11, 12), 50 S. E. 402; *Dukes v. Baugh*, 91 Ga. 33, 16 S. E. 219; *Blitch v. Edwards*, 96 Ga. 606, 24 S. E. 147; *Jay v. Sweatt*, 8 Ga. App. 481, 70 S. E. 16.

Error from Superior Court, Lamar County; W. E. H. Searcy, Jr., Judge.

Action by M. M. Haygood against J. L. Kennedy. Judgment for defendant, and plaintiff brings error. Reversed.

Redding & Lester, of Barnesville, for plaintiff in error.

Cleveland & Goodrich, of Griffin, for defendant in error.

JENKINS, P. J. Judgment reversed.

STEPHENS and HILL, JJ., concur.

(27 Ga. App. 627)

GATLIN v. STATE. (No. 12733.)

(Court of Appeals of Georgia, Division No. 1. Nov. 17, 1921.)

(Syllabus by the Court.)

1. Criminal law \S 394—Evidence that defendant was drunk when arrested held relevant to show admissibility of evidence as to finding whisky.

The defendant was tried for having intoxicating liquors in his possession. The evidence showed that two policemen arrested him in the city of Thomasville and took some whisky from his person. It was not error to allow the arresting officers to testify that the defendant was drunk when they took the whisky from him, they testifying that "the defendant was drunk and disorderly in our presence and violating a city ordinance, and we arrested him for violation of city ordinance." The evidence that the defendant was drunk was relevant for the purpose of showing that his arrest was legal, and therefore that the evidence as to the finding of whisky on his person was legal and admissible against him.

2. Criminal law \S 935(1)—New trial properly refused when evidence demanded verdict.

The evidence demanded the verdict, and the court did not err in refusing to grant a new trial.

Error from City Court of Thomasville; W. H. Hammond, Judge.

Sam Gatlin was convicted of having intoxicating liquors in his possession, and he brings error. Affirmed.

Jas. B. Burch, of Thomasville, for plaintiff in error.

H. J. MacIntyre, of Thomasville, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 689)

SOUTHERN RY. CO. v. BUNCH.
(No. 12364.)

(Court of Appeals of Georgia, Division No. 2.
Nov. 18, 1921.)

(Syllabus by the Court.)

1. Carriers \S 159(2), 163—Stipulation for notice of claim within four months is valid; burden on carrier to show failure to give required notice of claim.

Where a shipper signs and accepts a bill of lading containing a stipulation that claims against the carrier should be made in writing to the carrier "at the point of delivery or at the point of origin within four months after the delivery of the property, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed," this clause is valid and binding; and in a suit for damages for unreasonable delay in the delivery of goods, where it appears that such notice was not given either by the consignor or the consignee, nor waived by the carrier, a recovery will not lie. *Southern Ry. Co. v. Simpson*, 20 Ga. App. 290, 93 S. E. 47; *Mitchell v. Atlantic, etc., R. Co.*, 15 Ga. App. 797, 84 S. E. 227. But where the consignee does not sue upon the express contract evidenced by the bill of lading, but brings his action in tort based solely upon the public duty of the carrier to properly transport and deliver the goods, and upon the custom of the carrier to notify consignees immediately after the arrival of shipments at destination, and where it is the carrier who sets up by its plea and introduces in evidence such bill of lading with its stipulation as to notice, the burden of proof lies upon the carrier to further sustain its affirmative plea and defense by showing the failure of the plaintiff to give the notice thus required. 10 Corpus Juris, 302.

2. Appeal and error \S 1140(1)—Carriers \S 105(1)—Measure of damages for unreasonable delay stated; plaintiff may write off excess when judgment excessive.

When this case was previously before this court upon exceptions to the overruling of the defendant's general demurrer, it was held that the proper measure of damages for the alleged unreasonable delay in the delivery of the goods was "the difference between their market value when they should have been delivered and their market value when they were delivered, with interest from the former date, less the freight, if unpaid." *Southern Ry. Co. v. Bunch*, 25 Ga. App. 45, 46(1), 102 S. E. 462. On the subsequent trial it appeared that there were

two shipments of goods, the first made November 9, 1915, and received at destination November 17, 1915, and the second shipped February 9, 1916, and received at destination February 17, 1916. As to the second of these shipments, the record discloses no proof whatever as to the damages for the alleged unreasonable detention in the defendant's warehouse; but as to the first shipment, there was some evidence, admitted without objection, from which the jury were authorized to find that there was a decrease in value caused by the delay amounting to as much as one-half of \$300, or \$150, and, to add interest thereto at 7 per cent. from November 17, 1915, to the date of trial, January 17, 1921, \$54.25. As the grounds of the motion for a new trial are without merit, except as to the amount of the finding, the plaintiff in the court below is given the privilege of writing off the unauthorized amount of the finding, to wit, \$75.75, at the time the remittitur from this court is made the judgment of the trial court, in which event the judgment will stand affirmed; otherwise the judgment is reversed.

Error from Superior Court, Richmond, County; H. C. Hammond, Judge.

Action by S. M. Bunch against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed, on condition that plaintiff write off part of recovery.

Cumming & Harper, of Augusta, for plaintiff in error.

Henry C. Roney, of Augusta, for defendant in error.

JENKINS, P. J. Judgment affirmed, with direction.

STEPHENS and HILL, JJ., concur.

(27 Ga. App. 590)

HANSON v. STATE. (No. 12630.)

(Court of Appeals of Georgia, Division No. 1.
Nov. 16, 1921.)

(Syllabus by the Court.)

1. Criminal law \S 603(1)—Trial in absence of witnesses not error, when no motion for continuance made.

Where no motion for a continuance is made for absence of witnesses, the court does not err by disregarding such absence; the accused having had full time after his arrest to prepare for trial.

2. Criminal law \S 938(1)—Newly discovered, impeaching, cumulative evidence not ground for new trial.

The alleged newly discovered evidence was (a) cumulative of the evidence introduced upon the trial to show an alibi. "Cumulative evidence to prove an alibi, even if newly discovered, is not cause for a new trial." *Harrison v.*

State, 83 Ga. 129(1), 9 S. E. 542. Tipton v. State, 119 Ga. 305(8), 46 S. E. 436. (b) Its effect would be to impeach the evidence for the state. Odum v. State, 24 Ga. App. 271, 100 S. E. 655; Nisbet v. Vandiver, 24 Ga. App. 572(8), 101 S. E. 761.

3. Criminal law \hookrightarrow 935(1)—New trial properly denied, when evidence warranted verdict.

The evidence warranted the verdict, the trial judge approved it, and no error was committed in overruling the motion for a new trial.

Error from City Court of La Grange; Duke Davis, Judge.

George Hanson was convicted of an offense, and he brings error. Affirmed.

L. B. Wyatt, of La Grange, for plaintiff in error.

L. L. Meadors, Sol., and B. J. Mayer, both of La Grange, for the State.

BLOODWORTH, J. [1-3] Only the first headnote needs elaboration. The first ground of the amendment to the motion for a new trial is as follows:

"Because at the beginning of the criminal week of the March term of the city court of La Grange movant was advised by his then sole counsel, Judson Andrews, that on account of his physical condition a leave of absence had [been?] granted him, and that the case against movant would not be tried at that term of court, and that it would [not?] be necessary to have any witnesses attend court until the June term of said court. Movant had no knowledge, notice, or information that the case would be tried until the morning of the day that same was tried. Movant then had no other counsel, and reported the matter to the solicitor of the city court of La Grange, who, of course, could do nothing for movant regarding the matter. Movant shows that by reason of this instruction from his counsel he had made no arrangements for a trial, and had no witnesses in attendance upon court, and had not an opportunity to get his evidence properly before the court, and was by reason thereof denied a fair and impartial trial."

This ground of the motion is absolutely without merit. Although the defendant was represented at the trial by two attorneys, one of them being the attorney above referred to as his "sole counsel," yet the attention of the trial judge was not called to the foregoing facts, nor was any motion made to postpone or continue the case. See Harrison v. State, supra; Phillips v. Bagwell Motor Car Co., 22 Ga. App. 488, 96 S. E. 334; Harrison v. State, 20 Ga. App. 12 (1), 92 S. E. 388, 95 S. E. 630.

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 700)

INVESTORS' REALTY CO. v. THOMSON.
(No. 12392.)

(Court of Appeals of Georgia, Division No. 2.
Nov. 18, 1921.)

(Syllabus by the Court.)

1. Appeal and error \hookrightarrow 1051(2)—Admission of carbon copy harmless where there was other undisputed evidence of notice to same effect.

It being otherwise proved without dispute that notice of the same tenor and effect as that contained in the carbon copy of the letter excepted to was given by the plaintiff to the defendant prior to incurring the items of expense sued for, the admission of such copy, if illegal, should be treated as harmless.

2. Appeal and error \hookrightarrow 1140(1)—Damages \hookrightarrow 163(4)—Owner bound to prove that items of expense for new roof were necessary to obtain roof contracted for; judgment affirmed on plaintiff writing off excess of recovery shown by defendant's testimony when taken most strongly against it.

The verdict in the amount sued for, to wit, \$753.80 consisting of items which under the undisputed evidence were subject to exact calculation, and which must have been so calculated and found by the jury, and being only authorized in the amount of \$601.95, the judgment will stand affirmed if the plaintiff in the court below shall write off the unauthorized excess; otherwise the judgment is reversed.

Error from City Court of Savannah; Jean Rourke, Jr., Judge.

Action by E. G. Thomson against the Investors' Realty Company. Judgment for plaintiff, and defendant brings error. Affirmed on condition that plaintiff write off part of recovery.

Wilson & Rogers, of Savannah, for plaintiff in error.

Simon N. Gazan and McIntire, Walsh & Bernstein, all of Savannah, for defendant in error.

JENKINS, P. J. The action was for damages resulting from the breach of a certain specification in a contract for the building of a dwelling house, as follows:

"Roofing: The main roof is to be covered with tin shingles of Conklin make or equal put on in the best manner, do all necessary flashing and counterflashing. Flashing at chimneys to be let into reglets in the brickwork, wedged in place, and cemented in with Portland cement."

The petition alleges that soon after the completion of the house the roof began to leak, and, notwithstanding repeated notices to the defendant to remedy such defect, the leaks continued; that the tin shingles rusted and corroded, and the leaks could only be

remedied by laying a new roof; that in endeavoring to stop the leaks and lessen the damage the plaintiff expended \$53.83 in applying a coat of roofing paint, and \$100 in restoring to their former condition the ceilings and walls which were stained and cracked from the leaks; and that he finally incurred an expense of \$600 in replacing the original roof with new tin shingles, so as to put it in proper condition as required by the contract. The jury rendered a verdict for the plaintiff in the amount sued for, to wit \$753.80.

[1] Only two questions are raised by the record—the first relating to the admission of certain evidence as to notice given the defendant of the defect, which is disposed of in the first headnote; the other relating only to the sufficiency of the evidence as to the \$600 item.

[2] The defendant's counsel in effect admit that the verdict is proper in so far as it covers the two items amounting to \$153.80, and their only contention is as to the other \$600 item, which was necessarily allowed by the jury in their verdict. It is also in effect admitted that the plaintiff had the right to recover the value of a roof as good as that provided by the specifications, that is, a roof of "tin shingles of Conklin make or equal"; but it is contended that, as the evidence shows that plaintiff laid a more costly roof than that required by the contract, the defendant was not liable for the excess cost, and that, as the burden was on the plaintiff to show the proper items of expense, and as he had failed so to do, the verdict as to the \$600 item was without evidence to support it.

The plaintiff, however, contends that the \$600 was a proper allowance under the evidence, not only on account of the increased cost of materials and labor at the time of replacement above such cost at the time of original construction, but because he had incurred additional items of expense in painting the new roof and in laying it over tarred paper. His contention is based upon the clause in the specification that the shingles should be "put on in the best manner"; and he contends that to do this so as to avoid leaks the shingles should have been painted as well as primed, and laid over tarred paper.

The plaintiff testified, without objection, that for such a roof to be laid in the "best manner" painting was required. G. E. Pacetti, one of the firm of roof contractors who laid both the original and the new roof, testified that "the roof should be painted, in addition to the priming coat." O. C. Pacetti, his partner, testified that, while their firm would not paint a tin-shingled roof or lay it on paper unless expressly provided for in the specifications, and while they did not paint the original roof in question except to apply a coat of priming, yet immediate painting after finishing such a

roof was "the only thing to make a roof tight, so that it is properly flashed, and these are the things that prevent leaks," and, further, that he had advised the defendant's vice president that "the leakage was due entirely to the fact that the roof had not been painted." As to the use of tarred paper he said, "It is an open question whether paper is to be included or not; some people want it, and some don't," and he said also that such paper "cannot prevent leaks." There was thus ample evidence to sustain the plaintiff's contention that painting was a necessary element and expense in laying the roof "in the best manner," as stated in the specification. But there was no proof showing such a necessity for using tarred paper. It was incumbent on the plaintiff to prove that each of the items of expense incurred by him in laying the new roof was necessary in obtaining such a roof as he was entitled to have under his contract. He offered no evidence showing the cost of the several items for the new shingles, painting, tar paper, and labor. Unless there is something definite and tangible in the evidence by which the unauthorized item for tarred paper can be excluded from the \$600 item included in the verdict, such item must be held unsupported by any evidence.

While the evidence of the plaintiff falls in this respect, it appears, however, that the defendant's vice president, W. H. Stillwell, testified that "the difference in the cost of a roof put on like this new roof and the roof that was specified in accordance with these plans and specifications" was "35 or 40 per cent. more," and that the roof which the plaintiff "now has is worth \$605, which is a superior article, has paint on it and tar paper underneath, it is a more expensive roof to the extent of 40 per cent." under the rule that a party's testimony is to be construed most strongly against himself, it may thus be taken that the cost of the new roof to the plaintiff, with paint and tar paper added, exceeded the cost without such two items by 35 per cent., which would make the cost exclusive of those items \$448.15, and the cost of such disputed items \$156.85. The plaintiff under this admission was authorized to recover as much as \$448.15. This excluded the proper item of paint, as well as the unauthorized item of tarred paper, and, had there been any evidence to show the cost of painting, or any evidence by which such cost might be separated from the cost of the tarred paper, the former item might be recovered. But, in the absence of any such proof, the only amount authorized under the evidence is that which the jury could have definitely calculated from the defendant's admission as properly allowable, to which should be added the undisputed items of \$153.80, making a total of \$601.95. The plaintiff is therefore given the privilege of writing off the unauthorized amount of the

finding, to wit, \$151.85, from the \$753.80 found, at the time the remittitur from this court is made the judgment of the trial court, in which event the judgment will stand affirmed; otherwise the judgment is reversed.

Judgment affirmed, with direction.

STEPHENS and HILL, JJ., concur.

(27 Ga. App. 879)

JOHNSON v. STATE. (No. 12857.)

(Court of Appeals of Georgia, Division No. 1.
Nov. 18, 1921.)

(Syllabus by the Court.)

1. Homicide \S 340(4)—Instruction on murder harmless where defendant convicted of manslaughter.

Plaintiff in error was tried for murder, but was convicted of manslaughter. For this reason the instructions on the subject of murder could not have been prejudicial to the accused. *Dunwoody v. State*, 23 Ga. App. 93(1), 97 S. E. 561, and cases cited. *Thompson v. State*, 24 Ga. App. 144(2), 99 S. E. 891. This ruling disposes of grounds 4, 5, 6, and 7 of the motion for a new trial.

2. Homicide \S 309(4)—Instruction on manslaughter authorized when there is anything tending to show manslaughter.

"It is well settled, by repeated rulings of the Supreme Court and this court, that on a trial for murder, if there is anything deducible from the evidence or the defendant's statement that would tend to show manslaughter, voluntary or involuntary, it is the duty of the court to instruct the jury fully on the law of manslaughter." *Smith v. State*, 23 Ga. App. 77(4), 97 S. E. 454, and see cases there cited. In the case under consideration there was ample evidence to authorize the charge on voluntary manslaughter.

3. Criminal law \S 851, 1144(1/2), 1144(15)—Sheriffs and constables \S 12, 24—Party claiming bailiff not sworn must affirmatively show fact; presumption in favor of regularity and legality of proceedings; evidence insufficient to show bailiff not sworn; removal of constable to another district does not vacate office until fact judicially ascertained; bailiff selected by sheriff is de facto officer; appointment of bailiff need not appear on minutes.

(a) Before a verdict will be set aside upon the ground that the bailiff who attended the jury while they had the case under consideration was not sworn, this fact must affirmatively appear.

(b) "The presumption is in favor of the regularity and legality of all proceedings in the superior court."

(c) The removal of a constable from the militia district for which he was elected or appointed to another militia district in the

same county does not vacate his office until the fact has been judicially ascertained.

4. Sufficiency of evidence.

There was evidence to support the verdict.

Error from Superior Court, Worth County; R. Eve, Judge.

Almer Johnson was convicted of manslaughter, and he brings error. Affirmed.

Perry & Tipton, of Sylvester, for plaintiff in error.

R. S. Foy, Sol. Gen., of Sylvester, for the State.

BLOODWORTH, J. [1-4] Only the third headnote will be elaborated. Ground 9 of the amendment to the motion for a new trial alleges error because the plaintiff in error "was not given and did not have upon the trial in this case the benefit and protection of having the jury trying his case attended during the trial and during the deliberations in making up their verdict, by a bailiff sworn as required by section 883 of the Penal Code of Georgia." Three reasons are assigned why the bailiff was not qualified to take charge of and attend the jury.

"(a) Because the said Hiram Stewart, the bailiff who attended the jury was not sworn as required by law, he not having had administered to him at any time during said term of court the oath prescribed by section 883 of the Penal Code of Georgia, and not at any time prior to the trial of said case having had administered to him any oath of any kind, and being unsworn throughout his connection with said case and his handling of the said jury.

"(b) Because the said Hiram Stewart, at the time of the trial of said case and of his having charge of and attending said jury therein as above shown, was not one of the constables or bailiffs of said county in which the said trial occurred, and held no office or authority whatever.

"(c) Because the said Hiram Stewart, at the time of the trial of said case and throughout his connection therewith in having charge of and attending the said jury as above shown, was none other than a private citizen of said county, under no oath of any kind, and having no legal authority of any kind to take charge of and attend the said jury."

A discussion of the "reasons" set out under (a) and (b) will dispose of reason (c). Before the first of these reasons would avail the plaintiff in error it would have to appear affirmatively that the party who acted as bailiff and had charge of the jury had not been sworn. This did appear in the cases of *Roberts v. State*, 72 Ga. 674 (2), and *Washington v. State*, 138 Ga. 370 (4), 75 S. E. 253, cited and relied upon by the plaintiff in error. Had it been shown in this case that the bailiff who attended the jury had been deputized by the sheriff and acted as bailiff, and had charge of the jury without being sworn,

a new trial would necessarily result. The plaintiff in error insists that the bailiff was not sworn, and the burden of proving this is upon him. The presumption is that the bailiff was sworn. The law requires that he be sworn, and "there is a presumption of law that all officers do their duty, and, unless in the given instance this presumption be in some way rebutted, it will prevail." See *Goldberg v. State*, 25 Ga. App. 200, 103 S. E. 90, citing *Carter v. Griffin*, 118 Ga. 634, 38 S. E. 946. In *Grinad v. State*, 34 Ga. 270 (1), it was held: "The presumption is in favor of the regularity and legality of all proceedings in the superior court." The affidavits offered on the hearing of the motion for a new trial by the plaintiff in error to support this ground of the motion do not affirmatively establish that the bailiff was not sworn. In each of the affidavits the testimony is negative. The substance of these affidavits is that the affiant does not remember—that his mind is a blank as to this particular transaction. Some of the witnesses, in counter affidavits introduced by the solicitor general, swear that if the oath had not been administered they think they would have remembered this fact, as it was the custom for the bailiffs to be sworn. If the bailiff who waited upon the jury in this case had not been sworn, then he could have been designated, so far as the law is concerned, as suggested by Chief Justice Jackson in *Roberts v. State*, 72 Ga. 678, as a "heathen man and publican" and as an "uncircumcized Phillistine."

We think that the second of these "reasons" is settled adversely to the plaintiff in error, not only by the decisions of the Supreme Court and of this court, but by the statute law of the state. The motion for a new trial shows that the person who attended the jury had been for a number of years a constable of the county in which the trial was held, but in December before the trial in February had moved from one militia district of the county to another. Section 264 (5) of the Civil Code of 1910 provides that all offices in the state are vacated "by the incumbent ceasing to be a resident of the state, or of the county, circuit, or district for which he was elected. In the first case the office shall be vacated immediately; in the latter cases, from the time the fact is *judicially ascertained*" (italics ours). In the case under consideration there is no contention that this fact had been *judicially ascertained*. In *Bush v. State*, 10 Ga. App. 544, 73 S. E. 697, where it was sought to bring in question the title of the acting solicitor general of the city court, Judge Russell said:

"The court judicially knew that Mr. Rich was the duly commissioned solicitor of the city court of Miller county, and, taking all the allegations of the plea to be true, he was at least the de facto officer of the court. Furthermore, the plea was defective in that there

was no statement that the office of the solicitor of the city court had been judicially ascertained to be vacant in a legal sense by reason of the fact that it had been judicially ascertained that Mr. Rich had moved his residence from the county of Miller to the county of Decatur. The exact point was decided by the Supreme Court in the case of *Channell v. State*, 109 Ga. 152, 34 S. E. 854, in which Justice Lewis, delivering the opinion of the court, says: "Section 229 of the Political Code (Political Code of 1910, § 264) describes how offices in this state may be vacated, and one of the methods (see subdivision 5) for vacation is: "By the incumbent ceasing to be a resident of the state, or of the county, circuit, or district for which he was elected. In the first case the office shall be vacated immediately; in the latter cases, from the time the fact is judicially ascertained." It is manifest from this provision that when an incumbent of an office has moved from the county for which he was elected to another county in this state, the office is not thereby immediately vacated, and does not become so until the fact has been judicially ascertained."

See, also, *Christopher v. State*, 21 Ga. App. 244, 94 S. E. 72. The record shows that this bailiff was selected by the sheriff to serve during the term of court at which plaintiff in error was tried, and that he did serve in that capacity, and, as hereinbefore stated, we must presume that he was sworn for this special service, and would at least be a de facto officer, and his acts as such would be valid. In *Hinton v. Lindsey*, 20 Ga. 746 (4), an officer de facto was defined as:

"One who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law; one who acts by color or an appointment, but is not in all respects legally qualified."

In the case just referred to it was also held that—

"Neither the title of such an officer nor the validity of his acts, as such, can be collaterally impeached in a proceeding to which he is not a party."

See cases cited on page 748 (3). See, also, Civil Code 1910, § 277; *Twiggs v. Hardwick*, 61 Ga. 272 (1); *Gunn v. Tackett*, 67 Ga. 725 (1).

It is insisted that the minutes of the court do not show the appointment of this constable. There is no merit in this contention. Had the selection of this person as bailiff appeared on the minutes, this fact could have been proven by the introduction of these minutes, but this method of proof is not exhaustive. See, in this connection, *Zeigler v. State*, 2 Ga. App. 632, 58 S. E. 1066, and cases cited. In *Allen v. State*, 21 Ga. 219 (2), 68 Am. Dec. 457, Judge Benning said:

"In *Greenleaf on Evidence*, § 92, vol. 1, it is said that: 'It is not in general necessary to prove the written appointments of public officers. All who are proved to have acted as such are presumed to have been duly appoint-

ed to the office, until the contrary appears; and it is not material how the question arises, whether in a civil or a criminal case, nor whether the officer is or is not a party to the record.' And there is ample authority cited to sustain the statement."

In *Massey v. Allen*, 48 Ga. 21, the third headnote is as follows:

"The court having to pass upon the weight and credit of the affidavits filed on the motion for a new trial, this court will not interfere with its discretion unless abused."

See, also, Civil Code 1910, § 6088.

Under the facts of this case, and the law as above noted, we cannot say that the trial judge abused his discretion in refusing to grant a new trial.

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 671)

HETRICK v. STATE. (No. 12686.)

(Court of Appeals of Georgia, Division No. 1.
Nov. 18, 1921.)

(Syllabus by the Court.)

1. Criminal law \S 823(15)—Omission of charge as to reasonable doubt not error in view of other instructions.

When considered in connection with the remainder of the charge, the judge did not err in failing to add the words "and beyond a reasonable doubt" to the words "to a reasonable and moral certainty," in the excerpt from the charge embodied in the first ground of the amendment to the motion for a new trial.

2. Criminal law \S 878(2)—Indictment and information \S 128—Indictment may charge same offense in different counts and general verdict good if any count sustained by evidence.

While the indictment in this case contained three counts, all of them "covered the same offense, and the same transaction, and the embezzlement of the same funds, and all were based on the same statute." In *Innes v. State*, 19 Ga. App. 273, 91 S. E. 339, this court held: "It is well settled that an indictment may in several counts charge a violation of one statute in different ways; in which event a general verdict of guilty is good, if the evidence sustains either count." See in this connection, *Jones v. State*, 12 Ga. App. 564(2), 77 S. E. 892; *Colquitt v. State*, 6 Ga. App. 109, 64 S. E. 231.

3. Charge on admissions and confessions authorized.

The evidence was sufficient to authorize a charge on admissions and confessions.

4. Criminal law \S 822(13)—Instruction as to necessity of state showing embezzlement of full amount charged not error in view of whole charge.

In the light of the entire charge the court did not err in instructing the jury as follows:

"It is not incumbent upon the state to show the full amount charged in the indictment; any part, either the full amount of 90-odd thousand dollars and cents, or any part would be sufficient, as far as the amount is involved in the case."

5. Criminal law \S 400(7), 472—Testimony as to total amount of checks introduced and as to how they were used held properly admitted.

The court did not err in allowing the auditor to testify as to the "total amount" of "a large batch of checks" introduced in evidence, nor in allowing him to tell the jury how he treated these checks in his audit, as complained of in ground 6 of the amendment to the motion for a new trial; nor did the court err in ruling on the admission of evidence, as complained of in ground 9 of the amendment to the motion for a new trial. *Spence v. State*, 20 Ga. App. 62(11), 92 S. E. 555.

6. Criminal law \S 856(3), 918(5)—Court's remarks in ruling on evidence not error, though involving statement as to testimony.

"Generally, what the court says in stating to counsel the reason for denying a motion to exclude or rule out evidence is, if pertinent to the question raised by counsel, not error, although the reason given involve a statement as to certain testimony which is already in."

7. Criminal law \S 696(2)—Objections to evidence provisionally admitted are abandoned when no motion to exclude them made.

The evidence the introduction of which was complained of in grounds 8 and 10 of the motion for a new trial was provisionally admitted, and no motion was thereafter made to exclude it, and it will be considered that counsel abandoned his objections thereto. *Quinn v. State*, 22 Ga. App. 632(2), 634(2), 97 S. E. 84, and cases cited.

8. No error in rulings.

The court did not err in admitting the evidence of which complaint is made in ground 11 of the amendment to the motion for a new trial; nor did the ruling of the judge on this evidence violate the provisions of section 1058 of the Penal Code of 1910 (Civ. Code 1910, § 4863).

9. Admission of evidence not error.

For no reason assigned did the court err in admitting the checks referred to in special grounds 12, 13, 14, 17, 18, and 19 of the motion for a new trial; nor in admitting the evidence of which complaint is made in the fifteenth special ground.

10. Criminal law \S 918(5)—Remarks of court of slight importance do not require new trial.

"Observations of the court to counsel in the hearing of the jury during the progress of the trial, though open to criticism, if of but slight importance and only possibly, not probably, injurious, will not work a new trial."

11. Sufficiency of evidence.

There is ample evidence to support the verdict.

Error from Superior Court, Cobb County; D. W. Blair, Judge.

W. F. Hetrick was convicted of embezzlement, and he brings error. Affirmed.

Clay & Blair, of Marietta, for plaintiff in error.

Jno. S. Wood, Sol. Gen., of Canton, and L. W. Camp, Morris & Hawkins, and Abbott & Wallace, all of Marietta, for the State.

BLOODWORTH, J. [2-5, 7-9, 11] We will amplify only the first, sixth, and tenth head-notes.

[1] 1. The first special ground of the motion for a new trial alleges that the court erred in charging the jury as follows:

"The credibility of the witnesses, that is, the amount of weight to be given to the testimony of the several witnesses who have testified in the case, is a matter peculiarly for you. You see them on the witness stand, you note their demeanor, you judge of their sources of information, their interest or want of interest in the case, their opportunity for knowing the facts about which they testified; and from all the facts and circumstances which appear on the trial of the case you reach a conclusion as to what amount of weight should be given to the several witnesses who testified in the case, and from all the facts and circumstances you reach a conclusion as to whether or not the prosecution has carried the burden in the way I have stated, and shown the defendant's guilt to a reasonable and moral certainty."

This excerpt from the charge is alleged to be error because the court did not follow the words "to a reasonable and moral certainty," in the last line thereof, with the words "and beyond a reasonable doubt." Elsewhere in the charge the judge instructed the jury that—

"The effect of his plea of not guilty is to put the burden upon the prosecution to show the defendant's guilt to a reasonable and moral certainty and beyond a reasonable doubt. Reasonable and moral certainty of the guilt of the accused is all that is required of the prosecution. A reasonable doubt is such a doubt as the term implies, that is, it is such a doubt as fair and impartial jurors find because of the want of evidence, or because for some reason the evidence is not sufficient to satisfy the minds and conscience of the jurors of the guilt of the accused."

In another portion of the charge the jurors were told that, if they had a reasonable doubt about the guilt of the defendant, it would be their duty to give him the benefit of that doubt and acquit him. In the decision in *Bone v. State*, 102 Ga. 390, 30 S. E. 845, it was said:

"One thing is quite apparent from the words of the charge: That is, that the jury would not be authorized to convict if they had a reasonable doubt of guilt, nor unless they were morally and reasonably certain of such guilt. It is difficult to conceive how the mind of a juror

may reach a conclusion as to a fact to the point of moral certainty, and yet be rendered uncertain by the existence of a doubt of that fact which is reasonable."

In *Cole v. State*, 125 Ga. 276 (3), 53 S. E. 958, Mr. Justice Lumpkin, speaking for the Supreme Court, said:

"The charge of the court having fully explained to the jury the necessity to prove the accused guilty beyond a reasonable doubt in order to authorize a conviction, it furnished no ground for a new trial that he also stated to them that 'the state is bound only to establish his guilt to a reasonable and moral certainty; and if the state has done that, it is your duty to convict the defendant.' Taking the entire charge together, there was no error on this subject."

This court, in *Austin v. State*, 6 Ga. App. 211 (1), 64 S. E. 670, held:

"The phrases 'to a moral and reasonable certainty' and 'beyond a reasonable doubt,' as applied to the quality of proof in a case, are identical in meaning."

In *Thomas v. State*, 19 Ga. App. 105. (4), 91 S. E. 247, this court announced that—

"One distinct and unequivocal statement by the judge in his charge to the jury, that the jury must be satisfied beyond a reasonable doubt of the guilt of the accused of the offense charged in the accusation upon which he is being tried, is sufficient, and it is not necessary to reiterate this instruction in charging as to various phases of the case developed by the evidence."

The rulings in the foregoing cases show that the first special ground of the motion for a new trial is without merit.

[6] 6. While a witness was upon the stand testifying as an expert, counsel for the defendant objected to certain evidence upon the ground that the witness had not said that he was an expert. The judge replied: "He testified he was a public accountant." This remark of the judge was not such error as would require the grant of a new trial. The witness had previously sworn that—

"In the fall of 1920 and until December 31, 1920, I was a public accountant; connected with the Audit Company of the South. My place of business was 209 Candler Building, Atlanta, Ga. Since then I have moved to Florida. I was, as a public accountant, called upon to audit the books and records of the Acworth Cotton Manufacturing Company."

In *Scarborough v. State*, 46 Ga. 83, it was said:

"It would be impossible to carry on a trial if this section of the Code [section 4863 of the Civil Code and section 1058 of the Penal Code of 1910], prohibiting a judge from expressing an opinion as to what is proven, is to be construed as is contended for. A judge, in deciding as to admissibility of testimony, must always, to some extent, decide as to its weight, since often its admissibility depends on that,

so he must often determine what has been proven so as to say whether certain other things may be proven. * * * The only practicable rule is, to treat the jury as possessed of common sense, and as capable of understanding what is addressed by the judge to them and what is not. He may not express to the jury any opinion; but if in the decision of any legal question, as it arises, he must pass upon facts, the statute does not apply."

In *Redwine v. Street*, 18 Ga. App. 77 (4), 89 S. E. 163, this court held:

"The trial judge may give the reasons which influence him in the admission or exclusion of testimony, without expressing an opinion of what has been proved. Even though the judge, for the purpose indicated, recites or reviews some of the testimony already adduced, this is no violation of section 4863 of the Civil Code."

See, also, *Croom v. State*, 90 Ga. 430 (3), 17 S. E. 1003; *Louisville & Nashville R. Co. v. Rogers*, 21 Ga. App. 324, 94 S. E. 321; *Hall v. State*, 7 Ga. App. 116 (5), 119 (5), 66 S. E. 390, and cases cited.

[10] 10. Ground 16 of the motion for a new trial is as follows:

"Movant insists the court erred in allowing \$30,000 worth of stock certificates of the Marietta Cotton Mill to be introduced in evidence, as follows: Mr. Morris: 'We tender in evidence the stock certificates of the Marietta Cotton Mill that we have just examined the witness about, with four shares of them transferred.' Mr. Clay: 'We object, for the reason they were treated as the property of the Acworth Cotton Manufacturing Company and for the reason they are in Mr. Awtrey's hands, and their report now and not that of Mr. Hetrick, and they don't shed any light on this transaction and are irrelevant, immaterial, and incompetent.' The Court: 'Let them go in.' Mr. Morris: 'They aggregate \$30,000 par value.' The Court: 'That ought to be sufficient.' Movant insists the admissibility of this evidence and the statement of the court 'that ought to be sufficient' was an expression of opinion on the part of the court, and was immaterial and incompetent evidence, and prejudicial to the defendant's rights."

In the brief of counsel for the plaintiff in error they impliedly abandon all their objections to the evidence referred to in this ground of the motion for a new trial, except that it "was an expression of opinion on the part of the court." It is not alleged that it was an expression of opinion "as to what has or has not been proved, or as to the guilt of the accused." Exactly what the judge meant by saying "that ought to be sufficient" we do not know. Counsel for the state insists that—

"What the court actually did was to state that this was a sufficient description of the papers offered in evidence."

This is not an unreasonable conclusion, as the state had offered in evidence certain certificates of stock without stating the number of shares or the aggregate face value thereof; but whatever may have been intended by the judge when he used these words, we cannot say that this was such a violation of the "Dumb Act" as to require the grant of a new trial.

"Observations of the court to counsel in the hearing of the jury during the progress of the trial, though open to criticism, if of but slight importance and only possibly, not probably, injurious, will not work a new trial." *Chattanooga, etc., R. Co. v. Palmer*, 89 Ga. 161(3), 15 S. E. 34.

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 657)

AUGUSTA-AIKEN RY. & ELECTRIC CORPORATION v. BURDASHAW.
(No. 12230.)

(Court of Appeals of Georgia, Division No. 1.
Nov. 18, 1921.)

(Syllabus by the Court.)

Negligence — 138(4)—Instruction on comparative negligence held justified.

In this case the judge did not err in giving in charge "the principle of comparative negligence and apportionment of damages," as such a charge was authorized both by the pleadings and the evidence.

Error from City Court of Richmond County; J. C. C. Black, Jr., Judge.

Action by Mrs. J. F. Burdshaw against the Augusta-Aiken Railway & Electric Corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

Wright & Jackson, of Augusta, for plaintiff in error.

O. Lee White and C. Henry & R. S. Cohen, all of Augusta, for defendant in error.

BLOODWORTH, J. In the brief of plaintiff in error it is said:

"But it is respectfully contended that his honor in the court below erred in giving in charge to the jury the principle of comparative negligence and apportionment of damages. And this constitutes the only error and issue insisted upon before this court by the plaintiff in error."

The charge of the court of which complaint is made is as follows:

"If you find from the evidence in this case that both parties were at fault, and that the plaintiff, by the exercise of ordinary care, could not have avoided the consequences to herself of the defendant's negligence, she may nevertheless recover, but her damages shall be diminished by you in proportion to the amount of default attributable to her."

Counsel for the plaintiff in error insist that this charge was error, because "there was nothing in the pleadings or evidence upon which to base said charge." We cannot agree with this contention. In *Georgia Railroad v. Hunter*, 12 Ga. App. 294 (8), 77 S. E. 176, it was held:

"In a suit by a railroad employee to recover damages from the railroad company for personal injuries, an allegation in the petition of freedom from fault on his part, and a plea that he failed to exercise ordinary care, puts in issue the question whether the recovery should be diminished by reason of the fact that he was guilty of contributory negligence not amounting to a failure to exercise ordinary care."

In the case sub judice the petition alleges that—

"Your petitioner was in the exercise of ordinary care and diligence in alighting from said car; that your petitioner could not have avoided the injuries complained of; and that the injuries complained of were caused solely by negligence of the defendant company, its agents and employees."

And the plea alleges that—

"The plaintiff, by the exercise of ordinary care and diligence, could have avoided the consequences of the alleged negligence of this defendant."

Applying the above rule, the pleadings authorized a charge on "the principle of comparative negligence and apportionment of damages," and so did the facts; for, according to the evidence for the plaintiff, the defendant was negligent, and the evidence of the conductor introduced by the defendant was sufficient to authorize the jury to reach the conclusion that the plaintiff also was to some extent negligent.

No error of law is shown to have been committed on the trial; the evidence supports the verdict; the motion for a new trial was properly overruled, and the judgment is affirmed.

BROYLES, C. J., and LUKE, J., concur.

SOCKWELL v. STATE. (No. 12604.)

(Court of Appeals of Georgia, Division No. 1.
Nov. 16, 1921.)

(Syllabus by the Court.)

Weapons — License does not authorize carrying concealed or at place of public worship.

The indictment in this case charged that the defendant "did carry about his person a certain pistol to and while at Salem Camp Ground, a place of public worship, while the people were then and there assembled for the purpose of engaging in religious services." The allegations in the indictment were supported by the uncontradicted evidence of several witnesses, and the defendant himself admitted that he had the pistol at the time and place alleged. However, he insisted that he violated no law, because he had a license which authorized him to carry the pistol. This contention is not sound. Prior to the passage of the act of 1910 (Ga. Laws 1910, p. 134; Park's Ann. Pen. Code, § 848[a] et seq.), a person violated no law who carried a pistol openly and fully exposed to view, and did not carry it to any of the places to which carrying it was prohibited by law. The effect of the Act of 1910 was to make it unlawful for any person to have or carry about his person a pistol, whether it is concealed or not, unless a license has been procured as provided for by that act. Under the express provisions of the act of 1910, it does not alter, affect, or amend any laws now in force in this state relative to the carrying of concealed weapons on or about one's person. Hence the issuance of a license to a person to carry a pistol would not avail him as a defense, should he be prosecuted for carrying the pistol concealed or carrying it to a place of public worship. This being true, the judge did not err in withholding from the jury "a pistol totter's license" issued to the defendant, nor in charging the jury that "the fact that a man may have a license for the carrying of a pistol does not permit him, under the license, to carry it to the place described in this bill of indictment."

Error from Superior Court, Newton County; Jno. B. Hutcheson, Judge.

Tom Sockwell was convicted of carrying a pistol at a place of public worship, etc., and he brings error. Affirmed.

King & Johnson, of Covington, for plaintiff in error.

A. M. Brand, Sol. Gen., of Lithonia, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 711)

MARR v. DIETER. (No. 12657.)(Court of Appeals of Georgia, Division No. 2.
Nov. 18, 1921.)*(Syllabus by the Court.)*

1. Landlord and tenant ⇨167(8), 169(4)—Landlord conclusively presumed to have knowledge of defective construction; landlord entitled to notice to render him liable for failure to repair.

A landlord is responsible to a guest of his tenant for damages arising from defective construction or for damages from failure to keep the premises in repair. Civil Code 1910, § 3694. In the first case knowledge of the defective construction by the landlord is conclusively presumed. *Monahan v. National Realty Co.*, 4 Ga. App. 680, 62 S. E. 127. In the second case the landlord is entitled to notice, either actual or constructive. *Ocean Steamship Co. v. Hamilton*, 112 Ga. 903, 38 South. 204.

2. Landlord and tenant ⇨167(2)—Landlord retaining qualified possession liable if he knew, or should have known, of defective condition.

Where the landlord retains a qualified possession of the rented premises, himself attending to the supervision of the building, collecting the rents, and personally or by an agent making repairs, he is liable for an injury resulting from a defective condition of the building, if he has actual notice of such defective condition, or if, in the exercise of ordinary and reasonable care and diligence, he ought to have known of it. *Monahan v. National Realty Co.*, supra; *Davis v. Hall*, 21 Ga. App. 268, 94 S. E. 274.

3. Landlord and tenant ⇨167(2)—Landlord not ordinarily bound to inspect; landlord responsible for injury due to improper or imperfect repairs.

Ordinarily the landlord is under no duty to inspect the premises while the tenant is in possession, in order to keep informed as to its condition, yet where the landlord does inspect the premises and in such inspections finds a defect caused either by original construction or by a want of repair, and himself undertakes to remedy such defect, he is responsible for an injury due to improper or imperfect repairs. *Adams v. Klasing*, 20 Ga. App. 203, 92 S. E. 960.

4. Landlord and tenant ⇨167(8)—Landlord making repairs liable to tenant or a guest for injuries.

A landlord making repairs on the rented premises, either voluntarily or in compliance with his statutory obligation, is required to use due care to leave the repaired portion free from defects; and for personal injuries received by the tenant, or one lawfully on the premises as the guest of the tenant, from negligence in making the repairs, when the injured person had no notice of such defective condition and

was in the exercise of due care, the landlord is liable. See notes in 34 L. R. A. (N. S.) 806.

5. Landlord and tenant ⇨167(2)—Landlord liable for injuries from defective construction whether discovered before or after creation of tenancy.

A landlord would be responsible for injuries to a tenant occasioned by defects in the structure either when the landlord knew of such defects "before the tenancy was created" or discovered the existence of such defects after the tenancy was created, and especially would this be true if the landlord, after such discovery, attempted himself unsuccessfully to repair such defects when the tenant had no notice, actual or constructive, of such defective condition. The decision of the Supreme Court in *Ross v. Jackson*, 123 Ga. 657, 51 S. E. 578, properly construed, does not limit the responsibility of the landlord for improper construction to knowledge, actual or constructive, of the defective condition "before the tenancy was created."

6. Landlord and tenant ⇨169(8)—Evidence held to warrant verdict for plaintiff, injured by falling of mantelpiece.

The evidence showed a latent defect in the mantelpiece in a room of the rented house, which caused it to fall upon the plaintiff, injuring her foot. Whether this defect was due to improper construction and was known to the landlord before the tenancy was created does not clearly appear. It does appear that the landlord actually discovered that the mantel was defective and himself attempted to repair it. Subsequently to his effort to make the repairs the injury occurred from the falling of the mantel. These facts would warrant a verdict for the plaintiff for damages due to improper repairs as the proximate cause of the injury, in the absence of notice by the tenant or by the plaintiff of the defective condition of the mantel after the landlord had attempted to repair it. *McGee v. Hardacre*, 27 Ga. App. —, 107 S. E. 563.

7. Nonsuit held unauthorized.

Applying these principles of law to the evidence in support of the allegations of the petition, the nonsuit was unauthorized.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Action by Mrs. Lena Marr against Mrs. George Dieter. Judgment for defendant, and plaintiff brings error. Reversed.

Oliver & Oliver, of Savannah, for plaintiff in error.

Stephens, Barrow & Heyward, of Savannah, for defendant in error.

HILL, J. Judgment reversed.

JENKINS, P. J., and STEPHENS, J., concur.

(27 Ga. App. 595)

(109 S.E.)

RODGERS v. STATE. (No. 12653.)(Court of Appeals of Georgia, Division No. 1.
Nov. 16, 1921.)*(Syllabus by the Court.)*

Criminal law \S 778(4)—Instruction not to consider defendant's personality, the personal presumption, etc., held erroneous.

Where a judge, near the beginning of his charge, told the jury that "the defendant comes into this court with the presumption of innocence around about him, and that presumption remains with him until it is removed by evidence sufficient to convince you, and that beyond a reasonable doubt, of his guilt," it was error, requiring the grant of a new trial, for the judge, near the conclusion of his charge, to say to the jury that in considering the case they should "take away the personality of the defendant—the personal presumption—take away all things that may hang in your mind."

Error from Superior Court, Lincoln County; E. T. Shurley, Judge.

G. C. Rodgers was convicted of an offense, and he brings error. Reversed.

Burnside & McWhorter, of Lincolnton, for plaintiff in error.

M. L. Felts, Sol. Gen., of Warrenton, for the State.

BLOODWORTH, J. Just after stating the issue raised by the indictment and the plea of the defendant, the judge charged the jury as follows:

"The defendant comes into this court with the presumption of innocence around about him, and that presumption remains with him until it is removed by evidence sufficient to convince you, and that beyond a reasonable doubt, of his guilt."

Near the conclusion of his charge the judge told the jury:

"Take this case, gentlemen, consider it from the evidence and the prisoner's statement and those things alone. Take away the personality of the defendant—the personal presumption—take away all things that may hang in your mind, weigh it according to the law as given you in charge and the evidence as delivered from the stand, and render your verdict, and when you have considered your verdict and made your verdict, write it on this indictment, date it and sign it, and return it into court. Retire, gentlemen, and make up your verdict."

It is insisted by counsel for the plaintiff in error that this charge—

"might well be construed by the jury to mean that they should take away from their consideration of the case the presumption of innocence, since a defendant in the trial of a criminal case has no personal presumption other than the legal presumption of his innocence. The instruction, 'Take away all things that may hang in your mind,' used in the connection

as above quoted, was confusing to the jury, and probably caused them to absolutely disregard the legal presumption of the defendant's innocence, which the court near the beginning of his charge had instructed the jury was with the defendant and remained with him until sufficient [evidence had been introduced] to convince them beyond a reasonable doubt of the defendant's guilt, remove the presumption of his innocence. Now at the close of the charge to instruct the jury, in substance, not to consider the personal presumption of the defendant amounted to an expression of an opinion on the part of the court, when considered in connection with the first instruction in regard to the presumption of innocence, that sufficient proof had been submitted to remove this presumption."

The charge of which complaint is made is inapt, inaccurate, and erroneous, and such as might have misled the jury, and requires the grant of a new trial.

It is unnecessary to consider the other grounds of the amendment to the motion for a new trial, as the alleged errors are such as are not likely to reappear on a second trial.

Judgment reversed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 592)

PERSONS v. STATE. (No. 12643.)(Court of Appeals of Georgia, Division No. 1.
Nov. 16, 1921.)*(Syllabus by the Court.)***1. Provisions of statute.**

Confessions, to be admissible, must have been made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury. Pen. Code 1910, § 1032.

2. Provisions of statute.

All admissions should be scanned with care, and confessions of guilt should be received with great caution. A confession alone, uncorroborated by other evidence, will not justify a conviction. Pen. Code 1910, § 1031.

3. Criminal law \S 769, 824(11)—Judge must charge all the material law on any subject charged on; failure without request to charge all the law regarding admissions and confessions held error.

It is well settled that where the judge undertakes to charge upon a certain subject, although it be one upon which it is unnecessary, in the absence of a request, to instruct the jury, he must charge all the law upon that subject that is material to the facts of the case. In the instant case, the court having charged upon the subject of admissions, and the state largely relying upon certain alleged admissions of the accused for a conviction, and there being an issue of fact as to whether

the admissions were freely and voluntarily made, the court committed reversible error in failing to charge, even in the absence of a request therefor, the principles of law set forth above.

Error from Superior Court, Carroll County; O. E. Roop, Judge.

George Persons was convicted of an offense, and he brings error. Reversed.

Jas. Beall, of Carrollton, for plaintiff in error.

W. Y. Atkinson, Sol. Gen., of Newman, for the State.

BROYLES, O. J. Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 554)

HOWARD v. STATE. (No. 10870.)

(Court of Appeals of Georgia, Division No. 1.
Nov. 16, 1921.)

(Syllabus by the Court.)

1. Decision of Supreme Court conformed to.

Upon a writ of certiorari in this case the Supreme Court held: "The language employed in section 10 of the act of November 30, 1915 (Acts Ex. Sess. 1915, p. 107), relating to the regulation of motor vehicles and motorcycles and their rate of speed upon the highways of this state, and providing that a motor vehicle shall not be operated upon any public street or highway 'at a speed greater than is reasonable and safe,' is so indefinite as to render that part of the statute void. Moreover, since the decision of this case by the Court of Appeals (108 S. E. 683), the portion of the statute above referred to has by this court been held to be unconstitutional and void." For full opinion of the Supreme Court, see 152 Ga. 845, 108 S. E. 513. See, also, Jones v. State, 151 Ga. 502, 107 S. E. 765, where the statute in question is held unconstitutional and void.

2. Grounds of motion not considered.

As, under the foregoing ruling, the former judgment of this court must be vacated and a new trial ordered, it is unnecessary to deal with the other grounds of the amendment to the motion for a new trial.

Error from Superior Court, De Kalb County; C. W. Smith, Judge.

David Howard was convicted of involuntary manslaughter, and he brings error. Reversed in conformity to decision of Supreme Court on certiorari (152 Ga. 845, 108 S. E. 513).

W. F. Buchanan and Branch & Howard, all of Atlanta, for plaintiff in error.

Geo. M. Napier, Sol. Gen., of Atlanta, for the State.

BLOODWORTH, J. Judgment reversed.

BROYLES, O. J., and LUKE, J., concur.

(27 Ga. App. 556)

TAYLOR v. STATE. (No. 12589.)

(Court of Appeals of Georgia, Division No. 1.
Nov. 16, 1921.)

(Syllabus by the Court.)

Criminal law §1092(4)—Writ dismissed when bill of exceptions not tendered within 20 days.

It appearing that the bill of exceptions in this case was not tendered the judge within 20 days of the date of the judgment overruling the defendant's motion for a new trial, the writ of error must be dismissed.

Error from Superior Court, Fulton County; John D. Humphries, Judge.

Action between the State and W. R. Taylor. Judgment for the State, and Taylor brings error. Writ of error dismissed.

H. A. Allen, of Atlanta, for plaintiff in error.

Jno. A. Boykin, Sol. Gen., and E. A. Stephens, both of Atlanta, for the State.

LUKE, J. Dismissed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(27 Ga. App. 556)

BURTON v. STATE. (No. 12664.)

(Court of Appeals of Georgia. Nov. 16, 1921.)

(Syllabus by the Court.)

1. Homicide §340(4)—Misstatement of penalty for offense of which accused not convicted was harmless.

While the judge in his charge to the jury misstated the maximum penalty for assault with intent to murder, the misstatement was harmless, since the defendant was convicted, not of the offense of assault with intent to murder, but merely of shooting at another. James v. State, 25 Ga. App. 749, 105 S. E. 56.

2. Criminal law §1160—Judgment affirmed when verdict authorized and approved by trial judge.

The verdict was authorized by the evidence and has the approval of the trial judge; no error of law is shown, and the judgment of the court below is affirmed.

Error from Superior Court, Wilkes County; E. T. Shurley, Judge.

C. T. Burton was convicted of shooting at another, and he brings error. Affirmed.

H. E. Combs and Colley & Colley, all of Washington, Ga., for plaintiff in error.

M. L. Felts, Sol. Gen., of Warrenton, for the State.

BROYLES, O. J. Affirmed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 635)

JOHNSON v. STATE. (No. 12772.)(Court of Appeals of Georgia, Division No. 1,
Nov. 17, 1921.)*(Syllabus by the Court.)*

1. Larceny \Leftrightarrow 1—One obtaining property to apply to owner's use, and appropriating it pursuant to fraudulent intent previously formed, guilty of simple larceny.

Where one fraudulently intends to get possession of the money of another, and by false representations induces the owner to deliver the money to him for the purpose of being applied to the owner's use, and then appropriates it in pursuance of the original fraudulent intent, he may be convicted of the offense of simple larceny. *Martin v. State*, 123 Ga. 478, 51 S. E. 834.

2. Sufficiency of evidence.

The evidence in this case fully authorized the jury to find that the defendant, with a fraudulent intent and by false and fraudulent representations, induced a person to deliver to him money to be applied for the owner's benefit, and that the money was not so applied, but was appropriated by the defendant to his own use. The evidence clearly showed the defendant's guilt, and no error of law appears which would authorize a reversal of the judgment denying his motion for a new trial.

Error from Superior Court, Floyd County; Moses Wright, Judge.

John Johnson was convicted of simple larceny, and he brings error. Affirmed.

Porter & Mebane, of Rome, for plaintiff in error.

E. S. Taylor, Sol. Gen., of Summerville, and J. F. Kelly, of Rome, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(27 Ga. App. 684)

WILLIAMS v. STATE. (No. 12864.)(Court of Appeals of Georgia, Division No. 1,
Nov. 18, 1921.)*(Syllabus by the Court.)*

1. Robbery \Leftrightarrow 23(1)—Testimony as to resemblance of automobile exhaust with that of car in which defendant was riding shortly before crime committed held admissible.

A witness testified that he was at the store where the robbery was committed, and saw the defendant and two others indicted with him come in and take a drink. He further testified that when they left one of them cranked the automobile, and that they "went on down West Fourteenth street. I heard the exhaust of the car as it went off that time, and then I heard the exhaust of the car that the three people

were in 30 minutes later when they came, and the exhaust sounded very much like the first time; sounded like the cut-off, or whatever you call it, was open." This evidence was objected to as follows: "I object to that, because I don't think he could identify the car by the sound of the exhaust." The court properly allowed the evidence to go to the jury. It was a circumstance which they could consider along with the other evidence in determining the identity of the parties charged with the crime. The robbery was committed when the three people above referred to returned to the store later in the night.

2. Criminal law \Leftrightarrow 1160—Verdict supported by evidence and approved by trial judge not disturbed.

There is some evidence to support the verdict, which has been approved by the trial judge, no error of law appears, and, under repeated rulings of this court and of the Supreme Court, a reviewing court is powerless to interfere.

Error from Superior Court, Fulton County; John D. Humphries, Judge.

Lewis Williams was convicted of robbery, and he brings error. Affirmed.

John Y. Smith, of Atlanta, for plaintiff in error.

Jno. A. Boykin, Sol. Gen., and E. A. Stephens, both of Atlanta, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 621)

DAVIS et al. v. TAYLOR. (No. 12866.)(Court of Appeals of Georgia, Division No. 1,
Nov. 17, 1921.)*(Syllabus by the Court.)*

1. Witnesses \Leftrightarrow 175(2)—Party may testify to transactions with deceased party who answered interrogatories before his death.

Where one of the parties to a written contract or cause of action in issue or on trial answers interrogatories sued out in the cause before his death, and after his death they are introduced in evidence in the case, the opposite party is a competent witness to testify in rebuttal of the evidence contained in the interrogatories respecting transactions and communications with the witness. See *McNair v. Brown*, 147 Ga. 161, 93 S. E. 289. It was not error for the court to admit the testimony of the defendant, Taylor, as complained of in the fourth, fifth, sixth, and seventh grounds of the motion for a new trial.

2. Landlord and tenant \Leftrightarrow 296(2), 309—Vendor and purchaser \Leftrightarrow 298—One entering under contract to purchase cannot be dispossessed by summary proceedings; case should have been submitted to jury when evidence was in sharp conflict.

Where one enters into possession of lands under a contract of purchase, he cannot be

dispossessed by summary proceedings against him as a tenant. *Griffith v. Collins*, 116 Ga. 421, 42 S. E. 743. The question as to the validity of the contract in this case should have been submitted to the jury, as there was a sharp conflict in the evidence upon this point.

3. Verdict improperly directed.

Under the above rulings it was error for the court to direct a verdict in favor of the defendant.

Luke, J., dissenting in part.

Error from Superior Court, Ben Hill County; O. T. Gower, Judge.

Action by N. E. Davis and others, executors, against Dan Taylor. Judgment for defendant, and plaintiffs bring error. Reversed.

Eldridge Cutts, of Fitzgerald, for plaintiffs in error.

A. J. & J. C. McDonald, of Fitzgerald, for defendant in error.

PER CURIAM. Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concurs.

LUKE, J. (dissenting). I agree to the ruling announced in the first paragraph of the decision in this case, and to that portion of paragraph 2, wherein it is ruled that where one enters possession of lands under a contract of purchase he cannot be dispossessed by summary proceedings against him as a tenant, but under the contract in this case I cannot concur in the judgment of reversal, for the reason that in my opinion there was no question as to the validity of the contract, nor was there any question as to whether the defendant was a purchaser. Clearly, under the contracts in evidence, the defendant was a purchaser and not a tenant. Therefore, in my opinion, it was not error to direct a verdict in favor of the defendant.

(Ga. App. 559)

CODMAN v. ROBERDS. (No. 12423.)

(Court of Appeals of Georgia, Division No. 1.
Nov. 16, 1921.)

(Syllabus by the Court.)

1. Appeal and error \Leftrightarrow 1005(3)—Judgment on conflicting evidence not reversed.

Roberds obtained a judgment against Codman for \$350, the full amount sued for on two notes given for the purchase price of certain potash bought for use as fertilizer. *Held*:

The evidence being conflicting, the judgment will not be reversed on the general grounds of the motion for new trial.

2. Agriculture \Leftrightarrow 7—Statute as to registration of fertilizers does not apply to sales in bulk to one purchasing for his own use.

By section 1796 of the Civil Code of 1910 it is provided that "It shall be lawful for manufacturers, jobbers, dealers, and manipulators of commercial fertilizers and fertilizer material to sell or offer for sale in the state of Georgia acid phosphate or other fertilizer materials in bulk to persons, individuals, or firms who desire to purchase the same for their own use on their own lands but not for sale." Upon an examination of the act of 1903 from which this section is taken (Ga. Laws 1903, p. 94), and a comparison of it with section 1771 of the Civil Code of 1910, requiring the registration of the names of the brands of fertilizers, acid phosphate, fertilizer materials or chemicals offered for sale, together with the name and address of the manufacturer or manipulator and the guaranteed analysis thereof, with the sources from which the phosphoric acid, nitrogen, and potash are derived, section 1771, properly construed, does not apply to fertilizers or fertilizer material sold in bulk to persons desiring to purchase the same for their own use on their own land.

(a) The excerpt from the charge of the court to which exception is taken is not erroneous for any reason assigned. No error is assigned thereon upon the ground that the evidence was conflicting as to whether the sale was in bulk.

3. Agriculture \Leftrightarrow 7—Charge that there was dispute as to how fertilizer was sold not error, though there was no dispute as to how it was delivered.

The charge of the court that "there is a difference in the testimony here between these parties as to whether or not this fertilizer was sold in bulk or in sacks" was not error for the reason assigned, that the evidence showed that the fertilizer material was "delivered" in sacks. The question is not how it was delivered, but how it was sold.

4. Agriculture \Leftrightarrow 7—Potash not required to be branded when sold in bulk for use by buyer.

It was not error for the judge to charge that, if the sale was in bulk to one desiring to use it for his own use on his own land, the seller was under no obligation to brand the potash in accordance with the provisions of section 1772 of the Civil Code of 1910.

5. Agriculture \Leftrightarrow 7—Charge held to sufficiently cover contention as to invalidity of sale of untagged potash.

The court having substantially charged the provisions of the act of 1911 (Ga. Laws 1911, p. 172), embodied in section 1778(a) of Park's Annotated Code, and having stated to the jury the defendant's contention that the sacks of potash were not marked or branded in accordance with that section, and that therefore the notes sued on were void, there is no merit in the contention that "the charge did not plainly set forth the contention of the defendant that if the sacks were not tagged in accordance with the provisions of this section, the sale would be void."

6. Question for jury.

Whether the borax in the potash sold rendered it totally worthless was a question for the jury, and the court properly left it to them.

7. Appeal and error \S 302(3)—Motion for new trial must state evidence objected to, and not merely its purpose.

One of the grounds of the motion for a new trial is as follows: "Because the court admitted the testimony of a witness, John M. Blain, over the objection of defendant's counsel on the ground that the same was irrelevant and hearsay, the purpose of which was to show that the fertilizer material sold to the witness by the plaintiff was used upon his crops and did them no damage." It is not enough to state the purpose of the evidence. The evidence itself, literally or in substance, should have been set out in the exceptions. *Petty v. Brunswick, etc., Co.*, 109 Ga. 686(4), 35 S. E. 82; *Davis v. Gaskins*, 137 Ga. 450(2), 78 S. E. 579; *Chamblee v. Farmers' & Merchants' Bank*, 20 Ga. App. 527(4), 93 S. E. 239; *Tolbert v. State*, 16 Ga. App. 311(1), 85 S. E. 267.

8. Instruction proper.

The judge properly instructed the jury that there was no evidence to support a partial failure of consideration.

9. Sales \S 418(19)—Difference between crops treated with poisonous fertilizer and other crops held speculative, and not recoverable.

The defendant pleaded by way of recoupment that the poisonous borax in the potash sold him caused him a loss of 19 bales of cotton worth \$200 per bale, and 9,500 pounds of cotton seed worth \$80 per ton, or a total loss of \$4,180. He arrived at this loss by proof that the 52 acres to which he applied, at the rate of 500 pounds per acre, a mixed fertilizer containing a fifth part of the potash in question yielded only six bales of cotton, whereas two nearby acres of equal natural fertility, planted with the same kind of seed and worked alike, but fertilized differently, made at least half a bale per acre; his contention being that the 52 acres would have made at least twenty-five 500-pound bales of cotton of a grade worth 40 cents per pound, together with 1,000 pounds of seed to each bale, had the cotton seed planted not been injured by the borax. By subtracting the cotton and seed actually made from what should have been made, he undertakes to fix his actual loss. The damages sought were speculative, and the court did not err in charging that they were not recoverable. *Butler v. Moore*, 68 Ga. 780, 45 Am. Rep. 508; *Savannah Chemical Co. v. Bragg*, 14 Ga. App. 373, 80 S. E. 858. For no reason assigned was it error to overrule the motion for a new trial.

Error from City Court of Savannah; Davis Freeman, Judge.

Action by C. N. Roberds against W. C. Codman, Jr. Judgment for plaintiff, and defendant brings error. Affirmed.

Connerat & Hunter, of Savannah, for plaintiff in error.

Seabrook & Kennedy, of Savannah, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(27 Ga. App. 712)

ZAKAS BAKERY v. LIPES. (No. 12661.)

(Court of Appeals of Georgia, Division No. 2.
Nov. 18, 1921.)

(Syllabus by the Court.)

1. Master and servant \S 103(1), 258(12)—Master's duty nondelegable; petition for injuries by cogwheels held to state cause of action.

The allegations of the petition charge negligence by a partnership in failing to exercise the care imposed by law upon masters for the protection of their servants, and sufficiently set forth a cause of action.

2. Partnership \S 63, 153(1)—Liable to employees to same extent as individuals and corporations; partnership and members not given immunity from liability for negligence in partnership business; not liable for partner's torts unless committed in pursuance of partnership business; partnership held legal entity in conduct of business.

The rules of law applicable to the relationship of master and servant, where there is a failure on the part of the master to perform the nondelegable, absolute duty to safeguard the servant, apply with the same force, effect, and extent to partnerships as to individuals and to corporations. The law of this state gives no protection or immunity to partnerships for their negligent acts, as legal entities or as individual partners, if such acts are clearly for the partnership benefit and in furtherance of the partnership business.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by H. G. Lipes against the Zakas Bakery. Judgment for plaintiff, and defendant brings error. Affirmed.

McCallum & Sims, of Atlanta, for plaintiff in error.

J. A. Miller and Branch & Howard, all of Atlanta, for defendant in error.

HILL, J. This is an action against a partnership for personal injuries sustained by an employee. Two questions are made on general demurrer. It is insisted (1) that partnerships are not responsible for torts committed by a partnership, under Civil Code (1910), \S 3187; and (2) that, if there is such a liability, the allegations of the petition are not sufficient to set forth a cause of action.

[1] 1. The second question will be consid-

ered first. The suit is against a partnership to recover damages for an injury received by the plaintiff while he was working as an employee in a bakery operated by the partnership. It is alleged that the defendant partnership, in the operation of the bakery, used a machine known as a molding machine, run by electric power; that this machine had a set of cogwheels, at the end of which, between the machine and the wall, where the machine set close to the wall, and right back of the machine, and on the wall, and in close proximity to the cogwheels, was an electric switch, which had to be used in turning the electric power on and off. The cogwheels were ordinarily covered by a guard to protect the employee, who might be called upon to use the electric switch in the performance of his work, from being injured by exposed cogwheels. On the day of the injury the plaintiff, in the performance of his duties as an employee of the defendant, attempted to reach around the machine to use the electric switch to cut off the electric power, and in doing so his hand came in contact with the cogs and was very severely injured. The guard which was supposed to cover the cogs had been broken and was off at the time, and the cogs were exposed. It is alleged that this fact was known by the defendants, but that the plaintiff did not know of it and was given no warning of the defective condition. Under the allegations of the petition, which the demurrer admits to be true, it appears that the plaintiff was in the performance of his duties and received the injury by reason of the dangerous condition of the machine, that this machine was defective in the manner described, and this defective condition was known to the master, but was not known to the plaintiff, and he alleges that he had no opportunity of knowing of the defect. He further alleges that there is no duty of inspection upon him as an employee, but that the master, whose duty it was to inspect for the purpose of discovering the defect, and by the exercise of ordinary diligence in making the inspection could have discovered the defective condition of the machine and remedied the defect, or given the plaintiff notice of its condition. The plaintiff alleges that by the exercise of ordinary care he could not have discovered the defective condition of the machine and did not know of its condition.

Under the law of this state it is well settled that the master owes a duty to his servant of furnishing safe machinery and to keep the machinery in a safe condition, and that this duty is one of the absolute nondelegable duties of the master, and that a failure to perform this duty is negligence which renders the master liable for injuries to the servant caused by the failure of the master to perform this absolute, nondelegable duty, where the servant is free from any fault

contributing to his injury. *Brown v. Rome Machine & Foundry Co.*, 5 Ga. App. 142, 62 S. E. 720; *Moore v. Dublin Cotton Mills*, 127 Ga. 609, 56 S. E. 839, 10 L. R. A. (N. S.) 772; *Cedartown Cotton Co. v. Miles*, 2 Ga. App. 79, 58 S. E. 289; Civil Code (1910), § 3130.

[2] 2. Is the defendant relieved from liability for negligence because it is a partnership? It is earnestly contended by plaintiff in error that section 3187, supra, relieves a partnership from liability for its negligent torts. This section is in the following language:

"Partners are not responsible for torts committed by a copartner. For the negligence or torts of their agents or servant they are responsible under the like rules with individuals."

It is admitted that the second sentence of the Code section has no application to the case at bar, because there is no claim that the plaintiff was injured through the negligence of an agent or servant of the partnership. It is insisted that the case falls within the limitations of the first sentence of the section, namely, that "partners are not responsible for torts committed by a copartner." The section relied upon, in the opinion of the court, has no application to the negligent torts of a partnership. There is a wide difference between the torts of an individual partner and the negligent torts of a partnership as a legal entity. A partnership is not liable for the tort of a partner, unless the tort is committed for and in behalf of the partnership of which he is a member and in the pursuance of the partnership business. In the cases relied upon, cited in the brief of counsel, the torts alleged to have been committed, for which the partnerships were not liable for damages, were cases involving torts committed either by a fellow servant or by a copartner not in the performance of any duty as an agent of the partnership, nor in the furtherance of the partnership business. But there is no decision of the courts of this state which holds that a partnership is immune from liability for damage resulting from partnership negligence. If it were the law that a partnership could enter into a manufacturing or any other kind of business and employ servants therein, and, no matter how negligent it might be in failing to perform those duties which the law says every master must perform in the exercise of ordinary care to protect his servants from injury, could escape liability merely because the business was being carried on by a partnership, instead of by an individual or corporation, partnerships would be given a great advantage in the conduct of their business over individuals or corporations, and the business enterprises of this state would be

carried on largely by partnerships and not by individuals and corporations.

This court is of the opinion that the same rules of law which make individuals and corporations liable for negligence apply to partnerships, and that it was never contemplated by the Legislature that the section of the Code relied upon should be given such a broad and unlimited application as is contended for in the present case. This section, by its very terms, has no application to the negligence of a partnership and lays down no different rule of liability for partnership negligence than for individual or corporate negligence. Chief Justice Bleckley, in *Drucker v. Wellhouse*, 82 Ga. 129, 8 S. E. 40, 2 L. R. A. 328, said:

"Though a firm or partnership is not a person, it is a legal entity, and for some purposes is recognized as a quasi person having powers and functions exercisable by one of the partners severally or all of them jointly. * * * The law does take note, on a wide scale, of partnership as a legal entity, and regards it as a unit both of rights and obligations."

A partnership in the conduct of its business is a legal entity, both as to its rights and in the performance of its duties to the public and their employees, and is a legal entity as to its obligations. Partners are, in respect to the business in which they are engaged, agents of each other, and therefore one partner might be liable for the tortious acts of another *done in the usual course of business of the firm*. But neither the members of a partnership nor the partnership itself is liable for the personal, individual tort of a member, not done in the prosecution of the business of the firm but for his own individual and personal purpose. If the master is a member of a partnership by which the servant is employed, and the work in which he so takes part is within the scope of the common undertaking of the partnership, his partners are jointly liable with him for an injury caused by his negligence to the servant. If the act of negligence which causes the injury to the servant is the act of the partnership itself as a legal entity, there can be no question but that the partnership is liable under the same rules of law as apply to individuals or corporations, and in such case this liability would extend to the individual members of the partnership.

The cases cited by plaintiff in error in support of his contentions are cases in which the tort complained of was an individual tort of the partner, where it was properly held that the partnership would not be liable for the tort of one of the partners in which the other partners did not join. *Page v. Citizens' Banking Co.*, 111 Ga. 73, 36 S. E. 418, 51 L. R. A. 463, 78 Am. St. Rep. 144; *Martin v. Simkins*, 116 Ga. 254,

42 S. E. 483; *Hendricks v. Middlebrooks Co.*, 118 Ga. 131, 44 S. E. 835; *Corbett v. Connor*, 11 Ga. App. 385, 75 S. E. 492; *Battle v. Pennington*, 14 Ga. App. 56, 80 S. E. 297. In the instant case the alleged negligence is the negligence of the partnership—the negligent failure on the part of the partnership to perform the absolute, nondelegable duties imposed by the law upon the master for the protection of the servant. And the law, reasonably construed, makes no difference in the rules of negligence applicable to the relationship of master and servant, whether the master be an entity such as a partnership, or an individual or a corporation. The judgment of the trial court in overruling the general demurrer is affirmed.

Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(27 Ga. App. 660)

BERTHA MINERAL CO. v. BUIE.

BUIE v. BERTHA MINERAL CO.

(Nos. 12584, 12585.)

(Court of Appeals of Georgia, Division No. 1.
Nov. 18, 1921.)

(Syllabus by the Court.)

1. Affidavits \S 11—Liens \S 21—Paper not affidavit to support foreclosure when no oath administered; sale void when affidavit not sworn to; evidence held to show no oath administered; affiant's statement to officer held not sufficient oath.

Where a person signed a paper in the form of an affidavit for the purpose of foreclosing a mechanic's lien, and then procured a duly authorized officer to attest it by signing the jurat, but in fact no oath was taken or administered, or anything tantamount thereto, the paper did not constitute a legal affidavit, and furnishes no basis for the foreclosure of a mechanic's lien, and a sheriff's sale thereunder is without authority and void.

(a) A purchaser at such a sale acquires no title, and this is so whether or not the purchaser had notice of the want of authority on the part of the sheriff to sell the property.

2. Shipping \S 32—Evidence held sufficient to warrant finding that mortgagor had title and possession when mortgage executed.

There was evidence sufficient to authorize the judge, who was sitting without a jury, to find that the mortgagor had title to and possession of the property in question at the time the mortgage was executed.

3. Other assignments without merit.

The other assignments of error are without substantial merit.

Error from Superior Court, Camden County; J. P. Highsmith, Judge.

Proceedings on a claim of J. C. Buie to property levied on by the Bertha Mineral Company upon foreclosure of a mortgage. Judgment for the claimant, and the mortgagee brings error, and the claimant files a cross-bill of exceptions. Reversed on the main bill, and affirmed on the cross-bill.

This is a claim case. The facts disclosed by the record are in substance as follows: The St. Marys Transportation Company, a copartnership composed of J. L. Douglas and others, executed a mortgage on a certain "lighter" to the Bertha Mineral Company. This mortgage was executed by J. L. Douglas on behalf of the St. Marys Transportation Company, and was properly recorded. Subsequently John Richardson, who built the lighter or barge, foreclosed a mechanic's lien thereon against J. L. Douglas, and had the property levied on and sold at public outcry. At this sale J. C. Buie bought the lighter. Thereafter the Bertha Mineral Company foreclosed its mortgage and levied upon the lighter. Buie thereupon interposed a claim. Thus was the issue formed, which, by consent of all parties, was submitted to the court for determination without the intervention of a jury. The court decided the issue in favor of the claimant, holding:

"(1) The mortgage, whether a mortgage by Douglas or by the partnership, was a good and valid mortgage against the property as between the parties. A member of a copartnership is authorized to execute a mortgage on personalty belonging to the partnership to secure a partnership debt.

"(2) The evidence was sufficient to make a prima facie case on behalf of the plaintiff, showing possession of the property by Capt. Richardson to have been through and on behalf of Douglas.

"(3) The mechanic's lien was a superior lien to the mortgage.

"(4) The mechanic's lien appearing on its face to be in every way regular, and the claimant having bought at sheriff's sale under foreclosure of the mechanic's lien, without notice of any defect with respect to the affidavit of foreclosure not having been properly verified or otherwise, [he] would stand in the position of an innocent purchaser and would be protected in the title thus acquired. The alleged defect would be immaterial in this case as against the claimant.

"(5) It follows that * * * the property is not subject to the mortgage *in fa.*, and it is so held."

The plaintiff in *in fa.* excepts to the findings of the court against it, while the claimant, in a cross-bill of exceptions, excepts to the holdings adverse to him.

S. C. Townsend, of St. Marys, and Conyers & Wilcox, of Brunswick, for plaintiff in error.

Cowant & Vocelle, of St. Marys, for defendant in error.

BROYLES, C. J. (after stating the facts as above). [1] We deem it necessary only to consider one of the points raised by the main bill of exceptions, to wit, that the affidavit which formed the basis of the mechanic's lien foreclosure, not being sworn to, was void, the sheriff's sale thereunder was without authority, and the claimant, who purchased the property in dispute at such a sale, acquired no title thereto.

Section 3354 of the Civil Code of 1910 provides that—

"All mechanics of every sort, for work done and material furnished in manufacturing or repairing personal property, shall have a special lien on the same," which "shall be enforced in accordance with the provisions of section 3366 of this Code," when the property is surrendered and credit given.

Subsection 3 of section 3366 provides that—

"The person prosecuting such lien, either for himself or as guardian, administrator, executor, or trustee, must, by himself, agent, or attorney, make affidavit showing all the facts necessary to constitute a lien under this Code."

As to the making of the affidavit in question the witness Richardson, the person who built the lighter in question, testified:

"I do not remember where I was when I signed this paper [the paper relied upon by claimant as the affidavit foreclosing the mechanic's lien of John Richardson under which he bought at sheriff's sale]. I do not remember who was present when I signed it. I do not remember who it was that swore me when I signed the paper. I don't remember whether I was sworn or not, it has been so long. So many things happened, and me getting old, I don't remember. I don't know where I was when I went to foreclose this lien. I employed Col. Vocelle, and I don't remember where I was. I don't remember that Howard Rudolph was present and he had me hold up my hand. I am not trying to dodge; I could not tell you. You could question me all day and I could not tell you only what I have told you."

Rudolph, the officer who signed the jurat to the paper in question, testified on direct examination:

"That is my signature (indicating the signature to the jurat of the said alleged affidavit undertaking to foreclose the lien of John Richardson). At the time this paper was signed (indicating said alleged affidavit) before me by Capt. Richardson, I administered no oath or affirmation at all to him that I know of. I think he just signed his name."

On cross-examination this witness testified:

"I am not in the habit of attesting papers when a man signs his name to it. I don't know whether Capt. Richardson told me he wanted to swear to a paper. He said he wanted to sign a paper and I could not say what it was. I know I did not administer an oath to him, but I do remember that he told me he wanted to

swear to a paper in my presence, but I did not read it over. He said he wanted to sign a paper and I attested it as clerk of the superior court and issued execution on it. I do not know whether he told me the contents of it were true. I did not ask him any question at all."

While it is true that the introduction of the alleged affidavit in evidence, which appears on its face to be regular, cast the burden upon the party attacking it to show that it was not in fact legally executed (Britt v. Davis, 130 Ga. 76, 60 S. E. 180), still it is our opinion that the evidence quoted above was sufficient to carry this burden. That evidence shows conclusively that no oath was administered, nor anything done which the law deems sufficient as amounting to the administration of an oath. Therefore the paper claimed to be an affidavit can neither suffice as such nor furnish a basis for the foreclosure of a mechanic's lien. In the case of McCain v. Bonner, 122 Ga. 842, 846, 51 S. E. 36, 38, it was said:

"If, however, the affiant, at the time of tendering the affidavit to the officer, *uses language signifying that he consciously takes upon himself the obligation of an oath, and the officer so understands* and immediately signs the jurat, this will amount to such concurrence of act and intention as will constitute a legal swearing. The acts of the officer and of the affiant must be concurrent and must *conclusively* indicate that it was the purpose of the one to administer and the other to take the oath, in order to make a valid affidavit." (Italics ours.)

The facts of that case were that the affiant presented to the officer an affidavit previously signed by him, with the statement that he was familiar with its contents, that what was therein contained was true, and that he swore to the same, and the officer immediately, on the faith of that statement, appended his signature to the jurat; and it was held that this language of the affiant was sufficient to make it a question for the jury to determine whether or not the affidavit had been sworn to.

Viewed in the light of the decision in that case (which seems to be the leading Georgia decision on the subject), how stands the instant case? The affiant's testimony upon this point is altogether negative, and the uncontradicted evidence of the officer who attested the alleged affidavit is that he "did not administer an oath to him." It does not appear that the affiant stated that what was written on the paper was true. The mere statement that he told the officer that "he wanted to swear to a paper" in his presence is insufficient. What one wants to do and what one actually does are two entirely different things. The facts of the instant case do not, therefore, measure up to the test laid down in the McCain Case, supra, since the evidence shows conclusively that the affiant

did not in fact swear to the paper, and the facts failed to present anything from which such an inference could legally be drawn. See Britt v. Davis, supra; Bryan v. Madison Co., 135 Ga. 171, 68 S. E. 1106; Green v. Rhodes, 8 Ga. App. 301 (1, 2), 68 S. E. 1090.

The judge, sitting without a jury, failed to squarely decide this question, since in his findings he said:

"The mechanic's lien appearing on its face to be in every way regular, and the claimant having bought at sheriff's sale under foreclosure of the mechanic's lien, without notice of any defect with respect to the affidavit of foreclosure not having been properly verified or otherwise, [he] would stand in the position of an innocent purchaser and would be protected in the title thus acquired. The alleged defect would be immaterial in this case as against the claimant."

We cannot agree with the trial court in this finding. If the officer had no authority to issue the execution (and we have already seen that he had not, in view of the fact that the alleged affidavit was not sworn to), the sale of the property under such circumstances would be void, and the purchaser thereat would acquire no title, and this is true notwithstanding the purchaser was such bona fide and without notice of the want of authority to sell. See Bell v. Chandler, 23 Ga. 356 (2), where it was held:

"A purchaser at sheriff's sale acquires no title, if the sheriff had no authority to sell, and this is so whether the purchaser had notice of the want of authority or not."

And in Torbert v. Collier, 141 Ga. 700 (2), 81 S. E. 1103, the Supreme Court held:

"Inasmuch as there was no authority on the part of the clerk to issue the execution mentioned in the preceding headnote, and it did not confer upon the sheriff any authority to levy upon and sell the land involved in the former litigation, the purchaser at such sale acquired no title thereunder."

See, also, in this connection, 23 O. J. 757, and numerous cases there collected.

From what has been said it follows that the court erred in finding and adjudging that the property was not subject to the mortgage *fi. fa.*

[2] The case being reversed on the main bill of exceptions, it becomes necessary to pass upon the cross-bill of exceptions. The first point presented thereby is that the court erred in not dismissing the levy for the reason that the plaintiff in *fi. fa.* failed to make out a prima facie case, since it failed to show either title to or possession in the mortgagor at the time of the execution of the mortgage. We cannot say that the trial court (who, it will be remembered, was exercising the functions of both judge and jury) erred in holding that the evidence was sufficient to show title and possession to the property in question in the mortgagor. The

evidence of the witness Richardson, while not altogether clear and free from conflict, was in part as follows:

"I could not say for whom I was in possession except for Mr. Douglas. * * * Mr. John L. Douglas got me to build the lighter, and I was building it under his direction. * * * I was building the lighter for the stockholders. * * * Douglas was at the head; there was no contract for me to build the lighter, but Douglas paid me to build it, and if he paid me he employed me. All I was paid he paid it."

It will be recalled in this connection that Douglas executed the mortgage in question on behalf of the St. Mary's Transportation Company, a copartnership composed of Douglas and others, to the Bertha Mineral Company, the plaintiff in *fi. fa.* The evidence of the witness was, we think, sufficient to show a bailment by Richardson for Douglas. Possession in the mortgagor was all that the plaintiff in *fi. fa.* was required to show, and the possession of the bailee, Richardson, was the possession of the bailor, St. Mary's Transportation Company, subject, of course, to the bailee's claim of lien upon the property.

Furthermore, the record shows beyond question that the only right of the claimant to the property in dispute was through J. L. Douglas, and therefore, if Douglas had no title to the property, then obviously the claimant acquired none by purchasing it at public sale.

[3] The other points raised in the cross-bill of exceptions are without substantial merit.

Judgment reversed on the main bill of exceptions. Affirmed on cross-bill.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 573)

GOOGER v. STATE. (No. 12600.)

(Court of Appeals of Georgia, Division No. 1.
Nov. 16, 1921.)

(Syllabus by the Court.)

1. Criminal law §1044—Remarks of judge not reversible error when motion for mistrial not made.

In the special grounds of his motion for a new trial plaintiff in error complains of certain remarks of the judge made on the trial, which he insists were of such character as to prejudice the minds of the jurors against his cause, but he made no motion for a mistrial. In *Perdue v. State*, 135 Ga. 277(1), 69 S. E. 184 the Supreme Court laid down the following rule: "Where remarks are made by the trial judge to counsel in a criminal case in the hearing of the jurors, which counsel contend were of such a character as to prejudice the minds of the jurors hearing them against the cause of their client, they should either move for a

postponement of the hearing in order that other jurors may be impaneled than those present when the remark is made, or, if the jurors have actually been selected and impaneled to try the particular case, a motion should be made to have a mistrial declared; and upon the judge's refusal to grant a motion of the character indicated, his ruling would be subject to review. Counsel, having failed to make such motion and having proceeded without objection with the trial, cannot, after conviction, raise the question as to the prejudicial nature of the remarks complained of, in a motion for a new trial." See, also, *Woodall v. State*, 25 Ga. App. 8(3), 102 S. E. 918.

2. Criminal law §1160—Where verdict supported by evidence and approved by trial judge, Court of Appeals will not interfere.

There is ample evidence to support the verdict, which has the approval of the judge who tried the case, and this court will not interfere.

Error from Superior Court, Taliaferro County; E. T. Shurley, Judge.

Action between the State and Sam Googer. Judgment for the State, and Googer brings error. Affirmed.

J. A. Beazley, of Crawfordville, for plaintiff in error.

M. L. Felts, Sol. Gen., of Warrenton, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 573)

RHEBERG v. GRADY COUNTY.

GRADY COUNTY v. RHEBERG.

(Nos. 12610, 12644.)

(Court of Appeals of Georgia, Division No. 1.
Nov. 16, 1921.)

(Syllabus by the Court.)

1. Counties §208—Eminent domain §140, 270, 285, 295—Liability to suit may be based on constitutional provision against taking or damaging property without compensation; owner of property taken or damaged without compensation has right of action against county; measure of compensation for damage to land stated; county ratifying acts of chain gang crew in taking road materials from adjoining land liable to owner; retention of property taken authorizes inference of ratification.

While, as a general rule, a county is not liable to suit unless there is a law which in express terms or by necessary implication so declares, yet the appropriate law may be found in the constitutional provision that private property shall not be taken or damaged for public use without just compensation being first paid. When private property is taken or dam-

aged by the authorities of a county, or by their duly authorized servant, for the use of the public, without just compensation being first paid, a right of action arises in favor of the owner of the property, which may be enforced by suit against the county, and the owner is entitled to recover adequate compensation for the property taken or damaged.

(a) Where the private property wrongfully damaged is land, adequate compensation or damages would be the difference between the market value of the land immediately before and after the damage.

(b) Even if the wrongful acts complained of which had the effect of taking or of damaging private property for public use were not done in the first instance under the sanction of the county authorities, yet if such authorities ratified and approved the acts of those assuming to represent them, the county would nevertheless be liable. And if the county authorities, after knowledge that their agent, charged with the working of a public road of the county, knowingly or by mistake took private property (dirt from a person's land, and thereby damaging the tract of land from which the dirt was taken), without compensation, and used the property taken in the improvement of the public road, the retention of the property so taken would authorize an inference that the original appropriation of the property had been ratified by the county authorities, so as to charge the county with the original wrongful taking and make it liable in damages, at the election of the owner of the property, either for the value of the property taken or for the diminution in the market value of the entire tract of land from which the dirt was taken.

(Additional Syllabus by Editorial Staff.)

2. Eminent domain §300—Evidence insufficient to show taking of property was without authority of commissioners and not ratified by them.

Testimony of the clerk of the commissioners of roads and revenues that it was the custom of the commissioners never to go on adjoining land for dirt for the roads without the consent of the owner held not to show that the acts of a chain gang crew and its foreman, in taking dirt, was without the authority of the commissioners and never ratified by them.

Error from City Court of Cairo; L. W. Rigsby, Judge.

Action by L. H. Rheberg against Grady County. Judgment for defendant, and plaintiff brings error, and defendant brings a cross-bill of exceptions. Reversed on main bill of exceptions, and affirmed on cross-bill.

L. H. Rheberg brought suit for damages in the sum of \$1,000 against Grady county, and his petition made the following case: Petitioner, in the year 1919, was the owner of a certain described tract of land in Grady county, which abutted upon the Dixie Highway, a public road in the county. In the month of November, 1919, the county was repairing and grading said public road, adjoining petitioner's said land, with its chain gang crew,

organized, controlled, and operated by the proper officials of the county, to wit, its county commissioners of roads and revenues. The chain gang crew was working the road under the direct supervision of a foreman employed by the county. The foreman and the chain gang crew, while repairing the road, left the roadbed and the right of way of the road, and unlawfully went upon the plaintiff's premises and tore down his wire fence, and dug a large excavation upon his land for the purpose of obtaining dirt for the repairing of the public road, and the dirt was so obtained and so used. The excavation so dug was 40 feet wide, 300 feet long, from 18 inches to 4 feet, 6 inches deep, and was from 15 to 29 feet distant from the right of way of the road. After rains the excavation holds about 3 feet of water. The damage done to the wire fence was \$10, and the digging of the excavation rendered worthless to the petitioner one acre of land, which damaged him \$60. In addition to these items of damages, the digging of the excavation gives to his property a bad appearance, thereby reducing its market value \$1,000 and damaging him in that sum. All of which was done without the consent or authority of petitioner, and although demand has been made on Grady county nothing has been paid to petitioner.

A general and a special demurrer to the petition were overruled, and the defendant, in a cross-bill of exceptions, excepted to this ruling. The general demurrer was in the usual form, and the special demurrer set up that the paragraph of the petition which alleged that the plaintiff was the owner of the land (described in the petition), and which described the land, was not germane to the subject-matter of the petition and did not show what relation it had to the petition.

Upon the trial, after the introduction of the plaintiff's evidence, the court, upon motion of defendant, awarded a nonsuit, and the plaintiff excepted.

P. O. Andrews, of Thomasville, and Jeff A. Pope, of Cairo, for plaintiff in error.

R. A. Bell and J. S. Weathers, both of Cairo, for defendant in error.

BROYLES, C. J. (after stating the facts as above.) [1, 2] As authority for the preceding headnotes we cite *Elbert County v. Brown*, 16 Ga. App. 834, 86 S. E. 651, and the many pertinent decisions there referred to and exhaustively discussed by Chief Judge Russell. If the ruling in the instant case as to the liability of a county for the tortious acts of its servant in wrongfully appropriating or damaging private property, for the benefit of the public, goes further than any direct holding in those cases, we think the extension fully warranted by the spirit of those decisions and the broad legal principles upon which they

are based. In the light of the rulings in the headnotes, the petition set forth a cause of action against the county, and upon the trial every material allegation of the petition was supported by the proof. The mere fact that one of the witnesses for the plaintiff—the clerk of the commissioners of roads and revenues of Grady county—testified that the commissioners “had a custom to never go on adjoining land for dirt without first getting the consent of the owner” did not show that the unlawful acts of their servant were done without the authority of the county commissioners, and that such acts had never been ratified by them, the undisputed evidence showing that after the unlawful appropriation of, and the damage to, the plaintiff's property had been called to their attention they retained the plaintiff's dirt upon the road and failed to compensate him for it or for any of the damage to his property. Under the pleadings and the evidence in this case, the plaintiff was entitled to recover for the damage to his wire fence, and for the damage to his tract of land. It follows from what has been said that the court properly overruled the demurrers to the petition, but erred in awarding a nonsuit.

Judgment on main bill of exceptions reversed; on cross-bill affirmed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 560)

BUTLER v. BERRY SCHOOL
(No. 12441.)

(Court of Appeals of Georgia, Division No. 1.
Nov. 16, 1921.)

(Syllabus by the Court.)

1. Charities \S 45(2)—Not generally liable for negligence; industrial school held charitable trust and not liable for negligence of officers and employees.

“The general rule is that charitable trust funds are not to be depleted by subjection to liability for negligence.”

(a) The facts of this case do not take the Berry school out of the operation of the foregoing general rule. It is primarily maintained as a charitable institution, and “is not liable for the negligence of its officers and employees, unless it fails to exercise ordinary care in the selection of competent officers and servants, or fails to exercise ordinary care in retaining such officers and employees.”

(Additional Syllabus by Editorial Staff.)

2. Appeal and error \S 1028—Errors harmless where verdict demanded.

Errors at the trial were harmless, where the verdict rendered was demanded.

Error from City Court of Floyd County;
W. J. Nunnally, Judge.

Action by Wilma Butler, by next friend, against the Berry School. Judgment for defendant, and plaintiff brings error. Affirmed.

Frank Copeland and Harris & Harris, all of Rome, for plaintiff in error.

Maddox & Doyal, of Rome, for defendant in error.

BLOODWORTH, J. [1] In 1903 a charter was granted by the superior court of Floyd county to certain persons for “the formation of a corporation to be known as the Boys' Industrial School, for the purpose of carrying on, conducting, and operating a boys' industrial school.” Later the charter was so changed by amendment that the name became the “Berry school,” and a further amendment provided that it should be “a school for the education of the poor country girls upon the same privileges, rights and principles, and under the same regulations and provisions, as in the original charter and the amendment thereto for the poor boys, so that the said Berry school shall, after this amendment, become a school for the poor country boys and girls alike under the amended charter.” The charter makes no provision for capital stock, and the evidence shows that none was ever issued. The evidence further shows that the school is not conducted for private or corporate gain; that none of the officers or directors receive any salary, and the only salaries paid are to the teachers and instructors; that while a nominal charge is made against each pupil able to pay, a number of them never pay anything, and that no student pays anything like his or her per capita expenses of operating the school; that it is supported primarily by voluntary contributions, and that it has never received any funds or property except that “donated by charitably inclined people” for the purpose of carrying out the aims of the school as declared in its charter. The foregoing facts show that the Berry school is a good charitable trust, and comes under the general rule that institutions of strictly eleemosynary character, conducted purely and exclusively for public charity, supported by public munificence, and having no property except such as was dedicated to charitable purposes, should not be liable for negligence of their agents. The evidence shows also that—

“The school is principally an industrial school, and is to teach them (the pupils) the practical side as well as the theoretical side. At the boys' school they go to school four days and work two. At the girls' school they work two hours each day and go to school the rest of the time. The regular courses along literary lines are given. They work four hours on Monday and two hours in the other days. Along with the literary is carried the industrial training

along all lines. They are trained in the carpenter shop, the blacksmith shop, the laundry, cannery, dairy, print shop, farming, and, of course, stock raising. As to the girls' school they are given training in dairy, gardening, weaving, sewing, cooking, housekeeping, just to become homemakers, to go back to the home where they came from, to try to improve conditions there. They are also taught laundry work. Each boy is required to spend a certain time in each department of the boys' school, and the girls the same way; they go from one department to another."

The fact that all the pupils are required to give a portion of their time to work in the various departments of the school, and that some of them pay a part of their expenses, does not take this school out of the general rule above laid down or change its character as a charitable institution. In *Richards v. Wilson*, 185 Ind. 381, 382, 112 N. E. 794, Chief Justice Cox said:

"The fact that a private corporation, as trustee, conducting a school of the character here involved, requires those who receive its benefits to pay tuition either in money or labor, does not take away the public benefit which flows from its work without profit to it, or change its character as a charitable institution in the legal sense. The tuition was in no aspect of the matter to be full compensation for the benefits bestowed on those who were to resort to the school for its advantages, and whatever it was to receive for it went to the partial support only of the school. No one was to receive pecuniary profit from it. The real expressed purpose in exacting tuition of any kind was to instill self-respect and build character in those who profited from the bounty of those whose good will toward man and solicitude for the public welfare were to make the school possible. That the gift was to a public and not a private charity cannot be doubted. The authorities [there] are numerous and practically in accord."

See authorities cited.

In *Parks v. Northwestern University*, 218 Ill. 381(3), 75 N. E. 991, 2 L. R. A. (N. S.) 556, 4 Ann. Cas. 103, it is held that—

"A private corporation organized for the sole purpose of disseminating learning, having no power to declare dividends and depending for its maintenance upon the income from its property and the endowments and gifts of benevolent persons, holds its funds, from whatever source derived, in trust for the object of its organization, and is within the rule exempting a public charity from liability for the negligence of its servants."

The facts in the case under consideration differentiate it from that of *Morton v. Savannah Hospital*, 148 Ga. 438, 96 S. E. 887. In that case, while the hospital was chartered as a charitable institution, "the greater portion thereof was set aside by its officers and superintendent for the treatment of

patients who paid for the services they received." The Supreme Court held (148 Ga. 440, 96 S. E. 888):

"Under circumstances as just enumerated (although the hospital is a charity, and the general rule is that charitable trust funds are not to be depleted by subjection to liability for negligence), the corporation would be liable, but a recovery would be limited to the extent of income derived from treatment of patients who paid for services."

However, in that case it was also held (148 Ga. 438, 96 S. E. 887):

"With the exception just stated, an incorporated hospital, primarily maintained as a charitable institution, is not liable for the negligence of its officers and employees, unless it fails to exercise ordinary care in the selection of competent officers and servants, or fails to exercise ordinary care in retaining such officers and employees."

See *Plant System v. Dickerson*, 118 Ga. 650, 45 S. E. 483, and cases cited.

In *Williamson v. Louisville Industrial School of Reform*, 95 Ky. 251, 253, 24 S. W. 1065, 1066 (23 L. R. A. 200, 44 Am. St. Rep. 243), Judge Hazelrigg, who delivered the opinion of the court, said:

"If the funds of these institutions are to be diverted from their intended beneficent purposes by lawsuits and judgments for damages for negligent or malicious servants, their usefulness—indeed their existence—will soon be a thing of the past."

[2] It will be noted that in the case sub judice there is no allegation in the petition that the Berry school failed to exercise ordinary care in the selection of competent officers and servants, or failed to exercise such care in retaining its officers and employees. Attention is also directed to the fact that the prayer of the petition in this case is for general damages only. Considering the foregoing facts and authorities, it is clear that the Berry school is a charitable institution, supported primarily by donations from the public; that it is not run for private or corporate gain; and that it would be against public policy, as well as against the settled principles of law, to allow any judgment to be rendered against it because of the negligence of any of its employees or agents, except where it failed to exercise ordinary care in selecting and retaining its employees and servants. This being true, conceding (but not admitting) that errors were committed by the court upon the trial of the case, they were harmless, as the verdict rendered was demanded. The motion for new trial was properly overruled.

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 615)

GLOVER v. NEW YORK LIFE INS. CO.
(No. 12414.)(Court of Appeals of Georgia, Division No. 1.
Nov. 17, 1921.)*(Syllabus by the Court.)*

1. Insurance ⇨136(4)—Nondelivery during insured's good health held not to defeat recovery, where policy would have been delivered if agent had gone to post office.

Where the beneficiary of an insurance policy sues thereon, and the company defends solely upon the ground that the contract of insurance provides that it shall not be binding on the company unless the policy was delivered to and received by the insured during his lifetime in good health, this defense cannot avail where the evidence shows that the first premium was paid and that the contract of insurance was complete in every way, mailed to the agent of the company for unconditional delivery to the insured, and received at the post office of the agent of the insured while the insured was in life and in good health, and the only reason that the policy was not actually delivered by the agent to the insured was that the agent did not go to the post office and get the policy for several days after its receipt at the post office and while the insured was in life and in good health.

(Additional Syllabus by Editorial Staff.)

2. Insurance ⇨136(4)—Delivery during good health can be made condition precedent to liability.

Parties to an insurance contract can make the actual delivery of the policy during the good health of the insured a valid and binding condition precedent to the liability of the company.

3. Insurance ⇨136(1)—Actual delivery of policy not essential unless made so by terms of contract.

Actual delivery of an insurance policy to insured is not essential to the validity of a contract of life insurance unless expressly made so by the terms of the contract.

Error from City Court of Bainbridge; H. B. Spooner, Judge.

Action by Rillie Glover against the New York Life Insurance Company. Judgment for defendant, and plaintiff brings error. Reversed.

Hartsfield & Conger, of Bainbridge, for plaintiff in error.

Bryan & Middlebrooks, of Atlanta, and John R. Wilson, of Bainbridge, for defendant in error.

LUKE, J. Rillie Glover sued the New York Life Insurance Company for \$1,000 on an insurance policy on the life of her husband, Guilford M. Glover. The case was submitted to the court without a jury, and a judgment was rendered for the company.

[1] Though dated August 30, 1918, the policy, by its terms, took effect on August 23, 1918. The application for insurance attached to the policy and made part thereof provided: (1) That the insurance hereby applied for shall not take effect unless the first premium is paid and the policy delivered to and received by me during my lifetime in good health; (2) that any payment made by me before the delivery of the policy to and its receipt by me as aforesaid shall be binding on the company only in accordance with the terms of the company's receipt therefor on the receipt form which is attached to this application and contains the terms of the agreement under which said payment has been made, and is the only receipt the agent is authorized to give for such payment. The application further provided that the agent could not "make, modify, or discharge contracts, or waive any of the company's rights or requirements."

The application signed by Glover on August 23, 1918, arrived at the New York office of the company on August 29, 1918, and was favorably passed upon the next day. The policy was signed August 30, 1918, and mailed to the Atlanta office of the company the following day, reaching there September 5, 1918. On the same day it was mailed to Hudgins, the agent taking the application, for delivery. It was agreed that in due course of mail the policy would have reached Camilla, Ga., the post office address of Hudgins, on September 6, 1918. Because of a change in his address, he did not actually receive the policy until some time between September 10 and September 15, 1918. He mailed it to Guilford Glover, R. F. D., Camilla, Ga., on September 25, 1918. Glover was taken ill with typhoid fever on September 10, 1918 and died on October 7, 1918. Counsel agreed that the first premium was paid by Glover, returned to his wife, by her returned to the company, and kept by it subject to her demand. The company's only defense was "that said policy was not delivered to said Glover and received by him during his good health."

[2, 3] That the parties to an insurance contract can make the actual delivery of the policy during the good health of the insured a valid and binding condition precedent to the liability of the company is certain. It is also true that—

"Actual delivery of the policy to the insured is not essential to the validity of a contract of life insurance, unless expressly made so by the terms of the contract." *New York Life Ins. Co. v. Babcock*, 104 Ga. 87(2), 30 S. E. 273, 42 L. R. A. 88, 69 Am. St. Rep. 134.

The decision in that case is authority for the proposition that the phrase, "unless the

policy is delivered to the applicant while living and in good health," does not import an actual delivery, and that in such a case the controlling question on the subject of delivery is "not who has the actual possession, but who has the right of possession." We apprehend that if a contract of insurance unequivocally stipulates for a manual delivery of the policy, and the failure to make such delivery is not the fault of the insurer or of its agents, the reasoning of Justice Lewis in that decision would not apply.

If a decision of this case depended solely upon the question as to whether the words "delivered to and received by" mean an actual delivery, we should be inclined to hold that they do not. Under our law delivery certainly has no such meaning, and the Standard Dictionary defines "receive" as "to obtain by delivery, transmission, or communication." The Iowa Supreme Court, in the case of *Unterharnscheidt v. Missouri State Life Insurance Co.*, 160 Iowa, 223, 138 N. W. 459, 45 L. R. A. (N. S.) 743, construed the words "delivered to and accepted by" not to mean manual delivery. It should also be borne in mind that the law requires that an ambiguous stipulation in an insurance contract be construed most favorably for the insured.

As we view this case, however, a recovery on the policy was demanded by the evidence, whether the words of the contract import an actual or constructive delivery. In the Babcock Case, *supra*, the policy reached the local agent about 2 p. m. on November 30, 1895. He made an effort to deliver it. Babcock was found dead on the afternoon of December 1, with a pistol wound in his breast. In rendering the opinion of the court, Justice Lewis used the following significant language:

"That policy was received by its local agent who, through negligence or in disregard of his obligations both to his company and to the other contracting party, failed, without excuse and without authority, to hand the policy to its real owner. In consequence of this failure and negligence, the company contends it is not liable. It thus seeks to take advantage of the wrong of its own agent, by virtually pleading his negligence as a defense to this action. The law should be plain in its terms and unmistakable in its meaning before a court should hold that for such a cause an insurance policy was inoperative."

In the *Unterharnscheidt* Case, *supra*, the policy, which was mailed to the agent for delivery to the insured, and in due course of mail should have reached him at Sioux Falls by July 20, 1910, was delivered at his office and remained there until his return on August 7, 1910. The insured became seriously ill July 23, 1910. The court said that—

"The neglect or omission of the agent, under such circumstances, to perform the manual act of placing the policy in the hands of the insured, will not serve to suspend or postpone the obligation of the company upon its contract."

The Babcock Case was quoted extensively and followed in that case. In the decision last quoted it was held that the delay of the agent to deliver the policy for three days precluded the company from successfully defending on the ground that no delivery was had. In the Babcock Case a delay of one day was sufficient to elicit a similar ruling. In the case at bar it appears that but for the change in the address of the agent, the policy could have been actually delivered to the insured at any time between its arrival in Camilla on September 6, and the beginning of the fatal sickness of the insured on September 10. The contract was complete, and there was nothing left to be done except the delivery of the policy during the good health of the applicant. He remained in good health for four days after the policy reached Camilla, and during that time there was nothing whatever for the agent to do except to convey the policy to Glover. This he did not do. We do not think the beneficiary should suffer because of the negligence of the company's agent. After extended discussion of the two decisions herein cited, Justice Steere, of the Michigan Supreme Court, in the case of *Bowen v. Prudential Insurance Co.*, 178 Mich. 63, 144 N. W. 543, 51 L. R. A. (N. S.) 587, said:

"The strong, sound, underlying principle in both of the foregoing decisions, and which standing alone justifies the results reached, is that the defendants could not escape liability by relying on their own wrongs, and are estopped by their misconduct and negligence, or that of their local agents through whom the applications were made, from denying a delivery which they should have made, and therefore the court could and did say that there was a constructive delivery."

We plant our decision overruling the judgment of the court below squarely on the principle, announced in the Babcock Case, that the insurance company cannot avoid its contract upon the ground that there was no manual delivery of the policy to the insured. The insured was entitled to the possession of the policy, and therefore had constructive possession of it.

A consideration of the other assignments of error not dealt with above is not necessary.

Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(27 Ga. App. 629)

BROOKS v. STATE. (No. 12760.)(Court of Appeals of Georgia, Division No. 1.
Nov. 17, 1921.)*(Syllabus by the Court.)***Criminal law** \Rightarrow 878(2)—General verdict not sustained when no evidence to support one count.

A general verdict of guilty, upon an indictment containing two counts, the first charging the accused with stealing an automobile, and the second with buying and receiving the automobile, knowing it had been stolen, cannot be sustained, where there is no evidence supporting the charge in the second count, unless that count was withdrawn from the consideration of the jury.

Error from Superior Court, Putnam County; Jas B. Park, Judge.

W. L. Brooks was convicted of an offense, and he brings error. Reversed.

Stubbs & Duke, of Eatonton, and Thos. J. Shackelford, of Athens, for plaintiff in error.

Doyle Campbell, Sol. Gen., and A. Y. Clement, both of Monticello, for the State.

BROYLES, C. J. It is well settled that where two or more distinct and separate offenses are charged in different counts of an indictment, a general verdict of guilty means guilty under each and every count, and the verdict cannot be sustained unless the charge in each and every count is supported by evidence. *Morse v. State*, 10 Ga. App. 61 (4), 72 S. E. 534; *Dozier v. State*, 14 Ga. App. 473, 81 S. E. 368; *Innes v. State*, 19 Ga. App. 271 (1), 91 S. E. 339; *Sewell v. State*, 23 Ga. App. 765 (5), 99 S. E. 320.

In the instant case the indictment under which the defendant was convicted contained two counts, the first charging him the theft of an automobile, and the second with buying and receiving the automobile, knowing that it had been stolen. The jury returned a general verdict of guilty, which in law meant guilty under both counts of the indictment, and fixed the punishment as follows: "Minimum one year, maximum three years." There was no evidence adduced upon the trial which authorized the defendant's conviction under the second count, and in his motion for a new trial he excepts to the verdict on that ground. While it appears, from a note of the judge, that during the trial the solicitor general stated to the jury that he abandoned the second count of the indictment, the judge in his charge made no reference to this statement of the solicitor general, but, on the contrary, charged the jury

that the state contended that the defendant was guilty under both counts of the indictment, and charged them that if they found certain facts to be true the defendant would be guilty under the second count. The court also instructed the jury as to the form of their verdict if they should find the defendant guilty under the second count. In view of these instructions of the court, it does not appear that the second count was withdrawn from the consideration of the jury, notwithstanding the statement of the solicitor general that it was abandoned by the state. The charge of the judge was delivered subsequently to this statement, and the jury were in effect instructed by the judge that the state had not abandoned the count, but was insisting upon it. Nor can we say that a new trial is not required for the reason that the jury fixed one sentence only, which was a sentence that could have been imposed if the defendant had been found guilty under the first count only. While the punishment fixed was moderate and well within the limits of the punishment prescribed for the offense charged in the first count, it was not the lightest punishment which the jury could have fixed for that offense, and it is possible, and not an unreasonable supposition, that they might have made the sentence lighter if they had not found the defendant guilty of both of the separate and distinct felonies charged in the indictment. See, in this connection, *Morse v. State*, supra, where Judge Powell said:

"The conviction upon the first count cannot be sustained. This being so, the verdict [a general verdict of guilty] is without evidence to support it. The error is not harmless, for under the indictment and the verdict the defendant could be sentenced to the maximum punishment for each offense, and the sentences might be made cumulative. The two counts stand just as if they were two indictments; and the right to impose sentence, where the verdict is general in such a case, is the right to sentence as for two separate and distinct offenses. The law in this respect is well established."

An examination of the record in the *Morse* Case (now of file in the office of the clerk of this court) shows that only one sentence was imposed on the accused in that case, and that it was a moderate one and well within the limits of the punishment prescribed for the offense charged in the second count of the indictment.

The assignments of error not dealt with above are either without substantial merit or refer to errors not likely to recur on another trial of the case.

Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 577)

PIERCE v. LOO SING. (No. 12605.)(Court of Appeals of Georgia, Division No. 1.
Nov. 16, 1921.)*(Syllabus by the Court.)*

Appeal and error \S 1144—Bailment \S 18(4)—Replevin \S 12(1)—Return of property does not defeat suit; suit not defeated by failure to pay bailee's charges where he denied having the property; nonsuit affirmed, with directions to tax costs against defendant, property sued for having been returned.

The court erred in awarding a nonsuit, but, under the peculiar facts of the case, the judgment is affirmed, with direction that the defendant in error be taxed with the costs in the trial court and the costs of bringing the case to this court.

Error from City Court of Dublin; S. W. Sturgis, Judge.

Action by W. W. Pierce against Loo Sing. Judgment for defendant, and plaintiff brings error. Affirmed, with directions.

S. P. New, of Dublin, for plaintiff in error.

BROYLES, C. J. This was an action in trover, brought by the owner of a suit of clothes, of the value of \$20, to recover possession of the clothes, which he had delivered to the defendant for the purposes of being cleaned and pressed. When the owner demanded the clothes the defendant refused to deliver them, denying that he had them or that the plaintiff had ever delivered them to him. Thereupon the owner filed his suit in trover, and subsequently, one day after the service of the suit, the clothes were put by some unknown person upon the plaintiff's porch, and he recovered them in good condition. The fact that the clothes were redelivered to the plaintiff after the filing and service of the suit, but before the trial, was not sufficient to defeat the suit.

"When a conversion has once taken place it cannot be cured. Even the redelivery of the property will not cure it. Damages for the conversion are still recoverable, and the return of the property goes merely in mitigation of damages. *Jordan v. Thornton*, 7 Ga. 517, 528." *Spiers v. Hubbard*, 12 Ga. App. 680, 78 S. E. 138.

Likewise, the suit could not be defeated on the ground that the plaintiff had not paid or tendered the defendant the money due for the cleaning and pressing of the clothes. The refusal of the defendant to deliver the clothes, on the sole grounds that he did not have them, and that the plaintiff had never delivered them to him, amounted to a waiver of the defendant's right to demand payment for the work done on the clothes before their delivery to the plaintiff. *Lightsey v. Lee*, 8 Ga. App. 762, 70 S. E. 179.

From what has been said it follows that the court erred in awarding a nonsuit. However, it appearing from the evidence upon the trial that the plaintiff had recovered his clothes, and the evidence failing to show that he had been damaged in any amount, the only harmful result to him of the nonsuit was the taxing of the costs of the suit against him. The judgment of the trial court is accordingly affirmed, with direction that the defendant in error be taxed with the costs of the suit in the lower court and with the costs of this writ of error. See, in this connection, *Woodruff Machinery Manufacturing Co. v. Griffin*, 17 Ga. App. 529 (2 and 3), 87 S. E. 808.

Judgment affirmed, with direction.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 571)

DAVIS v. STATE. (No. 12593.)(Court of Appeals of Georgia, Division No. 1.
Nov. 16, 1921.)*(Syllabus by the Court.)*

1. Criminal law \S 940—Newly discovered evidence held insufficient to require new trial.

The special ground of the motion for new trial was based upon certain newly discovered evidence embraced in the affidavits of two witnesses, each of whom swore that about 6 o'clock in the morning he saw a person, not the defendant, go into a vacant building with a sack; one swearing that it contained "something in the shape of about a five-gallon keg or can," and the other swearing that the sack contained "something in the shape of a five-gallon keg or jug," and each swearing that the person went into a vacant store with this sack and contents and in a short time came back without anything. Granting that the sack carried into the vacant building about 6 o'clock in the morning contained a vessel filled with the same whisky which was there in the afternoon, this would not show that in the afternoon the defendant was not in "possession, custody, and control" of the liquor, and would not, therefore, require the grant of a new trial.

2. Criminal law \S 1156(2)—Trial court may grant new trial when verdict against weight of evidence, but if there is any evidence, Court of Appeals cannot interfere.

There was some slight evidence authorizing the verdict; and, the verdict having been approved by the trial judge, under the repeated and uniform rulings of this court and of the Supreme Court, a reviewing court is powerless to interfere. When the verdict is apparently decidedly against the weight of the evidence, the trial judge has a wide discretion as to granting or refusing a new trial; but when there is any evidence, however slight, to support a verdict which has been approved by the

trial judge, the court is absolutely without authority to control the judgment of the trial court. *Barber v. State*, 25 Ga. App. 242, 102 S. E. 879. See cases cited.

Error from City Court of Floyd County; W. J. Nunnally, Judge.

E. H. Davis was convicted of an offense, and he brings error. Affirmed.

Porter & Mebane, of Rome, for plaintiff in error.

James Maddox, Sol., of Rome, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(118 S. C. 82)

BAMBERG BANKING CO. v. MATTHEWS
et al. (No. 10749.)

(Supreme Court of South Carolina. Nov. 4, 1921.)

Deeds ¶130—After birth of contingent remaindermen grantor held to have no reversion.

Where an owner executed a deed, reserving a life estate in himself and his wife, and creating another life estate in his children, with remainder in fee in the grandchildren, such remainder being a contingent one, the fee only remained in the grantor until the birth of a grandchild or grandchildren, so that a subsequently executed deed, purporting to convey the fee to one of his children, was void.

Appeal from Common Pleas Circuit Court of Bamberg County; Jas. E. Peurifoy, Judge.

Action by the Bamberg Banking Company against Addie Matthews and others. Judgment for plaintiff, and defendants appeal. Modified. The deed of 1908, referred to in the opinion, was executed by Amzi August and Sarah August, and delivered to Addie Matthews, conveying the 35-acre tract described in the complaint and in the mort-

gages to Addie Matthews, her heirs and assignees forever, being in all respects a fee simple deed with general warranty.

Jacob Moorcr, of Orangeburg, for appellants.

E. H. Henderson, of Bamberg, for respondent.

WATTS, J. This is an appeal from a decree of Judge Peurifoy. The action was for foreclosure of two mortgages. The defendants interposed a number of defenses. The exceptions are 11 in number. Exceptions 1, 2, 3, 4, 5, 6, and 7 are overruled. The appellants have failed to convince this court that the concurring findings of master and circuit court are against the preponderance of the evidence.

The question to be determined, as to whether Addie Matthews owns the property in fee simple as found by the circuit court, or whether, as appellants contend, she has an estate for life only, and that the infant defendants, the children of Addie, are remaindermen. The deed of Amzi August, made in October, 1882, is an absolute deed, and must govern; it was duly witnessed, signed, delivered, probated, and recorded. Dower was renounced thereon; it was a perfect deed. It reserves a life estate in grantor and wife, and creates a life estate in the children, remainder in fee in the grandchildren. It is a contingent remainder; the fee only remained in the grantor until the contingency happened, to wit, the birth of a grandchild or grandchildren, in any view of the case. The deed of 1908 was void, under the case of *Rutledge v. Fishburne*, 66 S. C. 155, 44 S. E. 564, 97 Am. St. Rep. 757. Addie did not own the fee, but only an estate for life, and her children are the remaindermen; and at her death own the land in fee, so the exceptions raising these questions, 8 and 9, are sustained. All other exceptions are overruled.

Judgment modified.

GARY, C. J., and FRASER and COTH-RAN, JJ., concur.

(132 N. C. 511)

MITCHEM v. GASTON COUNTY DRAINAGE COMMISSION et al. (No. 447.)

(Supreme Court of North Carolina. Nov. 23, 1921.)

1. Drains \S 18—Special act creating county commission held to commit the administration of the act to its sound judgment and discretion.

Pub. Loc. Laws 1911, c. 427, a special act creating the Gaston county drainage commission, merely outlined the general purpose and left the practical development and execution of the same to the commission, thereby committing the administration of the act to its sound judgment and discretion.

2. Drains \S 76—One present at hearings of commission cannot complain that he was not served with formal notice.

Where landowner attended meetings of drainage commission when it sat as a body to hear and determine complaints from the landowners, fix the classifications and rate and the amount of assessments, and did not except, or take an appeal from any of the actions of the commission, such owner, or a subsequent grantee, cannot claim that he was not bound by the proceedings because he was not properly or legally served with notice.

3. Drains \S 82(2)—Validity of assessments cannot be attacked in absence of proper exceptions or appeal.

Landowner in drainage district cannot attack assessments unless he takes exceptions and appeals provided for in the statutes, and such is true as to assessment by Gaston county drainage commission No. 1, created by special act (Pub. Loc. Laws 1911, c. 427).

4. Drains \S 91—Collection of assessments not to be stayed because landowner has not been afforded drainage anticipated.

Collection of assessments by drainage commissioners should not be stayed because the scheme has not afforded to landowner the drainage he had anticipated, since the outcome of such enterprises cannot be absolutely predicted.

Appeal from Superior Court, Gaston County; Harding, Judge.

Action by D. W. Mitchem against the Gaston County Drainage Commission and others. From judgment of nonsuit, plaintiff appeals. No error.

This action was brought by the plaintiff to restrain the collection of drainage assessments levied by the Gaston county drainage commission No. 1 of Gaston county, N. C., against certain lands within such drainage district now owned by the plaintiff. This drainage commission was created by a special act of the Legislature. Chapter 427, Public Local Laws of 1911.

The drainage district was established in 1912 in pursuance of such act, and at the time of its establishment A. O. Stroup was

the owner of the 43 acres of land in such district now owned by this plaintiff. Stroup owned the lands when they were classified and when assessments were first levied, and he attended the meetings of the commission and was present at the time the commission sat as a body to hear and determine complaints from the landowners, as provided for in the act.

Stroup did not except to the findings of the commission, or to the establishment of the district with said 43 acres included within it, nor to any action of the commission the day it sat as a body to hear and determine complaints, fix the classifications and rate and the amount of assessments, nor did he except, or take an appeal from any of the actions of the commission.

Plaintiff, Mitchem, afterwards purchased said 43 acres of land with full knowledge that the same was included within the drainage district and that assessments had been levied against the lands. Since plaintiff has owned the lands, other assessments have been levied, and plaintiff has not at any time excepted to or appealed from any of the orders of the commission. He has not paid any of the assessments levied upon the lands. After he had constantly refused to pay, and in order to force collection of the assessments, the lands were advertised for sale by the tax collector. Plaintiff, pending the date of sale, brought this action and obtained a temporary restraining order, which was dissolved at the hearing before Judge Bryson. This action came on for trial before Harding, Judge, and a jury, at April term, 1921, when, at the close of plaintiff's evidence, and upon motion of defendant, the court rendered judgment, as of nonsuit, from which the plaintiff appealed to this court.

Woltz & Woltz and Mangum & Denny, all of Gastonia, for appellant.

Carpenter & Carpenter, of Gastonia, for appellees.

WALKER, J. (after stating the facts as above). The plaintiff, in his brief, has abandoned all of the irregularities complained of in his complaint except two, which, briefly stated, are: (1) The commission failed to divide the land into five classes; and (2) it abandoned the dredging of the stream.

[1] In order that we may intelligently present this matter, we first direct attention to the act of the Legislature creating this drainage commission. Public Local Laws 1911, c. 427. It is apparent, from a perusal of this act, the Legislature realized that many details of the drainage scheme contemplated by it would have to be threshed out by the local drainage commission. The Legislature outlined the general purpose, but very properly left the practical development and execution of the same to the commission, there-

by committing the administration of the act to the sound judgment and discretion of it. We give here a few excerpts from the act which show this to be true:

Section 1. They shall have power "generally to do whatever may be necessary to be done in order to make effectual the drainage of Big Long creek," etc.

Section 2. "Shall also have the authority, in the discretion of the said commission," to do certain things therein mentioned.

Section 3. "The commission shall make a just estimate of all of the lands along Big Long creek and its tributaries within Gaston county and within the terminal points mentioned and designated in section 1, that will in their judgment be benefited, either generally or specially."

Section 8. This section also refers to the drainage commission, as to what things it may do, and (among them), it may make "such changes as they may deem proper."

Section 10 (the latter portion). "That every privilege, power and right to carry out the provisions of this act are granted said commission."

We might cite other provisions of the act, which tend to show that it was the intention of the Legislature to give the commission authority to administer the various provisions, in accordance with its best judgment and discretion; but we deem it unnecessary to do so. It seems clear, we think, that the Legislature was providing for the commission merely a basis upon which to work, but not tying its hands with any prescribed formula or with any set of rules.

[2] The principal question for consideration is whether the fact that the drainage commission did not classify the lands in strict, and even literal, compliance with the act, renders their entire action void and of no effect, as to the plaintiff's interest therein. Counsel for him have argued that he was not bound by the proceedings of the commissioners as he was not properly, or legally, served with notice; but we do not consider it necessary to decide whether or not he was served with formal process, or notice, as we find in the record ample evidence to the effect that the owner was actually present when the assessments were made, and that he made no objection to them, and noted no exception, nor did he attempt, in any proper way, to have them reviewed. All this is to be found in the testimony of plaintiff's witnesses, giving him the most favorable, and allowable, construction of it, and it further appears that he took no such position at the hearing, as he now insists on, that he had not received the proper formal notice of the hearing, nor did he ask for further time in order that he might be better prepared with evidence, and otherwise, to protect, or defend, his interests. The case of *Newby & White v. Drainage District*, 163 N. C. 24, 79 S. E. 266, seems to answer all the objections made in this

case, and the purport of that decision is thus substantially stated or summarized in the headnote: A drainage district laid off under the provisions of the act of 1909 (Pub. Laws 1909, c. 442) is a quasi municipal corporation, partaking to some extent of the character of a governmental agency, and neither its existence nor the regularity of its proceedings can be collaterally impeached, in an action for trespass for cutting down trees in constructing the drainage canal. The drainage act of 1909 affords ample opportunity and machinery for the landowner in a district laid off thereunder to assert his rights, including those of damages to his land, with the right of appeal to the superior court; and he is concluded under the express provision of the statute, by the order of the court confirming the final report of the viewers, unless he has preserved his rights in accordance with the statutory requirements. The pendency of a proceeding to lay off a drainage district under the provisions of the act of 1909 is notice as to all the lands embraced in the district, and the grantees thereof are bound by the statutory requirements, as to the procedure to recover damages to the lands, as were their grantors who were parties to the proceedings and who owned the lands at that time.

The plaintiff, testifying in his own behalf, confessed that he could not state positively whether he had received formal notice, and also stated that he did not know whether the notice was written, or merely verbal—but he was there and made no protest against any failure to formally notify him. Mr. Stone testified that plaintiff's assignee, Mr. Stroup, who was then the owner of the land, was at the meeting when the question of assessments and other matters were discussed and settled, and it appears that he apparently was satisfied with what was done. A man who is silent when he should speak will not be heard when common fairness and justice requires that he should be silent. There is supposed to be a seasonable time for all things. The world in its development and progress towards higher and better conditions cannot be stopped, for those who have lagged behind, to be heard on a question so vitally affecting the public good, and especially is this true of judicial proceedings where the complainant has had his day in court or a fair opportunity to be heard, if he has any meritorious ground of objection to what is done or about to be done. The law comes to the aid of the vigilant and not to those who sleep upon their rights.

We said in *Drainage Com. v. Parks*, 170 N. C. 435-438, 87 S. E. 229, 231:

"The statutes under which this proceeding was brought and conducted to final judgment seem to provide for an appeal at two stages thereof, one, under Public Laws of 1909, c. 442, § 8, when the drainage district has been

laid off, and another, under section 17, when the time for an adjudication upon the final report of the viewers has arrived." The complainant "did not appear and except to either of these reports, the preliminary or the final, and the court, therefore, erred in allowing him to do so upon the application of the plaintiff for an additional issue of bonds. He could except then and be heard only as to any matters involved in the petition for the additional issue of bonds which affected his interests, but he cannot be permitted to go back of this and change the formation of the district and the classification and assessments already made, by attacking the reports of the engineer and viewers, and withdrawing a large part of his land from the district, especially after bonds had been issued on the basis of those reports and their confirmation, and sold to innocent holders. It would be unjust to them, if not illegal, as it would greatly impair their security, there being nothing substituted for the land thus taken out of the district, to preserve the value of that security. *Broadfoot v. Fayetteville*, 124 N. C. 478; *McCless v. Meekins*, 117 N. C. 35. But whether or no the bondholders could object, if they were parties, upon the ground that their rights would be, in a legal sense, impaired, it is sufficient to say that it would be unjust to them, and there is nothing in the statutes which allows an exception as to matters already settled at such a late stage in the proceedings. This view is sustained by the following decisions on similar statutes"—citing *Zeigler v. Gilliatt*, 263 Ill. 587, 105 N. E. 707; *Trigger v. Drainage District*, 193 Ill. 230, 61 N. E. 1114; *Hatcher v. Supervisors*, 165 Iowa, 197, 145 N. W. 12; *Allen v. Drainage District*, 106 Miss. 630, 64 South. 418.

In the more recent case of *Gibbs v. Commissioners of Mattamuskeet Drainage District*, 175 N. C. 5, 94 S. E. 695, the court, by the Chief Justice, states and applies these principles in such way as to leave not a vestige of ground upon which plaintiff can stand and successfully defend his position. And in the case of *Carter v. Board of Drainage Commissioners (of the same district)* 156 N. C. 183, 72 S. E. 380, the same principle is asserted, and it was also held, as it was in the *Gibbs Case*, *supra*, that works of this character being of a quasi public nature will not be interfered with, that is, stopped or delayed, by collateral attacks of those who have lost their right to be heard in the proper way by inexcusable laches, and an injunction which is the relief sought in this proceedings, was denied. In the more recent case of *Mann v. Mann*, 176 N. C. 353, 97 S. E. 175, which was a motion in the original cause where Mattamuskeet Lake District was established (*Carter v. Commissioners, supra*), this court reviewed the same subject and the authorities somewhat extensively, and arrived at the same conclusion as formerly in the numerous cases decided by it up to that time, and held, as appears from a part of the syllabus, that a final judgment rendered, in due course, in proceedings to establish a drainage district, may not be

amended at a subsequent term of the court to supply an alleged omission to limit the assessments to be made on the land in accordance with that stated in the petition; there being nothing to show that the judgment was not recorded by the clerk as actually given to him, or that it had been omitted by inadvertence of the judge or the mistake of any one. The correction of a final judgment for error rendered by a court having jurisdiction over the parties and subject-matter is by appeal, and it may not be collaterally attacked except for fraud, collusion, etc., or when it is void, and its invalidity appears upon its face, or otherwise in some cases. Where a final judgment has been rendered between the same parties on the same subject-matter, it is not essential that a later action or proceeding be identical in form for it to estop the parties therein, as *res judicata*. One who has been defeated on the merits in an action at law cannot afterwards resort to a bill in equity upon the same facts for the same redress. Upon this motion, made in the cause to amend a final judgment in proceedings to form a drainage district so as to restrict the amount of the assessments made upon the lands, and especially after the issuance of bonds thereon, the principle is applied that the one of two innocent persons must suffer whose conduct has occasioned the loss. Where, by motion at a subsequent term of the court, a final judgment entered in proceedings to establish a drainage district, under the provisions of a statute, is sought to be amended so as to include a provision limiting the amount of assessments to be made on the lands, the mere failure of the parties at the time to request that the provision be inserted in the judgment does not alone entitle them to the relief sought. A provision in the petition limiting the amount of assessments to be made on lands within a drainage district being formed under the provisions of the statute, which was not inserted in the final judgment rendered in due course, may not at a subsequent term be supplied by amendment, being also contrary to the statutory provisions and invalid.

Ruling Case Law, vol. 9, p. 637, says that the presumption in favor of the regularity of official proceedings puts the burden on the landowner who claims that proper notice of the proceedings has not been given, and, even in cases in which notice is necessary, any subsequent joinder in the proceedings will constitute a waiver. There is no evidence tending to show that either Stroup, or the plaintiff himself, took proper advantage, at any time, of the remedies provided in the act, and it is too late now to hear him. *White v. Lane*, 153 N. C. 16, 68 S. E. 895.

[3] In *Spencer v. Wills*, 179 N. C. p. 177, 102 S. E. 275, it was said that we have held in sundry cases appertaining to the same subject, that parties to proceedings of this

character, and in reference to their lands situated within the district, are estopped from questioning, by independent suit, the judgment establishing the district, or the validity and amount of the assessments made in the cause or the matter of burdens and benefits affecting the property. These and other like rulings must be challenged, at the proper time, in the course of the proceedings and, unless objection is successfully maintained, the parties are concluded. Also the Court said in the case of *Drainage Dist. v. Parks*, supra, 170 N. C. at page 439, 87 S. E. 229, that exceptions and appeals are provided for in the statutes, and the time fixed when they must be noted. As complainant did not appear, and except at the proper time, it must be assumed that he was satisfied with what had been done and waived his right. He can file exceptions to any action taken in regard to new matter, but not to the former proceedings, which are not open to him, but past and closed forever. *Griffin v. Com'rs*, supra, 88 S. E. 575. We further said that this is a question (in speaking of benefits anticipated and not realized) that was settled at the time the report was adopted and the district was established and may not be questioned in a proceeding (injunction) of this character.

[4] It was urged, in the able argument of Mr. Mangum, that neither Stroup, the original owner of the land, nor the plaintiff, who is his assignee, had received any benefit from the drainage; but we think, upon a close study of the record, that it will appear otherwise. But, if it does not, we held in *Griffin v. Com'rs*, supra, that the collection (of assessments) should not be stayed because the scheme has not afforded to a landowner the drainage he had anticipated.

The claim of plaintiff that no work has been done on his land which facilitates its drainage is clearly untenable. It appears from the testimony that a gorge below his lands has been removed and work in removing a large shoal has been also done, and perhaps more even than that much. Whether the work actually done was as beneficial as plaintiff or his predecessor in title anticipated is a matter not before us, as it was settled at the hearing before the commissioners, when the report was adopted and the district established, and may not now be questioned, as we held in *Griffin v. Com'rs*, supra. The outcome of these enterprises cannot be absolutely predicted, and they may even result in the abandonment of the project; but probable feasibility has been shown and the district in consequence organized, and preliminary work must then be done and its cost must be met. It is work undertaken by the district, and, in the present case, the district was created upon an adequate showing of basis, and it is not

disputed that the plaintiffs received the notice to which they were entitled, or were actually present, and were thus apprised of whatever legal consequences attached to the formation of the district with their lands in it. The same was said in *Houck v. Little River Drain. Dist.*, 239 U. S. 254, 36 Sup. Ct. 58, 60 L. Ed. 266. There was testimony for plaintiff that he attended the meetings of the drainage commissioners, and that he did not take any action about what was done there, until this suit was commenced.

The plaintiff's reliance upon *Spencer v. Wills*, supra, to show that the landowner may bring suit for damages when there has been a substantial departure from the scheme authorized by the commissioners, is without avail to him, as the principle does not apply to this case, and that case expressly recognizes and supports the rule which underlies our present decision. The case of *County Collector v. O. I. Traction Co.*, 267 Ill. 510, 108 N. E. 687, is manifestly not applicable, as there was a classification here, and if it was erroneous, plaintiff should have excepted to it.

Upon a review of the entire case, we have discovered no error of the court in granting a nonsuit.

No error.

(182 N. C. 563)

HAYMAN v. DAVIS.. (No. 481.)

(Supreme Court of North Carolina. Nov. 30, 1921.)

1. Work and labor \S 14(1)—Recovery may be had for services performed under contract breached by the other party.

If the father, who had agreed to convey land to his daughter if she would live with him and perform services for him, broke the contract, in such way as to render her performance impossible, he became liable for the services rendered before the breach.

2. Pleading \S 34(1)—Complaint for services rendered under contract to be liberally construed on demurrer ore tenus.

A complaint by plaintiff seeking to recover for services performed by her for her father under a contract broken by him preventing her performance was, on demurrer ore tenus, to be liberally construed.

3. Pleading \S 214(1)—Demurrer ore tenus admits truth of allegations of complaint.

A demurrer ore tenus admitted the truth of the allegations of the complaint.

4. Contracts \S 319(2)—Work and labor \S 14(1)—Party may recover on part performance if completion being prevented by other party.

A party to a contract may, on part performance, and prevention of full performance by the act of the other party, recover damages

for the breach, or on quantum meruit for the part performance.

5. Work and labor ¶22—Complaint held to state a cause of action.

A complaint alleging substantially that plaintiff's father had agreed to give her a tract of land if she would live with him, take care of him, and perform services, and that she had done so for a number of years, and that he had prevented further performance by leaving the premises and refusing to permit plaintiff to perform, held to state a cause of action.

6. Election of remedies ¶3(3)—Plaintiff must elect as between suit on contract and for quantum meruit for services.

Where plaintiff sought to recover for services rendered under a contract, full performance of which she alleged had been prevented by her father, the other party thereto, she thereby renounced all right to recover on the contract, and could not recover on both, they being inconsistent remedies, so that she must elect between the two.

Appeal from Superior Court, Randolph County; McElroy, Judge.

Action by Mary Ella Hayman against Nathan M. Davis. From a judgment dismissing the action, plaintiff appeals. Error.

This is a civil action brought by Mary Ella Hayman against Nathan M. Davis, who is her father, on a quantum meruit for services rendered to said Nathan M. Davis, covering a period of 22 years.

The complaint alleges that the defendant contracted and agreed with the plaintiff that, if she would live with him, take care of him, do the cooking, washing, mending and work in the house and field as a dutiful daughter, he would give her the tract of land she was, and is now, living on, and that said tract of land should be the consideration for her services. That Nathan M. Davis, after the plaintiff had lived with him and cared for him for 22 years, and fully performed her part of the contract, breached the said contract by leaving the premises referred to, and by refusing to let plaintiff take care of him and carry out her contract as alleged in the complaint.

The defendant demurred *ore tenus* to the complaint. The court sustained the demurrer and signed judgment dismissing the action, and plaintiff appealed.

Brittain, Brittain & Brittain, of Ashboro, for appellant.

J. A. Spence, of Ashboro, for appellee.

WALKER, J. (after stating the facts as above). [1] The plaintiff contended that, as there was no evidence taken at the time of the trial, the court could pass only upon the allegations of the complaint, and it held, and so adjudged, that the plaintiff had not stated a sufficient cause of action. This, the plain-

tiff insists, was error. There was consent on the part of both the plaintiff and defendant, and if the defendant breached the contract in such a way as to make it impossible for the plaintiff to carry out her contract, as was contemplated at the time of making the contract, and this was done by the defendant without the consent of the plaintiff, the former became liable for the services already rendered before the breach in such amount as they were reasonably worth.

[2] The plaintiff alleges, in her complaint, that she served her father according to the terms of their contract for many years, in the house and in the field, where she did a man's work, and by doing so she impaired her health, so that she is not now able to work and labor, as she formerly could, and has thereby diminished her capacity to earn a living; that her father broke the contract by leaving her alone and without the ability to further serve him and continue performance of the contract so that she can get the full amount of compensation promised to her; and while she does not clearly abandon the special contract, that is, in so many words, the effect of the pleading is, when it is liberally construed, as it should be, that her father has rendered full performance of the contract impossible by his conduct, and, therefore, she elects to treat it as abandoned and fall back upon her right to recover for her services their reasonable value.

[3] The demurrer admits the truth of the allegations of the complaint, the substance of which we have stated. The mere fact of her being ready to accept a deed for the land in full satisfaction should be treated as surplusage, or unnecessary, for she is not entitled to a deed at this time, and, if the contract had been kept, not until her father's death, as the stipulation was that she should work for him during his lifetime; and he is still living, and she was not to get the land until he died. She cannot, of course, have the land and full compensation for her services, and besides, she has no present right of action for the land, but she does allege that defendant, by his conduct, has prevented her from performing the contract, and she asserts her right to damages for such breach, and specifically asks for the value of the services performed by her and for any other amount to which she may, upon the facts, be entitled because of such breach by the defendant.

[4] The general rule is that though performance by one party of a part or the whole of his promise may be a condition precedent to the liability of the other party to perform, still his failure to perform will not discharge the latter, if the latter prevented performance. In such a case the party so prevented is discharged from further performance, and may recover damages for the breach or recover on the quantum meruit for his part per-

formance. Clark on Contracts (Ed. 1904) p. 468. As we said in *McCurry v. Purgason*, 170 N. C. at page 469, 87 S. E. 247, Ann. Cas. 1918A, 907:

"The law implies a promise by the party to pay for what has been thus received, and allows him to recover any damage he has sustained by reason of the breach, for this is exact justice."

If a contract is made of such a character that a party actually received labor or materials, and thereby derived a benefit and advantage, the labor actually done and the value received furnish a new consideration, and the law thereupon raises a promise to pay to the extent of the reasonable worth of such service to him. This may be considered as making a new case—one not within the original agreement—and the party is entitled to "recover on his new case" for the work done—not as agreed, but yet as accepted by the defendant. *Britton v. Turner*, 6 N. H. 492, 28 Am. Dec. 713. That case (*Britton v. Turner*), says Judge Dillon in *McClay v. Hedge*, 18 Iowa, 68, has been criticized, doubted, and denied to be sound, yet its principles have been gradually winning their way into professional and judicial favor. It is bottomed on justice and is right upon principle, however it may be upon the technical and more illiberal rules as found in the older cases. The case of *McCurry v. Purgason*, supra, goes fully into the law on this subject, where the terms of the contract were strikingly similar to those we have here, and cites the authorities in this and other jurisdictions. We there said:

"The complaint and evidence in this case indicate that plaintiff is suing upon the theory that she could not perform her part of the contract by reason of the testator's conduct, and that her withdrawal from the home place was caused thereby. She seeks to recover, not the price or measure of value fixed by the contract for her services, but on an implied assumpsit to pay for the actual services rendered what they are reasonably worth. It was said * * * in *Tussey v. Owen*, 139 N. C. 457, at pages 461, 462: 'There is a class of cases where, under some circumstances, the rigor of the common-law rule has been relaxed, and a person has been permitted to recover the actual value of his services, although failing to perform the entire contract on his part. In some cases the law implies a promise to pay such remuneration as the benefit conferred is really worth. *Dumalt v. Jones*, 23 How. (U. S.) 220. But we know of no authority to support the claim that the plaintiff could recover the full contract price, unless she had performed the contract.'"

This plaintiff has not failed to perform her part of the contract, as was the case in one of the decisions cited, but has, on the contrary, been free from any blame. The *McCurry* Case so fully covers the law of this

one that we refrain from further discussion in regard to it.

[5] The complaint should have complied more formally with the rule of pleading that superfluous matter should be omitted, but it is entitled to a liberal interpretation. *Blackmore v. Winders*, 144 N. C. 215, 56 S. E. 874; *Brewer v. Wynne*, 154 N. C. 487, 70 S. E. 947. Following this rule, and discarding what is immaterial, we conclude that the complaint does substantially state a cause of action on a quantum meruit. The judge will, no doubt, permit the plaintiff to amend her pleading, so as to state the cause of action with greater legal accuracy, if so desired, though amendment is not absolutely essential.

The demurrer should have been overruled, and the defendant allowed to answer over.

[6] As the plaintiff is suing on a quantum meruit, she thereby renounces all right to recover on the special contract. She is not entitled to recover on both causes, as they are inconsistent remedies, and therefore she is required to make her election between the two.

Error.

(182 N. C. 567)

VANN v. ATLANTIC COAST LINE R. CO. (No. 227.)

(Supreme Court of North Carolina. Nov. 30, 1921.)

1. Railroads §350(1)—Negligence held question for jury.

In an action for injuries in a collision between an automobile and a train at a crossing, where the evidence as to negligence was somewhat conflicting, so that that question was properly submitted to the jury, it was not error to overrule a motion for nonsuit.

2. Evidence §506, 513(6)—Expert can give opinion as to matter in controversy and state whether railway crossing was properly constructed.

An expert may give his opinion about the particular matter in controversy, so that he could state whether a crossing of a highway over a railroad track was properly constructed.

3. Appeal and error §926(7)—Witness presumed to have qualified as expert in absence of contrary showing.

In support of the trial court's ruling, it will be presumed on appeal that a witness who was permitted to express an opinion was qualified as an expert, where no question was made as to that fact.

4. Evidence §513(6)—Expert can testify as to measurements at crossing in controversy.

In an action for injuries sustained in a crossing accident, an expert witness can testify to measurements made by him of the crossing at which the accident occurred.

5. Damages \Rightarrow 173(1)—**Indebtedness of plaintiff admissible on issue of impaired earning capacity.**

Evidence that plaintiff, who before the accident was in sound financial condition, was indebted at the time of the trial, is admissible as bearing upon the issue of impairment of his earning capacity by the injuries he received.

6. Negligence \Rightarrow 122(1)—**Burden of proving contributory negligence on defendant.**

In an action for injuries in a collision between an automobile and a railroad train, a charge that the defendant had pleaded contributory negligence, and that the burden was on it to show negligence by plaintiff, was correct, under C. S. § 523, requiring that defense to be pleaded and proved.

7. Negligence \Rightarrow 141(3)—**Instruction as to intoxication held correct.**

In an action for personal injuries, an instruction that, while there was evidence that plaintiff during the afternoon before he was injured had drunk some intoxicating liquors, there was no evidence other than the drinking of the liquor tending to show he was intoxicated thereby at the time of the injury, was correct, where the testimony mentioned was all there was in the case as to plaintiff's intoxication.

8. Railroads \Rightarrow 330(1)—**Automobile driver can assume crossing is reasonably safe.**

The driver of an automobile approaching a railroad crossing can assume that the railroad had kept the crossing in a reasonably safe condition.

9. Railroads \Rightarrow 330(1)—**Care required of traveler assuming crossing is safe.**

While the assumption that a railroad crossing is in reasonably safe condition does not exempt an automobile driver approaching it from the duty of exercising proper care for his own safety, that assumption may be considered in determining whether he did exercise proper care under the circumstances.

10. Railroads \Rightarrow 351(12)—**Charge on contributory negligence held correct.**

In an action for injuries to an automobile driver at a crossing, a charge that, even if the driver was negligent, that fact did not of itself prevent recovery, where there was negligence on the part of the railroad, because that would withdraw the question of proximate cause from the jury, was correct.

11. Damages \Rightarrow 30—**Automobile driver injured at crossing accident can recover for damages to automobile.**

In an action for injuries resulting from a collision between plaintiff's automobile and a train at a railroad crossing, plaintiff can recover for damages to his automobile in addition to damages for injuries to himself.

Appeal from Superior Court, Sampson County; Lyon, Judge.

Action by Henry Vann against the Atlantic Coast Line Railroad Company. Judgment for the plaintiff, and defendant appeals. No error.

The assignments of error were as follows:

(1) His honor permitted the witness M. O. Bullard to testify as to his opinion as follows: Considering the angle 20 degrees and 30 minutes at which the dirt road crossed the railroad, the bridges should have been on both sides, the east and west side, across the railroad ditches, 56 feet to have covered the entire surface of the public road. This error is covered by the first exception.

(2) The same witness was permitted to testify over objection that said bridges, by actual measurement, were 33 feet; and this error forms the basis of the second exception.

(3) The plaintiff, Vann, was permitted to testify, over objection, that he owed \$50,000; and this error forms the basis of the third exception.

(6) At the close of the plaintiff's testimony, the defendant moved for judgment as of nonsuit. Motion was overruled, and the defendant excepted. This error forms the basis of the seventh exception.

(7) His honor charged the jury, among other things, as follows: "The defendant company in this action has pleaded contributory negligence. The burden is therefore upon the defendant company to prove to the jury by the greater weight of the evidence that the plaintiff in this action was guilty of negligence and such negligence contributed to his injury, and that such negligence of the plaintiff was the proximate cause of the injury." This part of the charge was erroneous, as defendant contends, and forms the basis of the eighth exception.

(8) His honor charged the jury, among other things: "While there is evidence in this case that the plaintiff, Vann, during the afternoon before he was injured, had drunk two glasses of cider and also had drunk three or four swallows of apple cider from a jug, there is no evidence in the case, other than the drinking of the cider, tending to show that the plaintiff, Vann, was intoxicated thereby, or was under the influence of any intoxicants at the time of the injury." Defendant contends that this was error, and it forms the basis of the ninth exception.

(9) His honor charged the jury, among other things: "While it is the duty of one crossing a railroad to exercise ordinary care for the safety of himself and his vehicle, he has the right to assume that the railroad company had discharged its duty to the public by keeping its railroad crossing in a safe and convenient condition for the traveling public." This part of the charge forms the basis of the tenth exception.

(10) His honor charged the jury: "The mere fact that the speed of an automobile exceeded that allowed by chapter 107, Laws of 1913, at the time of the injury of plaintiff on the railroad crossing, does not of itself prevent a recovery of the plaintiff, where there is negligence on the part of the railroad, because it would among other things withdraw the question of proximate cause from the jury." This error forms the basis of the eleventh exception.

On August 29, 1914, the plaintiff and his companions were driving in a Ford automo-

bile from Falcon, N. C., to Fayetteville, N. C., and after darkness had set in they attempted to cross over the tracks of the defendant, where the public road from Dunn to Fayetteville intersects with the said tracks, a little above the station at Wade. In so doing the automobile was wrecked, and one of the passengers, Randall Pusey, was killed, and the plaintiff was knocked senseless and otherwise injured. There were two tracks on the crossing, one of which was then being laid, and had not been completed and, as plaintiff alleges, rendered the crossing unsafe, and even dangerous, as the rails were exposed and high above the surface of the ground, and further, the track, and its condition, could not be seen in time to avoid the injury. The other facts necessary to an understanding of the matter will be found in the reported case of Pusey, Adm'r, v. A. C. L. R. Co., 181 N. C. at p. 137, 106 S. E. 452.

The case was submitted to the jury, under the evidence and the charge of the court and the jury returned a verdict for the plaintiff. Judgment thereon, and defendant appealed.

Grady & Graham, of Clinton, for appellant.

Fowler & Crumpler and Butler & Herring, all of Clinton, for appellee.

WALKER, J. (after stating the facts as above). [1] The evidence as to the negligence was somewhat conflicting, and it was therefore properly submitted to the jury, and the motion for a nonsuit overruled.

We will consider the exceptions in the order of their statement in the record, and in the brief of defendant.

[2, 3] First. It was competent for the witness M. O. Bullard to state whether the crossing was constructed by the correct method, as he was an expert and no question was made as to this fact. An expert, having special scientific knowledge, which fits him to do so, may give his opinion about the particular matter in controversy. We said in Summerlin v. Railroad Co., 133 N. C. 550, at page 557, 45 S. E. 898:

"We must infer from the record one of three things: (1) That there was evidence of the witness' qualification and that the fact of his being an expert was found by the court, or (2) that he was admitted to be an expert, or (3) that there was no question made in the lower court in regard to it. These inferences must be made because we cannot presume error, and the burden is upon the appellant to show it, and in this court we must assume that every fact was proved and everything done necessary to sustain the ruling and judgment of the court below, unless it otherwise appears in the record. Nothing appears in this record tending to show affirmatively that the judge committed any error in respect to the matter we are now considering."

[4] We do not see why, within the same principle, the testimony of the same witness, as to the measurements, was also not competent, and admissible.

[5] Second. The evidence as to plaintiff's present indebtedness, as compared with his sound financial condition when he was injured, bore upon his earning capacity, which he alleges was greatly impaired by the injuries he received when the car was wrecked at the crossing. The impairment of his earning ability is shown by the fact that, owing to it, he has fallen behind and whereas formerly he could, and did, make money and accumulate it, he is now embarrassed in his affairs and deeply involved.

Third. The motion to nonsuit was, as we have said, properly overruled, because there was evidence of negligence fit to be considered by the jury.

[6] Fourth. There was no error in the charge as to contributory negligence. That defense must be pleaded, and the burden to show it is upon the defendant (Consol. Statutes, § 523; Kearney v. Railroad Co., 177 N. C. 251, 98 S. E. 710; Boney v. R. R. Co., 155 N. C. 95, 71 S. E. 87), and as to reasons for the change in the former rule (Horton v. R. R. Co., 157 N. C. 146, 72 S. E. 958, and Owens v. R. R. Co., 88 N. C. 502).

[7] Fifth. The instruction of the court as to the drunken condition of the plaintiff on the evening of the accident was manifestly correct, as the testimony he mentioned in it was all in the case as to such condition, and it was for the jury to say whether or not he was drunk, and his contributory negligence, in this respect, caused the injuries.

[8, 9] Sixth. The plaintiff might well assume, in the ordinary course of things, that the defendant's crossing was in a reasonably safe condition, and had been kept so by the defendant. This question was directly involved, and decided, in Parks v. Railway Co., 124 N. C. 136, 32 S. E. 387, when the learned charge of Judge O. H. Allen to the jury is considered in connection with the opinion of the court. The plaintiff surely had the right to expect that defendant had performed its duty to the public with respect to this crossing. That, of course, did not exempt the plaintiff from the duty of exercising proper care for his own safety, but what was such care on his part must, of course, be determined by a consideration of the assumption he was permitted to make with respect to the condition of defendant's crossing. It will not, we presume, be contended that plaintiff should have assumed that the crossing was in bad condition. All that was required of him was that he should look out for his own safety and exercise that degree of care characteristic of the ideally prudent man, which is ordinary care under the same circumstances. The duty of a traveler on a highway at a railroad cross-

ing is fully discussed in *Johnson v. R. R. Co.*, 163 N. C. 431, 79 S. E. 690, Ann. Cas. 1915B, 598, with a full citation of authorities, though it may not be so closely applicable to the particular facts of this case as *Parks v. R. R. Co.*, supra. But the case of *Tankard v. R. R. Co.*, 117 N. C. 558, 23 S. E. 46, is directly in point, as it was there held that, while it is the duty of one crossing a railroad in a vehicle to exercise ordinary care for the safety of the animal he is driving, which was injured, he has the right to assume that the railroad company has discharged its duty to the public by keeping the crossing in safe condition.

[10] Seventh. It was obviously right to charge the jury that the negligence of plaintiff, if there was such, would not bar his recovery unless it directly and proximately contributed to his injury. His contribution to his own injury would not prevent a recovery by him, if there was negligence by the defendant which, when compared with that of the plaintiff, was the proximate cause of his injuries. *McNeill v. R. R. Co.*, 167 N. C. 890, 83 S. E. 704, where the doctrine of proximate cause was fully discussed by Justice Allen. Negligence, which is merely passive, is harmless. It must be active, and efficient, in producing the injury in order to be proximate to it.

[11] Plaintiff was, of course, entitled to recover damages for his automobile if it was proximately injured by the negligence of the defendant, in addition to damages for the injuries to herself.

The court granted all of defendant's requests for instructions to the jury.

We find no error that was committed at the trial.

No error.

STACY, J., having presided at one of the former trials of this case in the superior court, took no part in the present decision.

(182 N. C. 547)

BUTLER v. HOLT-WILLIAMSON MFG. CO. (No. 288.)

(Supreme Court of North Carolina. Nov. 30, 1921.)

1. Trial \S 418—Denial of motion for nonsuit not available to defendant, who thereafter proceeded to introduce evidence.

Under C. S. \S 567, a defendant, who moved for dismissal as in case of a nonsuit at the close of plaintiff's evidence, and who on denial of motion introduced evidence and again moved to dismiss action as in case of nonsuit at the conclusion of all the evidence, cannot complain on appeal of denial of first motion.

2. Trial \S 165—Evidence considered most favorably to plaintiff on motion for nonsuit at close of all the evidence.

On motion to dismiss the action as in case of nonsuit, at the conclusion of all the evidence, all the evidence introduced at the trial will be construed in the light most favorable to plaintiff.

3. False Imprisonment \S 39—Agency of watchman making arrest held for jury.

In an action against manufacturing company for false arrest and imprisonment following plaintiff's arrest by the company's night watchman, who had been sworn in as a special policeman, the question whether the watchman in making arrest was acting in the capacity of special policeman for the city, or in the capacity of night watchman for defendant, held for the jury.

4. Trial \S 255(9)—Failure to charge on defendant's theory that arrest made by employé, was outside of his authority held error.

In action against manufacturing company for false arrest and imprisonment following plaintiff's arrest by defendant's night watchman, who had been sworn in as special policeman while plaintiff was on defendant's premises in which defendant claimed and introduced evidence to show that the watchman's authority was limited to a certain inclosure, and that arrest was not made therein, court's failure to charge jury that defendant was not liable if watchman's authority was limited to inclosure and arrest was made elsewhere held error, notwithstanding defendant's failure to tender a written request for such instruction.

5. False Imprisonment \S 15(3)—Arrest by employé held outside of scope of employment.

Manufacturing concern, which employed night watchman to work inside inclosure and not elsewhere, was not liable for arrest made by watchman a considerable distance away from the inclosure, since such arrest was not made within the scope of the watchman's authority.

Appeal from Superior Court, Cumberland County; Daniels, Judge.

Action by M. F. Butler against the Holt-Williamson Manufacturing Company. Judgment for plaintiff, and defendant appeals. New trial.

It is not necessary to set out all the evidence. So much is stated as is necessary to explain the questions presented.

The plaintiff brought suit to recover damages for false arrest and imprisonment. Evidence for the plaintiff tended to show the facts to be as herein stated. The defendant corporation was engaged in manufacturing cotton cloth in the city of Fayetteville. On August 3, 1920, about sunset, the plaintiff went to Charles Maultsby's store, which was situated near the defendant's mill, to see Maultsby on a matter of business. Soon afterward he started home and followed a footpath which led through a field over defendant's land on which the defendant's op-

eratives lived; but this path did not extend through the inclosed mill property. On the way the plaintiff met Ed Mazingo, the defendant's night watchman, who inquired where the plaintiff was going, and to the plaintiff's answer that he was going to the street replied, "You can go with me." Plaintiff and Mazingo walked to the street and stopped, and Mazingo asked plaintiff whether he knew any one there, and was referred by plaintiff to Cato Salmon. The two thereupon went to the Holt-Morgan Mill and had a conversation with Salmon, in which Mazingo said he had arrested the plaintiff "down the path." A policeman was then called, and the plaintiff and Mazingo went with him in a car to the courthouse, thence to the police station, and the plaintiff was placed in a cell, where he remained about an hour. The plaintiff then gave bond to appear at the trial the next morning, and was released from custody. Upon the hearing the court held the evidence to be insufficient, and the plaintiff was discharged. Mazingo was defendant's night watchman when the arrest was made, and had no warrant; he was not acting as policeman of the city, and was not on the pay roll; but the mayor had sworn him in as special policeman to serve the defendant as night watchman.

Evidence for the defendant tended to show the facts to be as follows: Mazingo had been employed by the defendant as night watchman, and had served in this capacity about four years. There was a wire fence 8 or 10 feet high, inclosing defendant's mill, warehouses, and yard, and it was Mazingo's duty to stay inside this inclosure, to keep watch on the boilers, and to see that no one interfered with any property inside the fence. Mazingo's instructions, given him by the defendant's superintendent, limited his authority to the inclosure, and he exercised no authority, outside the fence, and had not done so during his four years' service. He had been sworn in as a special policeman of the city of Fayetteville, and had a badge which had been given him by the chief of police. The defendant did not request that he be sworn in as a special policeman, and knew nothing about it. Mazingo was instructed by the city authorities to serve anywhere in the city as policeman. He had made arrests in the city off the defendant's property, and in no case had he made an arrest as night watchman. On the night this plaintiff was arrested Mazingo was not acting as night watchman; he was off duty, and John Stevens had taken his place. Mazingo arrested the plaintiff, who was on a cement tile in the weeds near a woman's house, because he had been told by two or three people that a man of suspicious conduct had gone there. At the time of the arrest the plaintiff told him he was trying to ascertain whether Overton was going to see a certain woman who lived near by. Af-

ter the plaintiff had been taken to police headquarters a warrant was "written out." The issues as to the wrongful arrest and as to compensatory damages were answered in favor of the plaintiff, and the defendant appealed.

Oates & Herring and Sinclair, Dye & Clark, all of Fayetteville, for appellant.

Bullard & Stringfield and H. L. Brothers, all of Fayetteville, for appellee.

ADAMS, J. [1, 2] First at the close of the plaintiff's evidence, and afterward at the conclusion of all the evidence, the defendant made a motion to dismiss the action as in case of nonsuit. Exception was duly entered to the court's denial of each motion. By the express terms of the statute the defendant has the benefit only of the latter exception. C. S. § 567. *Riley v. Stone*, 169 N. C. 423, 86 W. E. 343. Therefore all the evidence introduced at the trial must be accepted as true and construed in the light most favorable to the plaintiff. *Rush v. McPherson*, 176 N. C. 562, 97 S. E. 613.

[3] The evidence introduced by the plaintiff tended to show that the mayor of the city of Fayetteville had administered the official oath to Mazingo, who was to serve the defendant, not the city, in the dual capacity of night watchman and special policeman; that on the evening of August 3, 1920, the plaintiff, while on the defendant's premises, was arrested by Mazingo without a warrant, restrained of his liberty in the mill office, carried thence in a car by Mazingo, and a city policeman to police headquarters, and there confined in a cell for the space of one hour; that he was then released from custody, having given bond to appear for trial on the day following; and that upon the hearing he was discharged by the court for want of sufficient evidence. The record does not show definitely that the mayor of the city administered the official oath to Mazingo at the request of the defendant, but it does tend to show that Mazingo had served the defendant as night watchman for a period of four years. There was other evidence tending to corroborate the testimony of the plaintiff concerning the circumstances under which the arrest was made. While we express no opinion as to its weight, we hold that the evidence was sufficient to justify his honor in declining the defendant's motion.

It is not necessary to discuss all the other exceptions entered of record, for the reason that one instruction which his honor gave the jury entitles the defendant to a new trial. In the argument here the defendant emphasized the contention that if Mazingo in fact made the arrest, he did so without the defendant's knowledge or authority, and that there was no evidence of ratification. Whether Mazingo at the time of the arrest was acting in the capacity of special policeman

for the city, or in the capacity of night watchman for the defendant, was a question directly relevant to the defendant's contention. If he made the arrest while purporting to act as night watchman, whether he was acting within the scope of his authority likewise became a vital question. The defendant insisted that Mazingo had no authority to perform any duty or to do any act on its behalf outside the wire fence which inclosed the mill, the dyehouse, and the warehouses; and that as the arrest was effected outside this inclosure the defendant was not liable in damages to the plaintiff.

His honor delivered his charge to the jury just before the midday recess, and, upon reconvening the court, recalled the jury, and gave the following additional instructions, which are numbered merely for the purpose of convenient reference:

(1) "I am not sure that I made the statement to you that I intended to make in connection with the rest of my charge, and that was this: That if the arrest was wrongfully made by Mazingo and made about the company's business and within the scope of his employment, and if you are satisfied by the greater weight of the evidence, then you will answer the first issue Yes."

(2) "I intended in that same connection to tell you that, if Mazingo made the arrest as night watchman while in the performance of his duty to the company, and within the scope of his employment, that would be a wrongful arrest, but before you can answer that issue Yes you would have to determine whether he was doing it about the company's business and within the scope of his employment. You will take this in connection with the rest of the charge I gave you.

(3) "In other words, I called you back because I could not remember whether I told you that it would be a wrongful arrest for Mazingo to arrest the plaintiff if he was then acting as night watchman; that would make it wrongful because as night watchman, according to his own contention, or the contention of the defendant, he had no right to make an arrest outside of the mill inclosure. You will take that in connection with the rest of my charge."

To the paragraphs numbered 2 and 3 the defendant excepted.

All the evidence of the defendant directly relevant to the question tended to show that Mazingo was employed to do certain work inside the wire fence and not elsewhere; that he was not engaged to perform any duty for the defendant beyond the defined area; that he had never exercised, or pretended to exercise, any authority on behalf of the defendant outside this inclosure; that he received his instructions from the defendant, and knew the limit of his authority.

In Labatt's Master and Servant, § 2480, it is said:

"The terms upon which a special policeman is appointed are usually such as to limit the exercise of his powers to a certain area. For

wrongful arrest made by him at a place which was clearly outside that area, in respect of an offense previously committed, the party at whose request he was appointed cannot be held liable, even though the act was of such a description that, if the element of locality were abstracted, the aggrieved party would have been entitled to recover."

And in Wood's Law of Master and Servant:

"The question usually presented is whether as a matter of fact or of law the injury was received under such circumstances that under the employment the master can be said to have authorized the act, for if he did not, either in fact or in law, he cannot be made chargeable for its consequences, because, not having been done under authority from him, express or implied, it can, in no sense, be said to be his act." Sec. 279.

The question is discussed by Justice Walker in *Daniel v. Railroad*, 136 N. C. 517, 48 S. E. 816, 67 L. R. A. 455, 1 Ann. Cas. 718, in which are cited a number of the leading decisions. Upon a review of these authorities his conclusion is this:

"It may then be gathered from the books as a general rule, which is clearly applicable to the facts of this case, that if the servant, instead of doing that which he is employed to do, does something else which he is not employed to do at all, the master cannot be said to do it by his servant, and therefore is not responsible for what he does. It is not sufficient that the act showed that he did it with the intent to benefit or to serve the master. It must be something done in attempting to do what the master has employed the servant to do. *Mitchell v. Crasweller*, 76 E. C. L. 246; *Limpus v. L. G. O. Co.*, 32 L. J. (Exch.) 34. Nor does the question of liability depend on the quality of the act but rather upon the other question, whether it has been performed in the line of duty and within the scope of the authority conferred by the master. The facts of this case do not bring it within the principle."

Mazingo testified that he was employed to serve as night watchman in the inclosure, to stay within it, to "look out for the boilers," and to see that no one interfered with any of the inclosed property. His testimony was corroborated by that of the defendant's superintendent.

The arrest was made on a remote part of the defendant's property outside the inclosure. If, then, the jury should find the facts to be as contended by the defendant, it is obvious that Mazingo was not acting within the scope of his authority when he made the arrest.

In paragraph 3 of the instructions referred to his honor expressly told the jury that the arrest was wrongful if made by Mazingo as night watchman, and at the same time permitted the jury, in response to the instruction in paragraph 2, to pass upon the question whether Mazingo as night watchman was acting within the scope of his au-

thority, without applying the instruction to the defendant's version of the evidence.

[4, 5] Without having tendered a written request, the defendant was entitled to the further instruction that if the jury should find from the evidence that Mazingo was employed to do certain work inside the inclosure and not elsewhere, as contended by the defendant, and, laying aside this work, he went outside the inclosure and made the arrest a considerable distance away, particularly at the instance of Royall or Brock, they should answer the issue in the negative, because in that event he would not be acting within the scope of his authority.

In *Real Estate Co. v. Moser*, 175 N. C. 259, 95 S. E. 449, it is said:

"The instruction given is correct as far as it goes, but the judge failed to state the defendant's contention and to instruct [the jury] that the defendant had a right to withdraw his proposition under certain conditions, and what those conditions were. Even without a specific instruction, it was incumbent upon the judge to do this. For when the judge assumes to charge, and correctly charges, the law upon one phase of the evidence, the charge is incomplete unless it embraces the law as applicable to the respective contentions of each party, and such failure is reversible error." *Jarrett v. High Point Co.*, 144 N. C. 299, 56 S. E. 937; *Lea v. Utilities Co.*, 176 N. C. 514, 97 S. E. 492.

His honor's omission to instruct the jury more definitely upon the law and the evidence relative to the scope of Mazingo's authority was evidently prejudicial, and entitles the defendant to a new trial.

New trial.

(182 N. C. 532)

J. A. FAY & EGAN CO. v. CROWELL.
(No. 415.)

(Supreme Court of North Carolina. Nov. 30, 1921.)

1. Sales \S 288(2)—Buyer's retention of goods beyond specified period held waiver of breach of warranty.

Where contract for purchase of machinery provided that a retention of the machinery after 30 days from its arrival at destination should constitute a trial and acceptance, and be a conclusive admission of the truth of all representations made by or for the seller and a fulfillment of all its contracts of warranty, express or implied, buyer, having retained machinery for more than such a period without offering to return it, could not avoid payment of purchase-money note on ground that there was a breach of warranty, though during such period he complained of defects therein.

2. Sales \S 288(2)—Buyer cannot complain of breach of warranty without offering to return property within time fixed therefor by contract.

Where contract requires buyer to return property within a specified time if not as rep-

resented, and there is no fraud or waiver of the condition, the buyer is not entitled to redress for breach of warranty, without first offering to return property within specified period, whether the goods delivered are different from and inferior to those sold, or whether the property, though corresponding in description with the article purchased, is defective or wanting in quality.

Walker, J., dissenting.

Appeal from Superior Court, Stanley County; Ray, Judge.

Action by the J. A. Fay & Egan Company against G. Edward Crowell. From a judgment giving it insufficient relief, plaintiff appeals. New trial.

Civil action to recover balance due on 10 promissory notes executed by the defendant and delivered to the plaintiff for a certain quantity of mill machinery. Defendant denied full liability, and alleged that said notes "would have been paid in full, if the plaintiff had given defendant proper adjustment and offsets on the machine No. 257, known as the resaw, on account of the defects in said machine as hereinbefore fully set out." Defendant also alleged that the machinery shipped was different from, and less valuable than, that which he had ordered, and that the same was defective in certain particulars; said defects being set up and pleaded by way of counterclaim.

Upon issues submitted, the jury returned the following verdict:

"(1) In what sum, if any, is the defendant indebted to the plaintiff? Ans. \$1,010.00, with interest on same from February 8, 1919.

"(2) Did the plaintiff ship the defendant a different brand resaw machine from that ordered under the contract of January 23, 1919? Ans. Yes.

"(3) What difference in value, if any, was there in the machine shipped by the plaintiff and the one contracted for by the defendant? Ans. \$250.00.

"(4) What damage, if any, is defendant entitled to recover on the counterclaim? Ans. \$150.00."

From a judgment reducing the amount of plaintiff's recovery in accordance with the jury's answer to the third and fourth issues, the plaintiff appealed.

Sinclair, Dye & Clark, of Fayetteville, for appellant.

R. L. Smith & Son, of Albemarle, for appellee.

STACY, J. On January, 23, 1919, the plaintiff, through its agent, sold to the defendant a certain quantity of mill machinery, guaranteeing the same in every respect, and in payment therefor it was agreed that the plaintiff would accept in exchange the defendant's secondhand machine as part payment, \$525 in cash, and his promissory notes

for the balance. The contract was in writing and contained the following stipulation:

"That in case of rejection the undersigned will promptly deliver it [the machinery] to consignor, f. o. b. Cincinnati, Ohio; that this contract is not modified or added to by any agreement not expressly stated herein, and that a retention of the property forwarded, after 30 days from its arrival at destination, shall constitute a trial and acceptance, be a conclusive admission of the truth of all representations made by or for the consignor, and a fulfillment of all its contracts of warranty, express or implied."

Within 30 days after the receipt of said machinery, the defendant notified plaintiff's agent by wire that the same was not satisfactory and asked him to "come to Oakboro at once in regard to resaw." The agent did not come, but immediately called over the telephone, and, in answer to plaintiff's inquiry about a missing handwheel, stated that this was not necessary, as the machine was equipped with a "lever shift." Defendant further testified:

"Later on in the year Mr. Whitlock [plaintiff's agent] came up. I told him about it, and showed him the machine, and told him the defect, and he said he would have it adjusted. He never said a word about it not being the machine he sold. I told him it was not the machine, and he said they would have it fixed. I never had any other negotiations with them. Never heard anything, nor they didn't fix it. I had no more negotiations with the company in regard to the machine after that; it just rocked along. I was waiting on them."

The defendant continued to use the machine, and still has it in his possession. There is no contention about the balance of the machinery. The "resaw" alone is in controversy. After the property had been used for several months, the defendant made a further payment of \$50 on one of the notes, and he says the payments already made are sufficient to cover the value of the machinery, not including the resaw.

[1] The agreement between the parties to this suit, in regard to the subject-matter of the action, is in writing. It is clear and free from any ambiguity. Hence both sides must stand or fall by the terms of the written instrument—there being no claim or suggestion that the contract was entered into as a result of any fraud, accident, or mistake. *Harvester Co. v. Carter*, 173 N. C. 229, 91 S. E. 840; *Machine Co. v. McClamrock*, 152 N. C. 405, 67 S. E. 991. In some of the cases and by a number of writers, it has been styled a "contract of sale and return" (*Walsh Mfg. Co. v. Lumber Co.*, 159 N. C. 507, 75 S. E. 718), because it is stipulated as a part of the warranty that the goods shall be promptly returned if not as represented. It is further specified that a retention of the property for more than 30 days after its arrival at destination shall constitute an absolute accep-

tance, etc. This may not have been a very wise provision; but the parties have so contracted, and it is but meet that they should abide by whatever obligations they have voluntarily assumed. *Burch v. Bush*, 181 N. C. 125, 106 S. E. 489. This is the law of contracts fairly and freely made. *Clancy v. Overman*, 18 N. C. 402; *Bland v. Harvester Co.*, 169 N. C. 418, 86 S. E. 350; *Guano Co. v. Livestock Co.*, 168 N. C. 447, 84 S. E. 774, L. R. A. 1915D, 875, and cases there cited. Any other rule would render all business transactions relating to sales of personal property unsafe, and subject vendors to many hazards and possibly grievous burdens. *Parker v. Fenwick*, 138 N. C. 209, 50 S. E. 627. The retention by the defendant of the property during the time referred to in the above stipulation amounted to an admission that the representations made by or for the plaintiff were true and avoided all warranties. *Fay & Egan Co. v. Dudley*, 129 Ga. 314, 58 S. E. 828 (which, by the way, is a case on all fours with the one at bar and involving the identical contract now before us).

[2] It has been the settled holding with us, in a long line of decisions, that where there is an express warranty in the sale of personal property, and it is stipulated as a condition of the contract of sale that the property is to be returned within a specified time, if not as represented, the complaining party is entitled to no redress by reason of a breach of the warranty, in the absence of fraud or a waiver of the condition, without first offering to return the property within the time fixed by the contract. *Robinson v. Huffstetler*, 165 N. C. 459, 81 S. E. 753, and cases there cited. See, also, 35 Cyc. 437. In the absence of fraud, this rule applies equally to a case where the goods delivered are different from, and inferior to, those sold, as where the property, though corresponding in description with the article purchased, is defective or wanting in quality. If the vendor tender goods of less value than those purchased, the vendee is not bound to accept them. But if he does accept them, under the terms of his agreement, he is deemed to assent to a fulfillment of the contract on the part of the vendor. *Pierson v. Crooks*, 115 N. Y. 539, 22 N. E. 349, 12 Am. St. Rep. 831. And in the instant case such acceptance and retention afford a "conclusive admission of the truth of all representations made by or for the consignor, and a fulfillment of all its contracts of warranty express or implied." See, also, *Farquhar Co. v. Hardy Hardware Co.*, 174 N. C. 369, 93 S. E. 922, and *Ward v. Liddell Co.*, 108 S. E. 634, at the present term, and cases there cited. The Supreme Court of Utah, in a comparatively recent case, states the law with clearness as follows:

"The rule . . . is . . . well established that, when the quality of an article sold

is guaranteed by warranty, one of the conditions of which being that, in case of a defect being discovered, the seller shall be liable only on condition of the production or return of the defective article, such condition is a condition precedent, and must be complied with, or there can be no recovery. [Citing authorities.] The rule deduced from the authorities is that, when the parties have not stipulated as to the course which shall be taken in case of a failure of the warranty, the vendee has his election either to sue on the warranty or to rescind the contract by returning the property and bringing an action for the money received by the seller. But it is competent, however, for the parties to provide by contract that a particular course shall be pursued on a failure of the warranty." *Wasatch Orchard Co. v. Morgan Canning Co.*, 32 Utah, 229, 89 Pac. 1009, 12 L. R. A. (N. S.) 540.

See, also, *Frick Co. v. Boles*, 168 N. C. 654, 84 S. E. 1017, and cases there cited.

In the light of the foregoing authorities, and upon the record, we think his honor should have directed a verdict in favor of the plaintiff for the balance due on the unpaid notes.

New trial.

WALKER, J., dissents.

(182 N. C. 536)

WHITE v. CAROLINA REALTY CO.
(No. 445.)

(Supreme Court of North Carolina. Nov. 30, 1921.)

1. Municipal corporations §705(1)—Concurring negligence of automobile driver no defense in action for injuries to passenger.

In an action for injuries to an automobile passenger in a collision with defendant's truck, the automobile driver's concurring negligence was no defense, if defendant's negligence was also one of the proximate causes of the injury.

2. Negligence §15—Both joint wrongdoers liable for whole damage.

Where the negligence of two persons proximately contributed to the injury of third person not contributorily negligent, both are liable for the whole damage.

3. Contribution §5—None among joint tortfeasors.

There is no contribution among joint tortfeasors.

4. Negligence §93(1)—Automobile driver's negligence not imputable to passenger.

The negligence of the driver of an automobile will not be imputed to a passenger not the owner of the car and exercising no control or authority over the driver.

5. Trial §296(3)—Instruction not requiring negligence to have been proximate cause not erroneous in view of other instructions.

In action for injuries to occupant of automobile sustained in collision with defendant's truck, instruction making defendant liable if it was negligent, without requiring such negligence to have proximately caused injury, held not erroneous, where other instructions, including that immediately following, required the negligence to have proximately contributed to injury.

Appeal from Superior Court, Mecklenburg County; Harding, Judge.

Action by W. L. White against the Carolina Realty Company. Judgment for plaintiff, and defendant appeals. No error.

Civil action to recover damages for an alleged negligent injury to plaintiff in a collision between a Ford automobile, in which the plaintiff was a passenger, and a truck belonging to the defendant.

Upon denial of liability and issues joined, the jury returned the following verdict:

"(1) Was the plaintiff's injury caused by the negligence of the defendant as alleged in the complaint? A. Yes.

"(2) What damages, if anything, is the plaintiff entitled to recover? A. \$2,500."

Clarkson, Talliaferro & Clarkson, of Charlotte, for appellant.

F. M. Redd and D. E. Henderson, both of Charlotte, for appellee.

STACY, J. This is an action brought by W. L. White to recover damages for an alleged negligent injury caused by a collision between a Ford automobile, in which the plaintiff was riding as a passenger, and the defendant's truck, said collision occurring on West Trade street in the city of Charlotte at an early morning hour on September 23, 1920.

There was evidence tending to show that the defendant's truck was standing at the intersection of Linden avenue and West Trade street in a manner violative of a traffic ordinance of the city, when the Ford automobile owned and driven by one E. H. McQuay, and in which the plaintiff was riding as a passenger, ran into and collided with the defendant's truck, causing serious and permanent injuries to the plaintiff. The accident occurred about 7:30 a. m. during a heavy equinoctial storm, when the fog, rain, and wind made it difficult for the occupants of the car to see very far ahead.

The evidence was conflicting as to the exact position of the truck at the time of the injury and as to whether the defendant's driver had violated any of the traffic ordinances of the city of Charlotte; but, under his honor's charge, the jury have found these matters in accordance with the plaintiff's contention.

From all the evidence it clearly appeared that the plaintiff was a passenger in McQuay's car and exercised no authority or control over its management and had nothing to do with the manner in which it was driven.

Upon these, the facts chiefly relevant, we think the defendant's motion for judgment as of nonsuit was properly overruled.

[1-3] Conceding that McQuay, the owner and driver of the Ford machine, was negligent, as it is quite apparent from the evidence he was, yet this would not shield the defendant from suit if its negligence was also one of the proximate causes of the plaintiff's injury. *Crampton v. Ivie*, 126 N. C. 891, 36 S. E. 351. There may be two or more proximate causes of an injury; and where this condition exists, and the party injured is free from fault, those responsible for the causes must answer in damages, each being liable for the whole damage, instead of permitting the negligence of the one to exonerate the others. This would be so though the negligence of all concurred and contributed to the injury, because with us there is no contribution among joint tort-feasors. *Wood v. Public Service Corp.*, 174 N. C. 697, 94 S. E. 459, 1 A. L. R. 942.

In *Harton v. Tel. Co.*, 141 N. C. 455, 54 S. E. 209, the following statement of the law is quoted with approval:

"To show that other causes concurred in producing or contributing to the result complained of is no defense to an action of negligence. There is indeed no rule better settled in this present connection than that the defendant's negligence, in order to render him liable, need not be the sole cause of plaintiff's injuries. * * * When two efficient proximate causes contribute to an injury, if defendant's negligent act brought about one of such causes, he is liable."

See, also, 21 Am. & Eng. Enc. (2d Ed.) 495, and note.

His honor correctly charged the jury that, if the negligence of McQuay, the owner and driver of the Ford car, was the sole and only proximate cause of plaintiff's injury, the defendant would not be liable; for, in that event, the defendant's negligence would not have been one of the proximate causes of the plaintiff's injury. *Bagwell v. Railroad*, 167 N. C. 615, 83 S. E. 814. But if any degree, however small, of the causal negligence, or that without which the injury would not have occurred, be attributable to the defendant, then the plaintiff, in the absence of any contributory negligence on his part, would be entitled to recover, because the defendant cannot be excused from liability

unless the total causal negligence or proximate cause be attributable to another or others.

"When two efficient proximate causes contribute to an injury, if defendant's negligent act brought about one of such causes, he is liable." *Wood v. Public Service Corporation*, supra, and cases there cited.

[4] There is no contention that the negligence of McQuay, the driver of the Ford car, is in any way imputable to the plaintiff, who at the time occupied the position of a passenger in said car. In a number of cases it is stated, as a general rule, that the negligence of the driver of an automobile will not be imputed to one who is a passenger therein, unless such passenger be the owner of the car, or unless he exercise some kind of control or authority over the driver. This position has been approved by us in a number of decisions and is undoubtedly the prevailing view. *Pusey v. Railroad*, 181 N. C. 137, 106 S. E. 452, and cases there cited; 2 R. C. L. 1207.

[5] The defendant relies upon its exception to the following portion of his honor's charge:

"If the plaintiff has satisfied you by the greater weight of the evidence that the defendant was negligent, as I have attempted to apply the rules of law, as the court observes it from the evidence in this case, you will answer the first issue 'Yes.'"

This excerpt, standing alone, might appear to be erroneous, but in the very next sentence his honor continued:

"If the plaintiff has failed to satisfy you that the defendant was negligent, or that, if he was negligent, that it was not a proximate cause of the injury, then you would answer the first issue 'No.'"

In other portions of the charge the court correctly stated the law as bearing upon this point; and when we consider the charge as a whole, as we are required to do, it is clear that the jury could not have been misled by this slight inadvertence. Besides, it was immediately corrected in the following sentence; and this shows the necessity of examining the charge, not disconnectedly, but as a whole, or at least the whole of what was said regarding any one phase of the case, or law bearing thereon. *Moore v. Lbr. Co.*, 175 N. C. 205, 95 S. E. 175.

No sufficient reason for disturbing the verdict and judgment having been shown, the exceptions must be overruled; and it is so ordered.

No error.

(182 N. C. 559)

JORDAN et al. v. INTERURBAN MOTOR LINES, Inc., et al. (No. 474.)

*(Supreme Court of North Carolina. Nov. 30, 1921.)

1. Trial \S 60(1)—Evidence as to injury properly admitted where there was other evidence that it was caused by accident.

In an action for injuries sustained in an automobile collision, a doctor's testimony as to the condition of plaintiff's ribs, which he testified had been concaved by a blow received in the accident, was properly admitted, where there was other evidence that the condition was caused by the accident.

2. Witnesses \S 287(4)—Redirect examination as to matter inquired about on cross-examination held proper.

In an action for injuries, where defendant, to show that plaintiff's health had previously been in a frail condition, cross-examined her husband as to whether she had ever fainted, he was properly permitted, on redirect examination, to state the circumstances under which she had the prior fainting spell shown.

3. Appeal and error \S 1053(3)—Examination of defendant sued for injuries as to receipts of business not prejudicial.

In an action against the owners of a jitney bus for the negligence of its driver, examination of one of the defendants as to dividends from the business was harmless, where the charge stated what plaintiff must show in order to recover, and what special damages she could recover, and did not allow the use of such testimony nor permit a recovery of punitive damages, especially where such defendant's answer was that he had received no dividends since he sold out.

4. Appeal and error \S 1064(1)—Court's reference to fact that driver of jitney was without license held harmless.

In an action for injuries sustained in a collision with a jitney bus, the court's reference in the charge to the fact that the driver was without a license was harmless, where it was merely stating the allegations of the complaint, and the charge allowed no recovery on this account, but based plaintiff's right to recover solely on the negligence of the driver.

5. Highways \S 184(4)—Misstatement of statute held not misleading.

In an action for injuries sustained in an automobile collision, an instruction that the statute prohibited the operation of a motor vehicle on the highways recklessly, etc., and provided that certain rates of speed "shall be a violation of this section," was not misleading because of the omission of the word "deemed" after the words "shall be," as in the statute.

6. Appeal and error \S 215(2)—Judge's attention should have been called to misstatement of contentions.

If the judge in his charge in stating the contentions of the parties did not state them correctly, his attention should have been called to it at the proper time so that he could make the necessary correction.

7. Master and servant \S 304—Owners of jitney bus liable for driver's negligence.

The owners of a jitney bus are liable for an injury caused by the driver acting within the scope of his employment.

Appeal from Superior Court, Randolph County; Shaw, Judge.

Action by Minnie Jordan and husband against the Interurban Motor Lines, Incorporated, and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

The witness Kirkman testified that he owned the jitney line, or practically all of it, before the accident, and that since the accident he had sold a one-half interest therein. He was then asked what dividends had been declared "since then," and answered that he had not received any dividend, since he sold out.

The court charged, in part, as follows:

The plaintiff alleges that the Interurban Motor Lines Company operated a jitney between High Point and Greensboro, and that the driver of the jitney was the agent of the Interurban Motor Line Company, and that he was operating without license; and under the ordinances of the city of High Point he was required to have a license before he was permitted to drive ——. It was admitted that the defendant, the Interurban Motor Line, Inc., is the owner of the jitney, which is a corporation that was operating a line of jitneys between High Point and Greensboro, and that Earle Murphy was the driver of the jitney on the occasion in question. The law is that the principal is liable for the negligence of its agents, when they neglect their duties, and it is admitted that on the occasion in question Earle Murphy was driving the jitney when it collided with the Ford car, and it is further admitted that he was driving as the agent of the defendant, and therefore, if the plaintiff has shown by the greater weight of the testimony that Earle Murphy was negligent, then the court instructs you that his negligence was the negligence of the motor line.

(To the foregoing charge the defendant excepted.)

The statute provides that, in the first place, no person shall operate a motor vehicle upon the public highways of this state recklessly or at a greater rate of speed than is reasonable and proper, having regard to the width, traffic, and use of the highway, or so as to endanger the property or the life or limb of any person; provided, that a rate of speed in excess of 18 miles per hour in the resident portion of any city, town, or village, and a rate of speed in excess of 10 miles per hour in the business portion of any city, town, or village, and a rate of speed in excess of 25 miles per hour on any public highway outside of the corporate limits of any incorporated city or town, shall be a violation of this section.

This statute does not permit a man to run 25 miles per hour outside of the city except under certain conditions, neither does it authorize him to run at the rate of 18 miles per hour in the resident portion of the city, or 10

miles per hour in the business portion of the city, except under certain conditions. The rate of speed must at all times be reasonable and proper, with due regard for the width, traffic, and use of the highway, and must not be such as to endanger the property, life, or limb of any person. If any person operates a motor vehicle upon the public highways of the city recklessly, it does not make any difference whether he is running five or 25 miles per hour or more; it is a violation of this act.

(To the foregoing part of the charge the defendant excepts.)

It is further contended by the plaintiff that the driver of this jitney was required, under the ordinances of the city of High Point, to have a license, and that he did not have a license, and it is admitted by the said Earle Murphy that he did not have any license. The court instructs you that it was the duty of Earle Murphy to use the same care a person of ordinary prudence would have exercised under the circumstances. If you should find that the plaintiff was injured as alleged and that Murphy was negligent as alleged, and that said negligence was the proximate cause of plaintiff's injury, you will answer the first issue yes.

(To the foregoing charge the defendant excepted.)

This is a civil action brought to recover damages for personal injuries of the feme plaintiff, alleged to have been caused by a collision of her automobile and that of the defendants, which was driven by Earle Murphy, commonly known as Clyde Murphy; the collision being due to the negligence of the said Murphy in driving the defendants' automobile on the road from High Point to Greensboro. As Murphy, who was driving what is known as a jitney bus, was attempting to pass a Buick automobile, which was standing on the right-hand side of the road, he met the car in which the feme plaintiff was riding, and the two cars collided and threw the plaintiff into the windshield of her car and thence upon the ground several feet away, causing her serious and painful injury; that the plaintiff's car gave the driver of the jitney bus sufficient space to pass the two other cars in safety, but by careless and even reckless management of Murphy's car, by him, the accident occurred.

J. A. Spence, of Ashboro, for appellants.

Walter Royal, of High Point, and Hammer & Moser, of Ashboro, for appellees.

WALKER, J. (after stating the facts as above). First. There was evidence tending to sustain the cause of action, as alleged in the complaint.

[1] The first objection of the defendant is that the court permitted Dr. Jackson, an expert witness, to testify as to the condition of two of the feme plaintiff's ribs, which he said had been concaved by the blow she received in the accident. The feme plaintiff testified that she was sore on that side of her body, and, upon examination, the

doctor discovered that the ribs were in a concaved condition. The defendant complains that the plaintiff had not first proven that this condition was caused by the accident; but there was ample evidence of this fact, and the testimony of the doctor was therefore competent to show what her physical condition was. There is no merit in this exception.

[2] Second. The defendant cross-examined the husband of the feme plaintiff, who was her witness, and he testified that his wife had fainted once before, and, in order to show what was the cause of her fainting, on redirect examination, the witness was permitted to state the circumstances under which she had the "fainting spell," and we do not see why this was not competent, as the evidence on cross-examination was offered to show that her health had previously been in a frail condition before she received the injuries and the redirect testimony was in explanation of it. *State v. Orrell*, 75 N. C. 317; 2 *Elliott on Evidence*, p. 195; *Smith v. Ry. Co.*, 147 N. C. 603, 61 S. E. 575; *State v. Allen*, 107 N. C. 805, 11 S. E. 1018.

[3] Third. The testimony of Mr. Kirkman, one of the defendants and the owner of the bus, as to the dividends received from his business, was not sufficiently harmful to be noticed, if it was at all prejudicial. The judge absolutely stated what plaintiff must show in order to recover any damages and then what special damages she could recover, and the jury were restricted in this way and were not allowed to use the question addressed to Mr. Kirkman as to the profits of his business. There was evidence of recklessness of the driver, and perhaps of wantonness; but his honor did not permit a recovery of punitive or exemplary damages, and, even if the court erred in permitting Mr. Kirkman to refer to the dividends of the business, it was surely harmless in view of the strict charge of the judge. But a conclusive answer to this objection is that Mr. Kirkman stated that he had received no dividends since he sold out, and that was in direct response to the question as it was formulated by defendants' counsel, so that there was really no evidence upon the question one way or another, and in this respect it was perfectly harmless.

[4] Fourth. The reference by the court to the fact that Earle (or Clyde) Murphy was driving the jitney without license from the city of High Point was manifestly innocuous, because the plaintiffs were not allowed, under his honor's charge, to recover anything on that account, or for that reason, but another, and more decisive answer to the objection is that the judge was merely stating the allegations of the complaint, or the contentions of the plaintiffs, and in his charge upon the law he gave no heed to this allegation, but based the right of plaintiffs to recover solely upon the negligence of the

driver of the jitney bus, and stated the law correctly in this respect, and the jury could not have acted upon any other ground without disregarding the instructions of the court, and this is not to be presumed.

We recently considered the statute in regard to the speed of automobiles on the public highways of the state and on the streets of cities and towns, in the case of *State v. Mills*, 181 N. C. 530, 106 S. E. 677, and the court charged the jury in this case according to the principles therein stated.

[5] Fifth. The exception in regard to the substitution of the words "deemed a violation of the statute" for the words "shall be a violation of this section" is without any substantial merit. The jury could not possibly have been misled by the judge's discussion of the statute and his statement of what would be considered as negligence if the requirements of the statute were not observed. There certainly was nothing prejudicial in this part of the charge.

The other exceptions are formal, and need not be considered, except one of them.

If the plaintiffs' evidence in this case should be accepted as true, which was a question for the jury, there was negligence on the part of the driver of the jitney bus, as the plaintiff gave him sufficient space within which he could safely pass, by the exercise of ordinary care, both the other automobiles; that is, the Buick automobile, which was standing on one side of the road, and the plaintiff's automobile, which had been placed out of his way on the other side, and even off the paved portion of the road.

[6] The sixth assignment of error was taken to the part of the charge of the court in which the judge was stating the contentions of the parties, and, if he did not state them correctly, his attention should have been called to it at the proper time, so that he could make the necessary correction. *McMahan v. Spruce Co.*, 180 N. C. 636, 105 S. E. 439; *Spears v. Power Co.*, 181 N. C. 447, 107 S. E. 442.

[7] The driver of the jitney bus was the agent of the defendants, and they were liable, as principal, for what he did which caused the injury to the plaintiff, under the familiar maxim that what one does by another he does by himself, which is but one way of stating the rule that the principal is liable for the acts of his agent if committed within the scope of his authority and when he is about his principal's business. *Jackson v. Tele. Co.*, 139 N. C. 353, 51 S. E. 1015, 70 L. R. A. 738; *Fleming v. Knitting Mills*, 161 N. C. 439, 77 S. E. 309; and *Rivenbark v. Hines*, 180 N. C. 242, 104 S. E. 524.

Upon review of the whole case, we are satisfied that no error has been committed, and we therefore affirm the judgment.

No error.

(182 N. C. 553)

GROVES et al. v. WARE et al. (No. 451.)

(Supreme Court of North Carolina. Nov. 30, 1921.)

1. Insane persons \S 95—Lack of personal service of summons held mere irregularity to be corrected by motion.

The requirement of C. S. \S 451, that a defendant who is non compos mentis defend by his general or testamentary guardian and, if he have none, that he be served with summons, whereupon the court may appoint a guardian ad litem to defend in his behalf, should be strictly observed; but, a guardian ad litem having been appointed, accepted service, and presumably performed his statutory duties, a failure to serve summons on such defendant personally is only an irregularity to be corrected, if at all, by motion.

2. Insane persons \S 100—Judgment not set aside merely because of lack of personal service of summons.

A judgment against an insane person, who was defended by a guardian ad litem will not be set aside for failure to serve summons on him personally.

3. Insane persons \S 2—Certificate of superintendent of private sanatorium insufficient to authorize appointment of guardian.

Under C. S. \S 2286, declaring the certificate of the superintendent of a governmental asylum for insane sufficient evidence to authorize the clerk of the superior court to appoint a guardian, a certificate of the superintendent of a private sanatorium for the insane did not authorize such appointment.

4. Constitutional law \S 313—Act authorizing restoration to sanity on inquiry by jury of six held not in violation of due process clause.

C. S. \S 2287, authorizing the restoration of an insane person to sound mind and memory, with power to make contracts and sell his property, on inquiry by a jury of six, is not unconstitutional as depriving a person of his property without due process of law; such prohibition not necessarily implying that all trials shall be by a jury of 12.

5. Jury \S 32(2)—Statute providing for sanity inquiry by jury of six held not unconstitutional.

C. S. \S 2287, authorizing an inquiry into the sanity of an insane person by a jury of six, and providing that if the jury find him to be sane he may make contracts and sell his property, is not in violation of Const. art. 1, \S 19, guaranteeing the right to trial by a jury of 12, for such right applies only to cases in which the prerogative existed at common law or was procured by statute when the Constitution was adopted, and not to those where the right and remedy are thereafter created by statute.

Appeal from Superior Court, Gaston County; Shaw, Judge.

Action by H. H. Groves and others against J. White Ware and others. From a judgment

overruling defendants' demurrer to the complaint, defendants appeal. Affirmed.

The following is a concise statement of the plaintiffs' allegations: L. F. Groves died leaving a last will and testament, in which he named as devisees his widow, Sarah E. Groves, and his sons, H. H. Groves, L. C. Groves, E. E. Groves, and Forest M. Groves. H. H. Groves and L. C. Groves duly qualified as administrators with the will annexed of the estate of said L. F. Groves, and thereafter entered upon the discharge of their duties as such administrators. Forest M. Groves had been, and at that time was, confined in the Westbrook Sanatorium in or near the city of Richmond, in the state of Virginia, which is a private sanatorium for the treatment of insane persons and others suffering from nervous and mental disorder. After said administrators had qualified, Dr. James K. Hall, who was in charge of said sanatorium, certified that Forest M. Groves was of insane mind and memory, not capable of managing his financial affairs, and that the said Groves was confined in said sanatorium. Thereafter application was made to the clerk of the superior court of Gaston for the appointment of a guardian for Forest M. Groves, on the ground that said Groves was insane, and the clerk, after notice to said Groves, issued letters of guardianship to E. E. Groves, who took the required oath and qualified as the guardian of said Forest M. Groves. After said E. E. Groves had been appointed guardian, a special proceeding was instituted before the clerk by Sarah E. Groves, widow, against H. H. Groves, L. C. Groves, E. E. Groves, and E. E. Groves, as guardian of Forest M. Groves, for the allotment of the widow's dower in the real estate of her deceased husband, and upon report of the jury allotting dower, said report was confirmed by said clerk. Subsequent thereto an ex parte proceeding was instituted by H. H. Groves, L. C. Groves, E. E. Groves, and Forest M. Groves, by his guardian, for the partition of the real estate claimed by said devisees as tenants in common, and upon the report of commissioners appointed for the purpose of making such partition, a decree was entered by said clerk confirming the report of said commissioners, and the land was accordingly partitioned among said tenants. After this partition was made, H. H. Groves and his wife conveyed the land or a part of the land allotted to H. H. Groves to the defendants J. White Ware, J. E. Simpson, and J. A. Estridge, at the purchase price of \$26,000, which was secured by a deed of trust. J. E. Simpson paid as a part of the purchase price \$8,666.67, and the defendants Ware and Estridge refused to complete their payments on the ground that said land had not been legally partitioned, in that E. E. Groves had

not been legally appointed guardian for said Forest M. Groves, and that Forest M. Groves had not been personally served with summons. A petition was filed by E. E. Groves for the purpose of having said Forest M. Groves declared sane, and afterward a jury was summoned to inquire into the sanity of said Forest M. Groves, who after investigation, made report that Forest M. Groves was no longer insane, but was of sound mind and memory, and capable of managing his own affairs. Thereafter on the 8th day of April, 1921, the clerk of the superior court made an order confirming the report of said jury. After this order of the clerk had been made, Forest M. Groves tendered to Sarah E. Groves a quitclaim deed for all his right, title, and interest in and to the land allotted her as dower, reserving his rights as remainderman in the same, and tendered also a quitclaim deed to the defendants Ware, Simpson, and Estridge for the lands conveyed to them by H. H. Groves and wife, and in addition a quitclaim deed to L. C. Groves and E. E. Groves for the land allotted to them. The widow and the tenants in common have tendered quitclaim deeds to each other, mutually releasing to each other the interest which each tenant had in the land allotted to the other tenants. H. H. Groves indorsed to the Groves Mill Company, Inc., of Gastonia, the note executed as evidence of the purchase price of the land sold by him to the defendants Ware, Estridge, and Simpson.

The defendants filed a formal demurrer to the complaint, which is as follows:

"The defendants demur to the complaint herein on the grounds that the same does not state a cause of action, particularly in that the said Forest M. Groves was not legally served with summons nor legally brought into court, and that the proceedings for his restoration to a normal and mental condition are not legal, and that the said H. H. Groves and wife cannot deliver to the defendants Ware, Estridge, and Simpson a good, legal, and indefeasible title to the lands which were conveyed by the said H. H. Groves and wife to the said Ware, Estridge, and Simpson, and that the said H. H. Groves has no legal right to collect the purchase money therefor."

Judge Thomas J. Shaw heard the argument at chambers in the city of Charlotte on November 7, 1921, and rendered judgment overruling the demurrer. The defendants excepted and appealed to the Supreme Court.

J. W. Timberlake, of Gastonia, for appellants Ware, Estridge, and Simpson.

Mangum & Denny, of Gastonia, for appellee. Clarence M. Austin, of Gastonia, for Forest M. Groves.

ADAMS, J. The legal propositions upon which the demurrer is based are these: (1)

Forest M. Groves was not personally served with summons; (2) the pretended appointment of his guardian is void; (3) C. S. § 2287, is unconstitutional. We shall consider the propositions seriatim.

[1] Section 451 of Consolidated Statutes provides that if any defendant in an action or special proceeding is non compos mentis, he must defend by his general or testamentary guardian, and if he shall have no general or testamentary guardian, and shall have been served with summons, the court may appoint a guardian ad litem to defend in his behalf. The requirement of the statute as to the service of a summons on a person who is non compos should be strictly observed; but the question here presented concerns the legal effect of a failure to make such service. The guardian ad litem accepted service and presumably performed his statutory duties. In *Matthews v. Joyce*, 85 N. C. 258, Chief Justice Smith said:

"While according to recent decisions jurisdiction over the person of infants is acquired only as in the other cases by the service of process on them, and then it is competent to appoint, in case there is no general guardian, a guardian ad litem, to act in their behalf and to protect their interests, so as to bind them by judicial action, a different practice has long and almost universally prevailed in this state, and this power of appointment has been generally exercised without the issue of process, for the reason that no practical benefit would result to the infant from such service on him, and the court always assumed to protect the interests of such party, and to this end committed them to the defense of this special guardian."

[2] Practically to the same effect is the language of Justice Hoke in *Rawls v. Henries*, 172 N. C. 218, 90 S. E. 140:

"The facts in evidence strongly tend to show that the proceedings were in all respects regular and that defendant's title has never been open to question; but were it otherwise, and by reason of the fact that summons was not personally served on the minor, our authorities are very uniformly to the effect that the interest of the minor having been presented and an answer having been filed by his general guardian or guardian ad litem, the failure to serve on the minor personally was only an irregularity, to be corrected, if at all, by motion in the cause. *Harris v. Bennett*, 160 N. C. 339; *Glisson v. Glisson*, 153 N. C. 185; *Rackley v. Roberts*, 147 N. C. 201; *Carraway v. Lassater*, 139 N. C. 145; *Carter v. Rountree*, 109 N. C. 29; *Matthews v. Joyce*, 85 N. C. 258. And these authorities are to the effect that, even when properly applied for, an irregular judgment is not to be set aside as a conclusion of law because of the irregularity, but only on a show of merits and when the complaining party has proceeded with proper diligence."

[3] It is insisted in the next place that the clerk's order appointing a guardian for Forest M. Groves is void, because the clerk had

no legal right to make such appointment upon the certificate of Dr. Hall. Consolidated Statutes, § 2286, is as follows:

"If any person is confined in any hospital for insane persons, in any state, territorial or governmental asylum or hospital, in this state or any other state or territory, or in the District of Columbia, the certificate of the superintendent of such hospital declaring such person to be of insane mind and memory, which certificate shall be sworn to and subscribed before the clerk of the superior court or any notary public, or the clerk of any court of record of the county in which such hospital is situated, and certified under the seal of court, shall be sufficient evidence to authorize the clerk to appoint a guardian for such idiot, lunatic, or insane person."

It was evidently intended by the General Assembly that the certificate of insanity should be received and accepted as evidence only when made by the superintendent of a hospital which is subject to state, territorial, or governmental control, and not when made by the manager or superintendent of a private institution, who occupies no public official position and is not directly subject to governmental supervision. The complaint alleges that Westbrook Sanatorium is a private institution, and for this reason we are of opinion that the certificate of Dr. Hall was not such as the statute contemplates, and did not authorize the clerk's appointment of the guardian.

[4] The complaint alleges, however, that Forest M. Groves was restored to sound mind and memory, and thereafter ratified the proceedings both for partition and for the allotment of the widow's dower. The demurrer admits this allegation. But the defendants contend that the alleged order of restoration to sanity was based upon a proceeding which is unconstitutional; that the jury was composed of six men, instead of twelve; and that Forest M. Groves was deprived of his property without due process of law. This contention presents the third ground of objection to the complaint.

C. S. § 2287, provides that when any insane person becomes of sound mind and memory, a petition in his behalf may be filed before the clerk of the superior court of the county of his residence setting forth the facts; whereupon a jury of six freeholders shall be summoned to inquire into the sanity of the person alleged to be sane, and if the jury shall find him to be sane such person may make contracts and sell his property.

The complaint alleges that the fact of Groves' restoration was inquired into and determined by a tribunal created under the provisions of this statute.

[5] It is not necessary to discuss the question at length. That a state cannot deprive a person of his property without due process of law does not necessarily imply that all

trials in the state courts shall be by a jury composed of twelve men. *Maxwell v. Dow*, 176 U. S. 603, 20 Sup. Ct. 448, 494, 44 L. Ed. 597; *Walker v. Sauvinet*, 92 U. S. 92, 23 L. Ed. 678. Nor is the contention of the defendants necessarily determined in their favor by article 1, § 19, of the Constitution of North Carolina. The right to a trial by jury which is provided in this section applies only to cases in which the prerogative existed at common law, or was procured by statute at the time the Constitution was adopted, and not to those where the right and the remedy with it are thereafter created by statute. 16 R. C. L. 194. In *Lindsay v. Lindsay*, 257 Ill. 328, 100 N. E. 982, 45 L. R. A. (N. S.) 916, Ann. Cas. 1914A, 222, the Supreme Court of Illinois in a discussion of the question presented here said:

"On the trial of the case before the county court, a jury of twelve men was demanded and was denied. The statute, as we have said, provided for trial by a jury of six. Upon this question the court said: 'The constitutional provision that "the right of trial by jury, as heretofore enjoyed, shall remain inviolate," does not apply. This is not a proceeding according to the course of the common law, in which the right of a trial by jury is guaranteed, but the proceeding is a statutory one, and the statute, too, enacted since the adoption of the Constitution. There was not, at the time of such adoption, the enjoyment of a jury trial in such a case. In reference to this subject, generally, Judge Cooley, in his work on Constitutional Limitations, p. 819, remarks: "But in those cases which formerly were not triable by jury, if the Legislature provide for such a trial now, they may doubtless create for the purpose a statutory tribunal composed of any number of persons, and no question of constitutional power or right could arise."'"

The proceeding under section 2287 was not according to the course of the common law, and the constitutional inhibitions do not apply. The judgment overruling the demurrer is affirmed.

Affirmed.

(182 N. C. 502)

LOWDERMILK v. BUTLER. (No. 416.)

(Supreme Court of North Carolina. Nov. 23, 1921.)

1. Corporations §619—Conveyance can be made in name of corporation by order of directors within three years after dissolution.

Under C. S. § 1198, continuing corporate existence for three years after termination or annulment of charter, and section 1194, making the directors the trustees to wind up the affairs of the corporation and prescribing their powers and duties, a valid conveyance of property belonging to the corporation can be made in the corporation's name by their order after its voluntary dissolution.

2. Corporations §619—Joinder as assignee of agent for dissolution does not affect conveyance by corporation.

The fact that the agent appointed for the dissolution of a corporation joined the corporation in a sale by it under the power contained in a mortgage, and the execution of a deed by order of the directors, on the theory that he was the assignee of the mortgage, does not invalidate the sale by the corporation.

3. Courts §93(1)—Rule of property recognized by several decisions should not be disregarded.

A rule of property established by numerous decisions covering a period of more than half a century, though it may not be absolutely binding on the courts, should not be lightly disregarded, and will be followed even though the question would be otherwise decided if it were being raised for the first time, unless circumstances are shown which indicate that greater harm will result from continuing to follow it than would result from changing it.

4. Courts §93(4)—Rule of stare decisis subject to exceptions.

The rule of stare decisis is not an inextinguishable one, but is subject to exception in the case of grave and palpable error widely affecting the administration of justice, where the opinion is in conflict with prior decisions and unsupported by reason or authority, or where it is not probable that property rights will be seriously affected.

5. Judgment §768(2)—Delay for more than a year in filing transcript of justices' judgment defeats lien.

A delay for more than one year after the judgment is rendered by a justice of the peace in filing the transcript thereof in the superior court defeats the lien of the judgment.

6. Mortgages §158—Mortgagee has interest in purchase-money mortgage with power of sale after assignment thereof.

A corporation holding a purchase-money mortgage with power of sale has an interest therein because of the power after assignment of the mortgage, so that such assignment does not defeat the priority of the mortgage over the lien of a judgment rendered before the property was conveyed to the mortgagor.

Appeal from Superior Court, Moore County; Ray, Judge.

Action by Kenneth F. Lowdermilk against Benjamin F. Butler to settle title to land. Judgment for the plaintiff, and defendant appeals. No error.

This is an action to settle the title to land, described in the pleadings, the plaintiff and defendant each claiming under the Piedmont Plantation Company, as the origin of title.

The Piedmont Plantation Company conveyed the land to A. Legler April 20, 1912, and on the same day A. Legler, to secure the purchase money, made a mortgage to it. The mortgage was recorded June 4, 1912, and the deed thereafter on August 27, 1912.

On May 28, 1913, the Piedmont Plantation Company and R. W. Pempelly (who claimed in the deed to be the assignee of the mortgage), after sale under the power contained in the mortgage, conveyed the land to the plaintiff by deed, which is copied in the record.

To establish title in himself, and disprove title in plaintiff, the defendant relied on the following records and deeds introduced in evidence by him:

(1) A judgment in favor of C. S. Fry and against Alexander Legler, rendered before a justice of the peace on September 25, 1909, and docketed in the superior court of Moore county on July 21, 1911, on a transcript of said judgment from the justice of the peace. The transcript itself was issued by the justice of the peace on the same date as the rendition of the judgment, and was docketed in the superior court more than 12 months from said date, but prior to the date of the original deed from Piedmont Plantation Company to Alexander Legler, and some time before the mortgage from Legler to Piedmont Plantation Company, upon which plaintiff relies to make out his title, was recorded.

(2) Deed from D. Al. Blue, sheriff of Moore county, to George H. Humber, dated August 21, 1913, and recorded August 23, 1913, in Book of Deeds No. 57, at page 244. This deed is set out in the record in full, from which it will appear that it was made pursuant to a sale of the land in controversy under an execution issued on the judgment of C. S. Fry against Alexander Legler aforesaid, at which sale George H. Humber became the purchaser.

(3) The evidence of M. M. Stutts, shown in the record, that Alexander Legler was a non-resident of the state during the year 1913, the date of the sale of the land by the sheriff of Moore county under the execution to George H. Humber.

(4) Several successive deeds, beginning with that of George H. Humber and wife, conveying ultimately such title as Humber received under the sheriff's deed to the defendant.

(5) The record of the dissolution of Piedmont Plantation Company, a corporation, as contained in Record Book of Incorporations No. 2, at page 32, in the office of the clerk of the superior court of Moore county. This record is fully set out in the case on appeal, from which it will appear that by voluntary proceedings as provided by law Piedmont Plantation Company was dissolved as a corporation by the Secretary of State, on the 5th day of July, 1912, prior to the execution of its deed to plaintiff, on which he relies for title, which is dated May 28, 1913.

The following is section 1194 of the Consolidated Statutes, relating to conveyances of property belonging to dissolved corporations:

"Directors to be Trustees; Powers and Duties.—On the dissolution in any manner of a corporation, unless otherwise directed by an order of the court, the directors are trustees thereof, with full power to settle the affairs, collect the outstanding debts, sell and convey the property, and, after paying its debts, divide any surplus money and other property among the stockholders. The trustees have power to meet and act under the by-laws of the corporation, and, under regulations to be made by a majority, to prescribe the terms and conditions of the sale of such property, and they may sell all or any part for cash, or partly on credit, or take mortgages or bonds for part of the purchase price for all or any part of the property. They have power to sue for and recover the said debts and property in the name of the corporation, and are suable in the same name for the debts owing by it, and are jointly and severally responsible for such debts only to the amount of property of the corporation which comes into their possession as trustees."

There was a verdict for the plaintiff, and from the judgment thereon the defendant appealed.

U. L. Spence, of Carthage, for appellant.
H. F. Seawell, of Carthage, for appellee.

WALKER, J. (after stating the facts as above). We will consider the questions raised by this appeal in the order of their statement in the assignments of error, briefs, and argument before us.

[1] First. The plaintiff attacks the last deed on the ground that on July 5, 1912, the Secretary of State certified to the clerk of the superior court of Moore county, that the Piedmont Plantation Company on that date had filed its consent in writing to the dissolution of the corporation, executed by the requisite number of stockholders, Raphael W. Pempelly being the agent therein named and in charge thereof, and that the corporation could not thereafter convey its property. This contention, as we think, is based upon a misconception of the statute. The corporation did not cease to exist at the date of the filing of the certificate of dissolution, as contended by appellant, but continued three years from that date as a body corporate, by express provision of Consol. Statutes, § 1193, which is that all corporations whose charters expire by their own limitation or are annulled by forfeiture or otherwise shall continue to be bodies corporate for three years after the time when they would have been dissolved, "for the purpose of prosecuting and defending actions by or against them, and of enabling them gradually to settle and close their concerns, to dispose of their property, and to divide their assets," etc. But the defendant relies upon the provisions of the next section (1194), which is above set out in our statement of the case. It appears therefrom that the "directors, as trustees, may sell and convey the corporate property

upon such terms as they may prescribe," but this does not exclude the idea that, in conveying the property, they may not do so in the name of the corporation in whom the legal title was originally vested. It may be conveyed in the name of the corporation by their order or direction, or perhaps they may convey it in their own names as directors and trustees. It appears in this record, and in the certificate of probate, as a fact judicially found by the clerk of the superior court, that the deed was made in the name of the corporation by order of the directors, who, under the statute, were the trustees. So that the statute was fully complied with.

[2] By reason of his appointment as agent in the dissolution proceedings of the corporation, it is probable that R. W. Pempelly concluded he was thereby made the assignee of the mortgage, and, out of abundance of caution, joined the corporation in the sale of the land and in the execution of the deed to the plaintiff. If he was not such assignee, his joining in the sale and in the execution of the deed were harmless acts.

Second. The defendant, through his counsel, further contends that on September 25, 1909, C. S. Frye recovered a judgment for \$26.89 against A. Legler before a justice of the peace of Moore county, which was filed and docketed in the superior court on July 21, 1911, more than a year after its rendition, and that execution issued on it from the superior court, and the land in controversy was levied on as the property of A. Legler and sold and conveyed by the sheriff to G. H. Humber, from whom, by mesne conveyances, the defendant claims title.

It is well to observe, in passing, that the judgment roll introduced in evidence by defendant shows that all of the executions issued to the sheriff on this judgment were returned by him without action, even down to May 6, 1913, and the clerk was still issuing executions thereon so late as April 1, 1921.

[3] In order to sustain the claim of title by the defendant under the sheriff's sale and deed, the appellant's counsel frankly admitted that it is necessary for this court to overrule several of its well-considered decisions heretofore rendered and to upset a doctrine which has existed and been recognized as a rule of property for well-nigh half a century. *Williams v. Williams*, 85 N. C. 383; *Woodard v. Paxton*, 101 N. C. 26, 7 S. E. 469; *Cowen v. Withrow*, 114 N. C. 558, 19 S. E. 645. No good reason has been advanced for such action on our part. What this court would decide if the question were *res nova* or presented now on its legal merits for the first time it is futile to declare, as we are satisfied that those cases should stand unmolested after such repeated adjudications, as it is to the interest of the state that there should at some time and somewhere be an

end of controversy. Some questions may fairly and justly be considered as closed by the former decisions of this court, and especially where rights of property are involved, and even those of contracts in some cases, in order that it may be known how to deal safely in our daily transactions. We should impart firmness and stableness to them, so that what we have declared to be the law in the past may not be easily assailed and overthrown in the future, thereby impairing public confidence in the integrity, permanency, and reliability of what we may decide to be the rule of reason and of conduct which is sanctioned by the law. This is essential that our judgments may acquire permanency and become trustworthy, and never subject to change, unless, after maturer consideration, we may be convinced that there is palpable error, and that it is better to retrace our steps and change our former decisions because of the greater benefit to be derived therefrom. But such instances are very rare, and, if possible, should be reduced to the minimum, as change in our opinions is far more apt to result in harm than in any indispensable benefit. "*Stare decisis, et non quieta movere*," the Latin phrase, which means to stand by decided cases and uphold precedents, by maintaining former adjudications, rather than unsettle those things which have been established, is one of the ancient maxims which has improved by its age, and is worthy of the greatest reverence and the fullest acceptance. It was said many years ago that a point which has often been adjudged should be permitted to rest in peace. *Spicer v. Spicer*, Cro. Jac. 527, 79 Eng. Reprint, 451; 1 Kent's Com. 477. The rule expresses the principle, in tangible form, upon which rests the authority and binding force of judicial decisions as precedents in subsequent litigations. When more mildly expressed, the rule means, in general, that when a point has been once settled by judicial decision, it forms a precedent for the guidance of the courts in similar cases. *The Madrid (C. C.)* 40 Fed. 677, 679.

[4] But it has been said that, where grave and palpable error, widely affecting the administration of justice, must either be solemnly sanctioned or repudiated, the maxim, "*Fiat justitia ruat coelum*," should apply, and not the rule of *stare decisis*. *Ellison v. Georgia, etc., R. Co.*, 87 Ga. 691, 13 S. E. 800. As a general rule, where a principle of law has become settled by a series of decisions, it is binding on the courts and should be followed. But it has been determined that a single decision is not necessarily binding. Again the maxim *stare decisis* is not imperative; and an opinion is not authority for what is not mentioned therein and what does not appear to have been suggested to the court from which the opinion emanates. A decision in conflict with prior decisions, and

not supported by reason or authority, will not be adhered to where it is not probable that property rights will be seriously affected and positive authority of a decision is co-extensive only with the facts upon which it is founded. 11 Cyc. 745, and notes; *Gage v. Parker*, 178 Ill. 455, 53 N. E. 317; *Larson v. Bank*, 86 Neb. 595, 92 N. W. 729. It has been well and wisely said that precedents are to be regarded as the great storehouse of experience, not always to be followed, but to be looked to as beacon lights in the progress of judicial investigation, which, although at times they be liable to conduct us to the paths of error, yet may be important aids in lighting our footsteps on the way to truth. *Leavitt v. Morrow*, 6 Ohio St. 71, 67 Am. Dec. 334.

After all has been repeated that has been or can be said pro or con upon this important question, we concur in the view taken by a court of the highest authority in another case that, whatever difference of opinion may have existed in this court originally in regard to these questions, or might now exist if they were open for reconsideration, it is sufficient to say that they are concluded by the former adjudications. The argument upon both sides was exhausted in the earlier cases. It could subserve no useful purpose again to examine the subject. *Parker v. W. L. Cotton, etc., Co.*, 2 Black (67 U. S.) 545, 17 L. Ed. 333.

It all comes to this, that former precedents should not be reversed except upon strong and imperious necessity. The federal Supreme Court and some courts in other jurisdictions have held that a decision is not an authority upon a question not considered by the court, though involved in a case decided. *Durousseau v. U. S.*, 6 Cranch, 307, 3 L. Ed. 232; *Buel v. Van Ness*, 8 Wheat. 312, 5 L. Ed. 624; *New v. Oklahoma*, 195 U. S. 252, 25 Sup. Ct. 68, 49 L. Ed. 182; *U. S. v. More*, 3 Cranch, 159, 2 L. Ed. 397; *Cross v. Burke*, 146 U. S. 82, 13 Sup. Ct. 22, 36 L. Ed. 896; *McCormick H. Mach. Co. v. Aultman Co.*, 169 U. S. 606, 18 Sup. Ct. 443, 42 L. Ed. 875; and other cases cited in notes to 2 Digest U. S. S. C. Reports (L. Ed.) p. 2327.

We admit that the rule which requires us to uphold former decisions upon the same subject is not an inexorable one, nor is it mandatory upon the court. *Hertz v. Woodman*, 218 U. S. 205, 30 Sup. Ct. 621, 54 L. Ed. 1001. There is some flexibility in it, and it has been said that it should not be employed to perpetrate error (15 Corpus Juris, p. 956, § 357), but the court will not listen readily, and surely not with favor, to appeals for reversals of former adjudications, where manifest error is not first shown. But there is none such shown here. With regard to this rule we have ourselves quite recently said that the people are supposed to have confidence in their highest court, at least to the

extent of ascribing to it the virtue of consistency and a desire to see that by no lack of stability in its decisions shall any citizen be jeopardized or prejudiced in his rights, because he has simply acted upon the supposition that what the court has so solemnly determined will again be its decision upon the same state of facts, or that, at least, if it does change its mind, his rights and interests will be thoroughly safeguarded. If courts proceeded upon any different theory in the decision of causes, the people would be left in a state of uncertainty as to what the law is, and could not adjust their business affairs to any fixed and settled principles which would, of course, produce most mischievous, if not disastrous, consequences. *Hill v. Railroad Co.*, 143 N. C. 581, 55 S. E. 854, 9 L. R. A. (N. S.) 606. See, also, *Mason v. Cotton Co.*, 148 N. C. 492, 62 S. E. 625, 18 L. R. A. (N. S.) 1221, 128 Am. St. Rep. 635, and *Williamson v. Rabon*, 177 N. C. 302, 98 S. E. 830. A great law-writer once said about this rule of the law that he did not wish to be understood to press too strongly the doctrine of stare decisis, when he recollected that there are more than 1,000 cases to be pointed out in the English and American books of reports which have been overruled, doubted, or limited in their application. It is probable that the records of many of the courts in this country are replete with hasty and crude decisions; and such cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuation of error. Even a series of decisions are not always conclusive evidence of what is law; and the revision of a decision very often resolves itself into a mere question of expediency, depending upon the consideration of the importance of certainty in the rule, and the extent of property to be affected by a change of it. Lord Mansfield frequently observed that the certainty of a rule was often of much more importance in mercantile cases than the reason for it, and that a settled rule ought to be observed for the sake of property; and yet, perhaps, no English judge ever made greater innovations and improvements in the law, or felt himself less embarrassed with the disposition of the elder cases, when they came in his way, to impede the operation of his enlightened and cultivated judgment. The law of England, he observed, would be an absurd science, were it founded upon precedents only. Precedents were to illustrate principles and to give them a fixed certainty. His successor, Lord Kenyon, was said to have acted like a Roman dictator appointed to recall and reinvigorate the ancient discipline. He controlled or overruled several very important decisions of Lord Mansfield as dangerous innovations and on the

(109 S. E.)

ground that they had departed from the precedents of former times, and disturbed the landmarks of property, and had unauthorizably superadded equity powers to a court of law. "It is my wish and my comfort," said that venerable judge, "to stand super antiquas vias. I cannot legislate, but by my industry I can discover what my predecessors have done, and I will tread in their footsteps." The English courts seem now to consider it to be their duty to adhere to the authority of adjudged cases when they have been so clearly and so often or so long established as to create a practical rule of property, notwithstanding they may feel the hardship or not perceive the reasonableness of the rule. There is great weight in the maxim of Lord Bacon that "*Optima est lex, quæ minimum relinquit arbitrio iudicis; optimus iudex, qui minimum sibi.*" The great difficulty as to cases consists in making an accurate application of the general principle contained in them to new cases presenting a change of circumstances. If the analogy be imperfect, the application may be erroneous. The expressions of every judge must also be taken with reference to the case on which he decided; we must look to the principle of the decision, and not to the manner in which the case is argued upon the bench; otherwise the law will be thrown into extreme confusion. The exercise of sound judgment is as necessary in the use as diligence and learning are requisite in the pursuit of adjudged cases. Considering the influence of manners upon law and the force of opinion, which is silently and almost insensibly controlling the course of business and the practice of the courts, it is impossible that the fabric of our jurisprudence should not exhibit deep traces of the progress of society, as well as of the footsteps of time. The ancient reporters are going very fast, not only out of use, but out of date, and almost out of recollection. The modern reports, and the latest of the modern are the most useful, because they contain the last, and, it is to be presumed, the most correct, exposition of the law, and the most judicious application of the abstract and eternal principles of right to the refinements of the science of the law as relating to property. They are likewise accompanied by illustrations best adapted to the inquisitive and cultivated reason of the present age. But the old reporters cannot be entirely neglected.

[5] Counsel for the defendant in this case very ably and zealously pressed upon us the necessity for overruling several decisions of this court of comparatively recent date (*Williams v. Williams*, 85 N. C. 383; *Woodard v. Paxton*, 101 N. C. 26, 7 S. E. 469; *Cowen v. Withrow*, 114 N. C. 558, 19 S. E. 645), on the ground that they were opposed to the mandate of a statute in regard to docketing justices' judgments and the lien acquired

thereby, but we do not think that this is the case, but, on the contrary, that they are not plainly inconsistent therewith, even though a contrary construction may have been permissible. If the reasoning of the court is not unanswerable, it is not palpably illogical or erroneous, and defendant has, therefore, not made out a case which will induce us to reconsider those decisions. *C. S. Fry* was dilatory in docketing his judgment against *Alexander Legler*, which was done more than one year after its rendition, and those cases clearly decide that this was too late and he acquired no lien thereby. We adhere without hesitation to the former precedents.

[6] It may not be absolutely important in this case to decide that question, as we are of opinion that, if the *Fry* judgment had been docketed within the time prescribed by the statute, the lien of the judgment could not prevail against the title of the plaintiff acquired by him under the deed to *Legler*, the mortgage back from him to the *Piedmont Plantation Company*, and the deed from them to the plaintiff. The fact, if it be so, that the debt secured by the mortgage had been assigned to *R. W. Pempelly* did not show that the plantation company had no further interest in the matter, because it held as mortgagee the legal title, which carried with it the power of sale, and it was necessary for the company to join with *Pempelly* in the sale under the power and in the deed to plaintiff, in order to a valid exercise of the power (*Williams v. Teachey*, 85 N. C. 402) and the conveyance of the legal and equitable title, though for the purposes of this action the company, having the legal title, could convey such an interest as would enable the plaintiff, its assignee, to recover in ejectment. *Wittkowski v. Watkins*, 84 N. C. 456, where Justice *Ruffin* said:

"The position taken for the plaintiffs in regard to the point of evidence raised on the trial cannot be questioned. They were so clearly entitled to recover the possession of the land in dispute upon the strength of their legal title as mortgagees, even if their sale to *Jones* and his reconveyance to them should be held to be invalid, as to make it perfectly useless to inquire into that matter. That may become of interest to the parties at some future day, but could not possibly affect the issues involved in the present action, and therefore was correctly excluded upon the ground of its immateriality."

Plaintiff contended that the title never rested in *Legler* for even a moment, as he conveyed back to the company, by way of mortgage, at the same time he received the legal title from it, under *Moring v. Dickerson*, 85 N. C. 406, and *Hinton v. Hicks*, 156 N. C. 24, 71 S. E. 1036, and therefore that the lien of the judgment, if it ever existed, did not attach to the land, and, while this may be so, it is not necessary that we should decide as to it, and we do not, as we have

held that defendant's judgment was never a lien, because not docketed within the time fixed by statute. Whether the fact that the mortgage of Legler back to the company was registered before the deed of the company to him would play any part in the solution of the matter we also leave undetermined and as an open question.

We conclude that in no view of the case should the judgment of the court below be disturbed by us.

No error.

(182 N. C. 861)

MANNING, Atty. Gen., v. RAMA RURAL COMMUNITY OF MECKLENBURG COUNTY. (No. 450.)

(Supreme Court of North Carolina. Nov. 30, 1921.)

1. Municipal corporations ⇨7—Incorporation of rural community embracing parts of several school districts held invalid.

Under C. S. §§ 7380, 7381, providing for the incorporation of rural communities when embracing one entire school district, a certificate of incorporation of a rural community composed of parts of three school districts was issued without warrant of law, especially in view of the stipulation in section 7380 requiring the county board of education to enlarge the boundaries on written request of a majority of the school committeemen or trustees "of said school district," thus showing the Legislature's intent that the territorial boundaries as designated should be considered of the substance and essential to a valid incorporation.

2. Municipal corporations ⇨18—Attorney General may sue to annul charter of fraudulently incorporated rural community.

Under C. S. § 1187, authorizing the Attorney General to sue to annul the charter of a corporation on the ground it was procured on a fraudulent suggestion or concealment of a material fact, he may sue to annul the charter of a rural community obtained on the false suggestion that it consisted of one entire school district, as required by sections 7380, 7381, and when in fact it was composed of parts of three, with knowledge of such facts by the petitioners for incorporation, though there was no corrupt purpose or intent to deceive.

3. Constitutional law ⇨56 — Courts may be given jurisdiction of Attorney General's action to annul charter of fraudulently incorporated rural community.

Since the Legislature, in the exercise of its power to create corporations and establish proper rules for their regulation and control, can confer on the courts jurisdiction to determine whether in a given instance their rules have been complied with, which is a judicial question, the court is not without jurisdiction of an action by the Attorney General, under C. S. § 1187, to annul the charter of an incorporated rural community, on the ground it was obtained on a fraudulent suggestion that it embraced one entire school district as required

by sections 7380, 7381, and concealment of the fact it included parts of several.

Appeal from Superior Court, Mecklenburg County; Ray, Judge.

Action by the State, on the relation of James S. Manning, Attorney General, against the Rama Rural Community of Mecklenburg County. From a judgment overruling its demurrer, defendant excepts and appeals. **Affirmed.**

The action is instituted by the state, on relation of the Attorney-General, to annul the charter of the Rama Rural Community on the grounds alleged in the complaint, that the requirements of the statute under which the charter purported to have been issued (Consolidated Statutes, § 7380) had not been complied with, and that on the facts presented the alleged charter was not authorized by said statute, the complaint, among others, containing allegations that the petitioners in their written application for the charter had made it appear that the proposed community embraced one entire school district, and had concealed from the Secretary of State the essential fact that it contained parts of three school districts in said county, each of which constituted a separate special school tax district in said county, the said statute providing that a charter of this kind in question may only be issued for territory embracing one entire school district.

Defendants demurred, and for the reasons chiefly (1) that the courts are without jurisdiction to question the acts of the Secretary of State in issuing the charter, or his findings of fact concerning the same; (2) that relator of plaintiff has no legal right to maintain the action; (3) that the complaint does not contain facts sufficient to justify the relief sought nor any other relief within the scope of the pleadings, etc.

Judgment overruling the demurrer, and defendant excepted and appealed.

T. L. Kirkpatrick, H. L. Taylor, Clarkson, Tallafarro & Clarkson, Thos. W. Alexander, and Jake F. Newell, all of Charlotte, for appellant.

John M. Robinson, Edgar W. Pharr and Pharr, Bell, & Sparrow, all of Charlotte, for appellee.

J. S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

HOKE, J. [1] Chapter 123 provides for incorporation of rural communities on petition of a majority of their registered voters, and when embracing "in area one entire school district." Section 7380, the first of the chapter, requires this allegation as a part of the petition, and section 7381 provides that the Secretary of State, to whom the petition shall be addressed, shall issue

the certificate of incorporation if the petition is in due form. It thus appears that this privilege is only conferred upon communities of the kind described, and it being admitted by the demurrer that the defendant, the community in question here, is composed not of one entire school district, but of parts of three different school districts. The petitioners have not brought themselves within the terms of the statute, and the certificate of incorporation has been issued without warrant of law. The position that only communities embracing in area "one entire school district" have the right of incorporation under the law finds full support, if any were needed, from a stipulation in section 7380 that—

"After any school district has been incorporated under the provisions of this article, the boundaries of such school district may be changed only in the manner prescribed by law for changing the lines of a special school tax district, except that the county board of education shall proceed to enlarge such boundaries in accordance with law upon the written request of a majority of the school committeemen or trustees of said school district and a written request of a majority of the board of directors of the incorporated rural community"

—thus again showing the intent of the Legislature that the territorial boundaries as designated should be considered of the substance and essential to a valid incorporation under the law, a principle of interpretation recognized and approved in an opinion of the court at the present term in *Woosely v. Commissioners of Davidson County*, 109 S. E. 368.

[2] It was chiefly insisted for the defendant that the demurrer should be sustained from lack of authority in the Attorney General, as relator, to institute and maintain the action. It was formerly held that the Attorney General, of his own motion without legislative sanction, could not bring an action to vacate a legislative charter. Under the present law, however, this authority has been provided for in certain designated instances appearing in Consolidated Statutes, § 1187. As appertaining to the question presented here, this power was given in terms as follows:

"An action may be brought by the Attorney General in the name of the state against a corporation for the purpose of annulling its charter upon the ground that it was procured upon a fraudulent suggestion, or concealment of a material fact, by the persons incorporated or by some of them, or with their knowledge or consent," etc.

Among the other allegations pertinent to the inquiry, the complaint in section VII contains the following:

"That the said purported certificate of incorporation of the defendant, Rama Rural Community of Mecklenburg county, a copy of which is attached hereto as Exhibit B, is absolutely

null and void, and the attempted incorporation of said community is of no effect for the reasons that:

"(a) The boundaries of the said Rama Rural Community of Mecklenburg county did not, at the time of the application for or issuance of said certificate, and does not now, embrace in area one entire school district, as provided by law, but, on the contrary, the said boundaries did, and still do, embrace parts of Progress school district, the Sardis school district, and the Oak Grove school district, as stated in paragraph 6 above, the same being three separate and distinct school districts of Mecklenburg county.

"(b) The said certificate of incorporation was procured upon the suggestion of a material fact by the persons purporting to be thus incorporated, or by some of them, or with their knowledge and consent, in that it was suggested to the Secretary of State, for the purpose of obtaining said certificate of incorporation, that the boundaries of said Rama Rural Community of Mecklenburg county embraced in area one entire school district, when as a matter of fact the said boundaries, to the knowledge of said incorporators, or some of them, embraced parts of three separate and distinct school districts of Mecklenburg county.

"(c) The said certificate of incorporation was procured upon the failure to disclose a material fact by the persons purporting to be incorporated, or by some of them, or with their knowledge and consent, in that the said certificate of incorporation was obtained by a failure to disclose to the Secretary of State the fact that the boundaries of the said Rama Rural Community of Mecklenburg county did not embrace in area one entire school district, but on the contrary embraced parts of three separate and distinct school districts.

"(d) By the express provisions of chapter 123 of the Consolidated Statutes, under which the said Rama Rural Community purports to have been incorporated, the people of a rural community can be incorporated only upon the condition that said community embraces in area one entire school district, and inasmuch as the purported incorporation of the defendant attempted to incorporate a community which embraced parts of three separate and distinct school districts of Mecklenburg county, the said attempted incorporation is utterly irregular, illegal, and null and void.

"(e) In obtaining said certificate of incorporation the signers thereof purported to be incorporating a school district, designated as Rama Rural Community school district, when as a matter of fact there was not and never has been such a school district in Mecklenburg county."

Upon these averments, admitted by the demurrer to be true, it appears that this charter has been obtained upon the false suggestion that the community consisted of one entire school district, and on concealment of the real conditions that in fact and truth it was composed of parts of three separate and distinct school districts of Mecklenburg county, and that these facts were known to the said petitioners or some of them.

It is not necessary that there should be a corrupt purpose or intent to deceive on the part of the petitioners, but a false statement as of an essential fact, or the withholding of essential facts with knowledge of their existence on the part of the petitioners, or some of them would, in our opinion, constitute a legal fraud within the purview of this statute and justify a maintenance of the action.

[3] The suggestion that the court is without jurisdiction to examine into and decide the question presented because the exclusive power over the subject is vested in the Legislature cannot be maintained. It is true that under our system of government the power to create corporations and to establish proper rules for these regulations and control is with the General Assembly (Clark on Corporations, pp. 33, 34), and it is also true that in the exercise of that power they can confer on the courts, and have done so in this instance, authority and jurisdiction to inquire and determine whether in a given instance their rules have been complied with, this last being distinctly and clearly a judicial question. In *Re Applicants for License*, pp. 1-6. There is no error in overruling the demurrer, and the judgment to that effect is affirmed.

(131 Va. 485)

BAYLOR v. HOOVER.

(Supreme Court of Appeals of Virginia. Nov. 17, 1921.)

1. Brokers \S 85(1)—In suit for commission, held not error to admit contract of husband and wife, and to show that it was the contract of the husband only, and accepted as such.

In an action by a real estate agent to recover a commission for procuring a purchaser who without authority signed his wife's name to the contract as joining with him therein, it was not error to permit plaintiff to introduce the contract in evidence, and to permit him to prove, as he contended, that it was the contract of the husband only, and accepted by defendant as such, though the latter had attempted in a prior suit to hold both parties as purchasers on a failure to comply therewith.

2. Estoppel \S 68(3)—Rights of real estate agent to collect commission from owner not prejudiced because he aided the owner in a suit on a contract of sale as a joint contract.

Where a real estate agent aided a landowner in a suit on a contract for the sale of land on the theory that the contract was a joint contract of the purchaser and his wife, he is not precluded in a subsequent suit against the owner for his commission, from offering the contract in evidence upon the theory that it was a contract of sale entered into by the husband only.

3. Brokers \S 86(1)—Evidence held to sustain verdict for broker suing for commission.

In an action for commission for sale of land, evidence held sufficient to sustain verdict for plaintiff.

4. Judgment \S 533—Statement of court in former action against husband and wife, as alleged purchasers, that a sale of land had not taken place, not controlling in an action by real estate agent against owner of land for commission.

Where the owner of land sued a purchaser and his wife on a contract of sale as codefendants, a statement of the court that a sale had never taken place does not control in an action by the real estate agent against the owner to recover his commission, on the theory that the contract of sale was entered into by the husband alone.

Error to Corporation Court of Staunton.

Action by J. Earl Hoover against G. Frank Baylor. In the first trial, judgment for plaintiff was reversed and remanded. From judgment for plaintiff at the second trial, defendant brings error. Affirmed.

Jos. A. Glasgow, of Staunton, for plaintiff in error.

S. D. Timberlake, Jr., of Staunton, for defendant in error.

SAUNDERS, J. This is a writ of error to a judgment of the corporation court of the city of Staunton. In the proceedings in the corporation court Hoover was plaintiff and Baylor defendant. The question for determination is whether, upon the law and facts in issue, Hoover, a real estate agent in Staunton, is entitled to recover commissions from Baylor under the terms of the following contract of authorization to sell Baylor's farm;

"I hereby authorize J. Earl Hoover to sell my property as listed above, until otherwise notified in writing. And if sold, I agree to pay said J. Earl Hoover a commission of 5 per cent. on the total amount of the sale. I reserve the right to sell myself, or give it to any other person to sell. G. Frank Baylor."

It appears, that after Baylor placed his farm in the hands of Hoover for sale, the latter became very active, and, after interviewing various parties, finally succeeded in interesting one Charles T. Carson. Hoover and Baylor give very different accounts of what followed in the negotiations between the parties, but this controversy was submitted to a jury, and they appear to have given credence to Hoover and his witnesses. According to the testimony for the plaintiff, after Hoover had interested Carson, he took him to see Baylor, and the three drove out to see the latter's farm. After a thorough examination of the place, Carson said that the farm was what he was looking for, and "he was willing to buy it, provided he could get such

terms as he would have to have." Thereupon he and Baylor talked the matter over, and came to a full and complete agreement upon the terms of sale. The parties returned to town, and an attorney of repute was employed to draw a contract. Mr. Baylor gave Mr. Kennedy, the attorney, the necessary data, and the contract was drawn up accordingly. This contract begins as follows:

"This contract of sale, made and entered into in triplicate the third day of January, 1916, by and between G. Frank Baylor, of Augusta county, Va., of the first part, and Charles T. Carson and Helen Carson, his wife, of West Virginia, parties of the second part, witnesseth: That for and in consideration of the consideration hereinafter named, the said party of the first part doth hereby sell unto the parties of the second part, and the parties of the second part do hereby purchase from the said party of the first part, that certain farm," etc.

In the body of the contract are various references to the parties of the second part. The contract was signed as follows:

"G. Frank Baylor. [Seal.]
 "Charles T. Carson. [Seal.]
 "Helen A. Carson,
 "Per C. T. Carson. [Seal.]"

Following the execution of this contract, Carson paid Baylor \$500. Carson returned to West Virginia to make his arrangements to take possession of the place which he had purchased. Later his wife visited the farm, and was very much dissatisfied with what she saw. Thereafter Carson refused to carry out the contract, or to accept a deed from the vendor. All efforts to induce compliance on his part having failed, Baylor brought an action for damages against Carson and wife for failure to carry out the contract. Under an instruction of the court, Mrs. Carson was relieved from liability, but Baylor recovered a judgment against the husband for \$1,500. This judgment proved unavailing, Carson having disposed of his real and personal property in anticipation of an adverse verdict. Upon the termination of the proceedings against Carson, Hoover called upon Baylor for the balance of his commissions, having received only \$50 on account of same. Baylor refused to pay this claim, alleging that Hoover had not effected a sale. Thereupon, Hoover sued Baylor and recovered a verdict for \$700, subject to a credit of \$50 as commissions for negotiating the sale of the farm in question. A writ of error was awarded to the judgment on this verdict, and the same was reversed for errors of law, and remanded for a new trial. On the second trial the jury returned a verdict for the plaintiff for \$550. The judgment on this verdict is under review in the instant case.

Baylor, the plaintiff in error, assigns several errors:

First and Second: The trial court erred in allowing the plaintiff and other witnesses

to testify in contravention of the contract of sale which indicated that Charles T. Carson and Helen, his wife, were joint purchasers of the Baylor farm. These witnesses were allowed to testify that Mrs. Carson was not a purchaser, and was never proposed as such, and that, while her name appeared in the contract as a joint purchaser with her husband, it was put there merely to indicate that when the deed was made, the same should be made to the said Carson and wife jointly.

Third: The court erred in overruling the motion to set aside the verdict on the ground that it was contrary to the law and the evidence, and for the admission of improper evidence.

The issue of fact submitted to the jury in the instant case under proper instructions was whether the plaintiff, as agent of Baylor, produced to the latter a purchaser ready, willing, and able to buy his farm on terms acceptable to him, and a valid contract was made between vendor and vendee.

The court instructed the jury by instruction No. 1 for the plaintiff as follows:

"The court instructs the jury that a real estate agent, in order to be entitled to his commissions, must procure and produce to the owner a purchaser who is ready, willing, and able to buy on terms authorized by the owner, or acceptable to him. When the real estate agent has done this, and the owner of the land has entered into a valid contract with such purchaser, the duty of the real estate agent is performed, and he is entitled to his commissions."

The evidence for the plaintiff appears to have satisfied the jury that such a purchaser had been produced by Hoover, and a valid contract had been entered into between said purchaser and Baylor. As a part of his evidence in his action for commissions, Hoover introduced the contract between Baylor and Carson. On the face of this contract Carson and wife were joint purchasers, but Mrs. Carson had successfully resisted the attempt to charge her with liability in the action of Baylor against Carson and wife, supra, on the ground that her husband had no authority, under seal or otherwise, to sign her name to the contract of sale of the Baylor farm, as a joint purchaser.

The contention of the plaintiff, Hoover, in his action against Baylor, was that C. T. Carson was the sole purchaser of the Baylor farm, and was offered to and accepted as such by Baylor; that the name of the wife was inserted by Kennedy, the draughtsman, at Carson's instance, not as a joint purchaser, but merely to indicate that the deed was to be made to him and his wife jointly; that her name was included in the contract under these circumstances, and for the purpose indicated, and that Baylor was present and heard what passed between Kennedy and Carson in the foregoing connection.

[1-3] When Hoover undertook to submit his testimony to show that the contract supra was a contract of sale of C. T. Carson only, and that it was intended and understood by Carson and Baylor that Carson alone was the purchaser of the Baylor farm, the defendant (Baylor) objected on the ground that this evidence was not competent; that a person could not claim under an instrument without confirming it—that is to say, he cannot at once accept and reject the same instrument. The principle of law advanced is sound and controlling in an appropriate case. But Hoover was not introducing the contract for its apparent, but for its real, meaning and effect. Prior to that time it had been judicially ascertained in a controversy between Baylor and Carson and wife that the instrument was a valid and binding contract as to the husband, although not operative as to the wife. It was the contention of Hoover that he had introduced Carson, and Carson only, to Baylor as a purchaser; that the terms of a sale had thereupon been agreed upon and reduced to written form, and that the paper introduced was Carson's contract, valid as to him, and accepted as such by Baylor. If Carson was the sole purchaser, if the contract contained the terms of sale agreed on between Carson and Baylor, and if it was binding on the former, it was immaterial that Mrs. Carson's name had, with his (Baylor's) acquiescence, been inserted in the instrument under a misconception. Hoover relied upon, and introduced the Carson contract as he understood it to be, and as he offered to prove it to be. He was not a party to that contract. It is not to the prejudice of Hoover's rights that in another action Baylor undertook to hold both Carson and wife under the writing, and induced Hoover to employ counsel in aid of that effort, and even paid a part of counsel's fee. Hoover did not offer the contract as a complete, valid contract, according to its apparent effect, claiming under one feature and repudiating or contradicting another, but offered it as the sole and exclusive contract of C. T. Carson according to its real meaning, purpose and effect. It is not considered that it was error in the trial court to allow the plaintiff (Hoover) to introduce this contract and to permit him to prove that it was C. T. Carson's contract, and as such in all respects valid and binding. The testimony of Hoover and Kennedy in contravention of the testimony for the defendant establishes the following material contentions of the plaintiff: That he secured Carson, and Carson only, as a buyer; that he took Carson to Baylor; that Baylor showed his entire farm to Carson; that they agreed upon the terms of sale; that the three went to Kennedy's office to have the same reduced to writing; that Baylor gave Kennedy all of the data

for drawing the contract; that Carson said that he wanted his wife's name inserted; that Kennedy thereupon asked him the following question: "Is your wife going to be one of the purchasers; if so, she must sign the contract"—that Carson replied, "No;" that Carson said that he wanted the deed to be made jointly to him and her; that Mrs. Carson's name was included in the contract under the foregoing circumstances, and, as Kennedy understood, as "a guide for drawing the deed, as Carson wanted it made;" that Baylor was present and heard what passed between Carson and Kennedy; that Carson's request to have his wife's name inserted, not as a purchaser, but as a guide, when the deed came to be made, "was an unusual request, and as such impressed itself upon Kennedy."

It appears by implication in the record that at the time of his contract of purchase Carson, who was a carpenter and contractor, had \$3,000 in bank, and was the owner in his own name of a farm in Augusta county, subsequently sold for a recited consideration of \$2,000, and that Mrs. Carson was assessed with no property, real and personal, in Augusta county. It further appears that Baylor now has his farm, the cash payment of \$500, less \$50 paid to Hoover, and a judgment for \$1,500 against Carson. This judgment may hereafter be enforced by proper proceedings against Carson's Augusta farm, which Mrs. Carson admits was sold to her son, "to get it out of the way." Mrs. C. T. Carson, who was introduced by the defendant, stated, among other things, that she had never authorized her husband by a power under seal to enter into a contract to buy the Baylor farm, or authorized or empowered him otherwise to buy said farm for her, and that she had nothing to do with the transaction.

The second assignment of error presents the same question of law raised by the first assignment. Hence, in overruling that assignment, as we do, substantial disposition is made of the second.

The third assignment of error is that the trial court erred in failing to sustain the motion to set aside the verdict on the ground that it was contrary to the law and the evidence, and for the admission of improper evidence. Having held that the evidence to which objection was made was properly received by the court, the motion to set aside the verdict on the ground of the admission of improper evidence must, of necessity, be overruled. The case was submitted to the jury under instructions that fully and correctly set out the law of the case appropriate to the respective contentions of the litigants, and the issues of fact were resolved by the jury in favor of the plaintiff.

[4] Conceding that credence should be given to the testimony for the plaintiff, that

testimony fully sustains the verdict of the jury. Plaintiff in error seems to think that the case of *Baylor v. Hoover*, 123 Va. 659, 97 S. E. 309, in which the judgment of the court in the first trial of this controversy was reversed, is in some way decisive of the instant case on the merits of the controversy of fact. The paragraph relied on and cited by plaintiff in error from the opinion in said case is as follows (Whittle, J., delivering the opinion):

"Defendant [i. e., Baylor] listed his farm for sale with plaintiff at a named price, 'and, if sold,' agreed to pay him a commission of 5 per cent. 'on the total amount of the sale.' In point of fact the farm was never sold, though the evidence shows defendant did all in his power to consummate the sale that plaintiff under took to negotiate."

The trial court was reversed, in the case, *supra*, on two grounds:

First: On the ground that a peremptory instruction was granted by the court on request of the plaintiff, directing a verdict for the plaintiff on the basis of the latter's evidence. This action of the court was held to be fundamentally erroneous, in that the instruction given ignored defendant's theory of the case, and omitted all evidence tending to sustain it, such action being in contravention of the settled doctrine that an instruction which in substance directs a verdict must cover every phase of the case.

Second: On the ground that, as the evidence presented conflicting theories of the case, each party was entitled to instructions submitting his theory to the jury. In addition to reversal the case was remanded for a new trial, "leaving the parties free at the next trial to request such instructions as they may be advised are proper in the case as then presented."

The statement cited from the opinion, to wit, that "in point of fact the farm was never sold, though the evidence shows defendant [i. e., Baylor] did all in his power to consummate the sale that plaintiff undertook to negotiate," is not considered to be controlling in the instant case as a determination of fact.

Baylor endeavored to hold Mr. and Mrs. Carson as joint purchasers, but it was his, not Hoover's, contention that he (Hoover) had undertaken to negotiate a joint sale. The opinion refers to two theories of the case, and reversed the trial court on the ground that it ignored one of them. The plaintiff's theory was that he had furnished a single buyer, C. T. Carson, who had been accepted by Baylor, and had entered into a valid, binding contract. The theory of the defendant was that the plaintiff had produced joint purchasers, Mr. and Mrs. Carson,

and that no valid, binding contract had been made with them. If the opinion *supra* referred to a joint sale, when it said the "farm was never sold, though * * * defendant did all in his power to consummate the sale," the reference was correct, since a jury had ascertained, in the case of *Baylor v. Carson and Wife*, that the latter were not joint purchasers.

It would hardly seem that the opinion referred to the sale to C. T. Carson, relied upon by the plaintiff, when it made the statement that "the farm was never sold." The sale to Carson was the sale that the plaintiff insisted had been made. His right to recover commissions was based upon the establishment of that sale. Plaintiff's evidence on the first trial that he had produced Carson, and Carson only, as a purchaser, and that a contract had been agreed upon between the latter and Baylor, was apparently so convincing, and the evidence supporting a contrary view so negligible, that the trial court gave an instruction ignoring the defendant's theory. It was on this account that the trial court was reversed and the case remanded, in order that the opposing theories might be presented to the jury under adequate instructions.

In view of the fact that the case was remanded to be tried on the merits, it seems in the highest degree unlikely that the court, in a statement not necessary to have been made, should have undertaken to decide the case against the plaintiff on the very question of fact directed to be submitted to the jury under instructions that would properly present the opposing theories of the litigants. If the Baylor farm "was never sold" to Carson, it followed as a matter of course that Hoover would not be entitled to commissions. His claim to commissions rested on that sale. Briefly put, no sale, no commissions. If the case of *Baylor v. Hoover* is an adverse adjudication of Hoover's contention that a sale had been made to Carson alone, then there was really nothing to be tried when the case was remanded. The very crux of Hoover's case was that such a sale had been effected. A decision contrary to that contention was conclusive of his case. We do not regard this case as intending to afford a prejudgment of the facts in issue in the case in judgment, or as intending to take from the jury the right to determine whether the Baylor farm was sold to C. T. Carson, and a valid written contract of sale effected between the parties, thereby entitling the agent to his commissions.

On the whole, we are of opinion that the instant case was properly tried, and that there are no errors in the record. The action of the trial court will be affirmed.

Affirmed.

(131 Va. 726)

HART v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Nov. 17, 1921.)

1. Criminal law §564(4) — Commonwealth held to have proved venue.

In a prosecution for rape, where it was testified that the scene of the crime was on a road between the home of the prosecutrix, less than a half mile west of the city, and the limits of the city of Staunton, *held*, that venue was proved.

2. Criminal law §304(6)—Judicial notice taken of location of city within county.

The court will take judicial notice that the city of Staunton is located within the county of Augusta, and is so located therein that the county surrounds and extends to a distance of over 15 miles to the west of the corporate limits.

3. Criminal law §304(5)—Judicial notice taken of distances on map.

Courts will take judicial notice of distances as calculated by a map.

4. Criminal law §1213—Death for attempted rape not cruel or unusual punishment.

Punishment of death for the crime of attempt to commit rape was not contrary to the Fourteenth Amendment to the federal Constitution or Const. Va. 1776, § 9, which forbids cruel and unusual punishments, such punishment being within the limits prescribed by Code 1919, § 4767.

5. Criminal law §1213 — Statute permitting jury to punish attempt to rape by death not invalid.

Code 1919, § 4767, is not unconstitutional because it authorizes cruel and unusual punishment, in that it empowers juries, in their discretion, to impose the punishment of death for an attempt to commit rape, under Const. Va. 1776, § 9.

6. Criminal law §1213—What constitutes "cruel and unusual punishment."

Under Const. § 9, prohibiting cruel and unusual punishments, only such punishments were prohibited as were regarded as cruel and unusual when such provision of the Constitution was adopted in 1776, namely, such bodily punishments as involve torture or lingering death, such as are inhumane and barbarous, as, for example, punishment by the rack, by drawing and quartering, leaving the body hung in chains, or on the gibbet, exposed to public view, and the like.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Cruel and Unusual Punishment.]

7. Criminal law §1213 — Electrocution not "cruel or unusual mode of punishment."

The punishment of death by electrocution is not a "cruel or unusual mode of punishment," under the Eighth Amendment to the federal Constitution, and Const. Va. 1776, § 9.

8. Criminal law §304(2) — Common knowledge that attempted rape is as heinous as consummated offense.

It is a matter of common knowledge that the crime of attempted rape is well-nigh, if not altogether, as heinous as the consummated offense of rape, and that public indignation is as much aroused by the one offense as the other, where the full accomplishment of the criminal purpose is thwarted only by some extraneous circumstance, and that, unless there is a prompt conviction and a severe penalty imposed, a lynching is liable to result.

9. Criminal law §577 — Accused held given reasonable opportunity to employ counsel.

In prosecution for rape, where no motion was made for a continuance of the case, and there was a hung jury on a first trial, *held* that accused was given reasonable opportunity to employ counsel and prepare for trial, the same counsel representing accused on both trials.

10. Rape §53(1)—Verdict for attempted rape held not contrary to evidence.

In prosecution for rape, a verdict of guilt of attempted rape *held* not contrary to the evidence.

Error to Circuit Court, Augusta County.

Henry Hart was convicted of an attempt to rape, and brings error. *Affirmed*.

In this case the accused was indicted in Augusta county on December 9, 1920, upon the charge of rape committed in that county upon the person of the prosecutrix, who was of the age of about 17 years. On the same day there was a trial by jury in said county, the accused being represented by counsel assigned by the court. The jury not having reached an agreement upon a verdict, the case was continued over to the next day, December 10th. On that day, it being found that the jury could not agree upon a verdict, by the consent of the accused and of the attorney for the commonwealth, and with the assent of the court, one of the jurors was withdrawn, the other members of the jury were discharged, and a new trial was ordered. Thereupon, on the same day, other persons qualified to serve as jurors were ordered to be ascertained and summoned according to law to attend the court the next morning at 10 o'clock, from whom a jury might be selected for the trial of the accused. On the next day, December 11th, the accused, being represented by the same counsel, was tried in said county before a jury duly constituted. That trial resulted in the verdict mentioned below.

The facts proven on the trial last mentioned are certified, and such facts and all of the proceedings in court on such trial appear in the record before us as follows:

"Certificate of Facts.

"Virginia Garber, at the time of the assault on her made by the defendant, Harry Hart, was

about 17 years old. She was rather small for her age, and is a simple, good, unsophisticated country girl, who lives with her mother about half a mile west from the corporate limits of the city of Staunton on what is known as the Buttermilk Spring road. At the time of the assault, which was on the 8th of December, 1920, she was working and had worked for some time at a laundry in Staunton, and was accustomed to go to her work about 6 o'clock in the morning, and on the morning of the assault left at her accustomed hour, by her accustomed way, to go to work. Six o'clock at that season of the year is in the early dawn of the day—about daybreak; the sun rises at 7:15. Harry Hart, her assailant, is a full-grown negro man, aged 21 years, married, and lived with his wife and child in the same neighborhood in which Miss Garber lived, and was familiar with her customs and habits to the extent that he knew that she was in the habit of going along this road at this time to her work. The point in the road at which she was assaulted was a secluded one, shut off from the front by a sharp bend in the road, with a high bank on the left-hand side thereof coming to Staunton. Hart, on leaving home, took with him an old overskirt belonging to his wife, which he said was to be used by him to wipe up with at the infirmary at the Staunton Military Academy, where he worked, there having been a case of scarlet fever there, and slipped up behind Miss Garber and threw it over her head, and at the same time put his hand over her mouth to prevent any outcry. She struggled to the extent of her ability, and freed herself sufficiently to cry out once for help, and sufficiently loud for her sister, who was on her home porch somewhere about 300 yards off, to hear her. She continued to struggle to escape from him to the best of her ability and until she was about exhausted. The soft ground over which they struggled showed that this struggle had been long and serious. While the struggle was going on, two young white men, Cressman and Southards, traveling westward on this road, walking, came suddenly around the sharp bend in it, and saw this negro man and a woman struggling in the road. They recognized the fact that the man was a negro, but the light was dim at that hour and they did not recognize that the woman was a white woman. They saw that he had something over her face, either a cloth of some sort or his hand. These men thought that this was a negro having some difficulty with his wife or woman, and it was not their part to interfere, and they did not interfere.

"Miss Garber attempted to call out to them as they passed her in the road, within a few feet of her, but her voice was so muffled that she was unable to make herself heard, but these men after they had gone a short distance along this road past the scene of the struggle stopped about 20 or 30 feet from the accused and the woman. Hart looked back over his shoulder and saw that they had stopped and were observing him. He thereupon turned the girl loose. She saw the two white men, but did not then call to them, except when they were passing her as aforesaid, but started to walk to the nearest house in that section that was lighted and showing any signs of life, 414 yards away, went to it and called when she arrived, and, to throw off suspicion on the part of Hart, said that she had a letter for its owner, a Mrs.

Smith. When she got into the house, she immediately told of the assault, remained there until it was light enough to return to her home, when she related to her mother her experience. Her mother, in the shortest possible time, laid the facts before the police of Staunton. After Hart had turned her loose and after she had started for this house, he followed, they talking together as they went, and he said he would walk a little distance behind in order that anybody who saw them might not "think anything." Hart threw the overskirt in a ditch by the roadside a short distance from the point of the assault, and said that his reason for so doing was that he was frightened at what he had done.

"During the attack and towards the close of it, about the time that Cressman and Southards stopped, Hart took his hand from Miss Garber's mouth, but told her not to make any outcry. She then said to him that she was a good Christian girl, and wanted to continue to be one, to which he replied that she was the first Christian girl he had ever seen, and he would not harm her if she was a Christian girl; but he did not turn her loose, as has been stated before, until he saw that Cressman and Southards, who had passed him, had stopped in the road and were looking back to see what was going on.

"After the matter had been reported to the police, they took up the trail, and in a short time arrested Hart, who was working at the Staunton Military Academy. He was questioned, and gave an account of himself and of his movements which seemed to be satisfactory, and, as the girl could not identify him, he was turned loose and returned to the Staunton Military Academy. His account of himself was, in the meantime, investigated and found to be false, and in a short time he was rearrested, and, upon being questioned, admitted that he was the man they were looking for.

"At the first trial, Hart testified in his own behalf, and there was a hung jury. At the second trial, he testified in his own behalf also, and said that, while he had assaulted Miss Garber, it was not his intention to push that assault to its ultimate conclusion, but it was then shown that, under cross-examination, at his first trial he had admitted not only the assault on Miss Garber, but that he had intended when he made this assault upon her to rape her.

"Soon after Hart was arrested his underclothes which he had on at the time of the assault were examined, and there was found thereon stains of seminal fluid that seemed to be fresh.

"Miss Garber was not injured or bruised or thrown down, nor were her clothes torn. Hart did not put his hands under her clothes, nor use any vulgar language, or make to her any improper proposal. When he relaxed his efforts to consummate the assault, he kissed her. The evidence of those who knew him more or less casually was that he bore a good reputation as a law-abiding citizen before this trouble arose."

The foregoing were all of the facts that were proven, and thereupon the court instructed the jury as follows:

"The court instructs the jury that an attempt in criminal law is an apparent unfinished crime,

and hence is compounded of two elements, viz.: (1) The intent to commit the crime; and (2) a direct act done towards its commission, but falling short of the execution of the ultimate design. It need not, therefore, be the last proximate act to the consummation of the crime in contemplation, but is sufficient if it be an act apparently adapted to produce the result intended."

"The court instructs the jury that, if they believe from the evidence beyond a reasonable doubt that the accused, with purpose and intent of committing a rape upon the prosecuting witness, Miss Garber, committed an overt act toward the accomplishment of such purpose which was of such a character apparently adapted to produce the result intended, then they should find the accused guilty of an attempt to commit rape, even though they may further believe that he subsequently voluntarily abandoned his purpose, and did no further act towards its accomplishment."

The court also, at the request of counsel for the prisoner, gave sundry instructions on his behalf, but these do not appear in the record on the appeal.

After the jury had heard all of the evidence, and had received the said instructions of the court, and had heard the argument of counsel, and before they retired from the jury box, the court charged them orally from the bench as follows:

"Gentlemen of the jury, you will now retire to the jury room to consult over a verdict, and, after you have retired, consider all of the evidence in the case carefully, and if, after a careful and painstaking consideration of all of the evidence in the case, you should believe that the defendant is not guilty, then say so and no more; but, if you should believe from the evidence beyond a reasonable doubt that the defendant is guilty of attempt to commit rape, as charged in the indictment, then you will find him guilty, and fix his punishment at death, or, in your discretion, by confinement in the penitentiary not less than three nor more than eighteen years."

Thereupon the jury retired to the jury room to consult, and in a short time returned to the court and delivered the following verdict:

"We, the jury, find the accused, Harry Hart, guilty of attempted rape, under the within indictment, and ascertain and fix his punishment at death."

Thereupon the defendant, by counsel, moved the court to set aside the verdict of the jury and to grant him a new trial, on the ground that the verdict was contrary to the law and to the evidence, but the court forthwith overruled the motion of the defendant, and rendered judgment against the defendant upon the said verdict, to which action of the court the defendant thereupon excepted.

Carter Braxton and Curry & Curry, all of Staunton, for plaintiff in error.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazile,

Second Asst. Atty. Gen., for the Commonwealth.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

The assignments of error raise the questions which will be disposed of in their order as stated below.

[1] 1. Did the commonwealth prove the venue—that is, that the crime was committed in the county of Augusta?

This question must be answered in the affirmative.

It is true that it is not expressly proved that the place at which the crime was committed was in the county of Augusta; but it is expressly proved that the prosecutrix lived about half a mile west from the corporate limits of the city of Staunton, on a certain road; that she was on her way, going along said road from her home toward her place of work in said city when she was assaulted; and that the point in the road at which she was assaulted was on the side of the road "coming to Staunton." It is further expressly proved that the cry of the prosecutrix for help, given while she was being assaulted, was "sufficiently loud for her sister, who was on her home porch, somewhere about 300 yards off, to hear her." The language of this statement of facts is, it is true, in itself obscure, since it is possible that the "home porch" referred to as being "about 300 yards off" may have been the home porch of the sister, and a different place from that of the home of the prosecutrix. But, in view of the context, in which no home of the sister is elsewhere mentioned, but the home of the prosecutrix is elsewhere therein expressly mentioned, the most natural and reasonable construction to be given to the language last quoted is that it refers to the home of the prosecutrix. This construction, as will also be observed, would give to the pronoun "her" the same meaning with that in which it is certainly first and last used in the phrase in question. This would locate the offense as having been committed about 300 yards east of the home of the prosecutrix, which would be about that distance less than approximately a half-mile west of the corporate limits of Staunton, and would accord with the other proved facts.

The only reasonable inference which can be drawn from these facts is that the place of the crime was west of, outside of, and less than one-half mile from the corporate limits of the city of Staunton.

[2] The location and boundaries of the county of Augusta and of the city of Staunton are designated in the legislation and referred to in the general laws of the state; and, moreover, it is geographical fact, shown by any map in common use, and thus a matter of common knowledge, that the city of Staun-

ton is located within the county of Augusta, and is so located therein that the county of Augusta surrounds, and, beyond all question, extends for a distance of over 15 miles to the west of, the corporate limits of the city of Staunton. The court will therefore take judicial notice of that fact. *McNeel v. Herold*, 52 Va. (11 Gratt.) 309, 815, 316; 17 Am. & Eng. Ency. Law, p. 906; Wharton on Law of Ev. §§ 335, 339; *Indianapolis & Cincinnati R. Co. v. Stephens*, 28 Ind. 429; *Same v. Case*, 15 Ind. 42; *Hinckley v. Beckwith*, 23 Wis. 328; *Central, etc., Co. v. Gamble*, 77 Ga. 584, 587, 3 S. E. 287; *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420; *Wright v. Hawkins*, 28 Tex. 452; *Ham v. Ham*, 39 Me. 263; *United States v. La Vengeance*, 3 Dall. 297, 1 L. Ed. 610; *Peyroux v. Howard*, 7 Pet. 324, 8 L. Ed. 700; *United States v. Johnson*, 2 Sawy. 482, Fed. Cas. No. 15,488; *R. v. Maurice*, 16 Q. B. (A. & E.) 906; *United States v. Beebe*, 2 Dak. 292, 11 N. W. 505; *State v. Arthur*, 129 Iowa, 235, 105 N. W. 422; *State v. Southern Ry. Co.*, 141 N. C. 846, 54 S. E. 294; *State v. Wabash Paper Co.*, 21 Ind. App. 167, 48 N. E. 653, 51 N. E. 949.

As said in *McNeel v. Herold*, supra, 52 Va. (11 Gratt.) 309:

"The objects sometimes called for are so connected with the general history or geography of the country, or its legislation, that they will be taken notice of by the courts and deemed of general notoriety and sufficiently identified without further proof. * * * In other cases, the objects called for possess but a local notoriety, or furnish a description * * * which must be verified and applied by means of facts to be ascertained on the spot. * * *

As said in 17 Am. & Eng. Ency. Law, supra, p. 906:

"It has been held that courts will take judicial notice of the geographical position of the towns within their jurisdiction, but not as to foreign towns and cities. To this latter rule, however, there have been adjudged exceptions."

As said in Whart. on Law of Evidence, § 339:

"A court is bound to take judicial knowledge of the leading geographical features of the land; * * * the courts of a particular state know the boundaries of the state and its divisions into towns and counties and the limits of such divisions, * * * the positions of leading cities and villages in such states. * * *

[3] As is also said in the learned work last cited, § 335, supra:

"So the courts will take notice * * * of distances as calculated by a map."

In *Indianapolis & Cincinnati R. Co. v. Case*, supra, 15 Ind. 42, the plaintiff sued in Shelby county for the value of an animal alleged to have been killed by the railroad company in that county. The statute required the action to be brought in the county in which the animal was killed. The defendant railroad

company raised the question of the jurisdiction of the court on the ground that the plaintiff failed to prove that the injury was committed in Shelby county. In the opinion of the Supreme Court this is held and said:

"No witness stated that the animal was killed in that county; yet several stated that it was killed on the railroad between two * * * geographical points, which we will judicially notice are in that county."

In *Same v. Stephens*, supra, 28 Ind. 431, the action was brought in Boone county for the killing of a horse in that county. The proof was "that the horse was killed about half a mile northwest of Hazelrigg Station." Held, that the court would take judicial knowledge of the geographical position of that station, and that the place in which the horse was killed, about 1½ miles west of it, was in Boone county.

In *Hinckley v. Beckwith*, 23 Wis. 328, the law was that the depositions of certain witnesses could not be read at the trial if they did not live more than 30 miles from the place of the trial. The place of trial was in Waupaca county. It appeared from the depositions that one of the witnesses resided at Necedah, in Juneau county, and the other in Leola, in Adams county. The court said:

"The place of residence of each witness is stated in his deposition; and the court, taking notice of the geographical divisions of the state, must know that they resided more than [30 miles] from the place of trial."

In *Central, etc., Co. v. Gamble*, supra, 77 Ga. 584, 3 S. E. 287, the court said:

"The declaration alleges that the injury complained of was done in the county of Talbot; and while the proof upon this question is not direct, yet it establishes that it occurred between two points—Bostick and Geneva—both located on the line of the railroad, in that county. At each of these points there are post offices, and we have held that the court will take judicial notice of the fact that they are located in the county."

It is true that there are decisions to the effect that courts will not take judicial notice of the distance between places in the same county, nor of the local situation and distances in a county (*Anderson's Case*, 100 Va. 864, 42 S. E. 865), nor that the boundary of a city or county is "located at a given spot" (*Greenleaf on Ev.* [16th Ed.] § 6). But these holdings have reference to places which are not incorporated, or located by general legislation, and which do not appear on maps in common use, and therefore have merely a local notoriety, or to cases in which the location in question, as judicially known from the legislation on the subject or from maps in common use, refers to a place so near the boundary line or lines in question as to leave the matter in doubt as to whether the location is within or outside of certain lines. In such case further specific evidence is needed

to resolve the doubt. But in the instant case the geographical fact aforesaid, when considered in the light of the facts expressly proved, locate the locus of the crime so far within the boundary lines of the county, and outside those of the city, as to leave no room for reasonable doubt on the subject.

Therefore when the facts proved as aforesaid are considered along with the fact of which the court will take judicial notice, as aforesaid, it appears that the venue has been proved by the commonwealth beyond any reasonable doubt.

The circumstance that the police of the city of Staunton were called upon by the mother of the prosecutrix to arrest the accused, and that neither the sheriff of the county of Augusta, nor any one of his deputies, was called upon to make the arrest, is urged as circumstantial evidence that the crime was committed within the corporate limits of the city of Staunton; and West's Case, 125 Va. 747, 99 S. E. 654, is relied upon in argument for the accused on this subject. The conclusion drawn in the West Case, however, from the circumstance that the police of the city were called upon to make the arrest, was merely that it was one among a number of other circumstances which tended to show that the crime was committed within the jurisdiction of the police. But by statute the jurisdiction of the corporation courts of cities, and hence of the police of cities, extends one mile beyond the corporate limits. So that, in the instant case, the circumstance that the police of the city of Staunton were called upon to make the arrest could, at most, be considered only as a circumstance of no probative value upon the issue of fact under consideration, since it is equally consistent with the conclusion that the crime was committed outside of and within one mile of the corporate limits of the city of Staunton, as with the conclusion that it was committed within such corporate limits.

[4] 2. Was the punishment of death for the crime of an alleged attempt to commit rape, under the facts of the instant case, contrary to the Fourteenth Amendment of the federal Constitution, or to section 9 of the Constitution of Virginia (1776), which forbids cruel and unusual punishments?

This question must be answered in the negative.

That the punishment was not contrary to the Fourteenth Amendment, see *Collins v. Johnston*, 237 U. S. 502, 509-510, 35 Sup. Ct. 649, 59 L. Ed. 1071.

As said by the Supreme Court in the case last cited:

"To establish appropriate penalties for the commission of crime, and to confer upon judicial tribunals a discretion respecting the punishment to be inflicted in particular cases, within limits fixed by the law-making power, are functions peculiarly belonging to the several states; and there is nothing to support the

contention that the sentence imposed in this case [fourteen years' imprisonment for perjury] violates the provisions of the Fourteenth Amendment, either in depriving appellant of his liberty without due process of law, or in denying to him the equal protection of the laws"—citing Supreme Court cases.

[5] The punishment fixed by the verdict of the jury was within the limits prescribed by the statute (Code 1919, § 4767). The inquiry next to be considered, therefore, is the following: Is the statute unconstitutional because it authorizes cruel and unusual punishment in this, that it empowers juries in their discretion to impose the punishment of death for the attempt to commit rape?

The statute under consideration, so far as material, is as follows:

"Sec. 4767. * * * If the offense attempted be punishable with death, the person making such attempt shall be confined in the penitentiary not less than two nor more than five years, *except that attempts to commit rape shall be punishable with death, or in the discretion of the jury, * * * by confinement in the penitentiary not less than three nor more than eighteen years.*"

The italicized language was added to the statute by an act of assembly approved January 15, 1894 (Acts 1893-94, p. 29), amending and re-enacting section 3888 of the Code of 1887.

Section 3888 of the Code of 1887, so far as material, reads as follows:

"If the offense attempted be punishable with death, the person making such attempt shall be confined in the penitentiary not less than two nor more than five years, except that in cases of attempt to commit rape, the term of confinement in the penitentiary shall not be less than three nor more than eighteen years."

The present statute prescribing the punishment for rape upon a female at the age of 15 years or more, against her will, provides that the person guilty of such crime "shall, in the discretion of the jury, be punished with death or confinement in the penitentiary not less than five nor more than twenty years." Acts 1918, p. 139. The age of consent has been changed from time to time, being the age of 12 under the Code of 1887, § 3680, made 14 by Acts 1895-96, p. 673, 16 by Code 1919, § 4414, and 15 by Acts 1918, p. 139. Subject to these changes in the age of consent, the punishment for rape was not less than 10 nor more than 20 years under the Code of 1887, § 3680, and was changed to not less than 5 nor more than 20 years by Acts 1895-96, p. 673, and has so remained since that time.

[6] It has been uniformly held by this court that the provisions in question in the Virginia Constitution, which have remained the same as they were originally adopted in the Virginia Bill of Rights of 1776, must be construed to impose no limitation upon the legislative right to determine and prescribe

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by statute the quantum of punishments deemed adequate by the Legislature; that the only limitation so imposed is upon the mode of punishments, such punishments only being prohibited by such constitutional provision as were regarded as cruel and unusual when such provision of the Constitution was adopted in 1776, namely, such bodily punishments as involve torture or lingering death—such as are inhumane and barbarous—as, for example, punishment by the rack, by drawing and quartering, leaving the body hung in chains, or on the gibbet, exposed to public view, and the like. *Aldridge's Case*, 2 Va. Cas. 447, 449, 450; *Wyatt's Case*, 6 Rand. (27 Va.) 694; *Bracey's Case*, 119 Va. 867, 872, 89 S. E. 144.

In *Aldridge's Case*, supra, 2 Va. Cas. 449, 450, the penalty imposed by the judgment of the trial court on a "free person of color" for the crime of grand larceny was that he be sold as a slave, transported, and banished beyond the United States, and that he be given, in addition, 39 stripes on his bare back. This punishment was authorized by the statute, and the judgment was held to be valid. The court said:

"As to the ninth section of the Bill of Rights, denouncing cruel and unusual punishments, we have no notion that it has any bearing on this case. That provision was never designed to control the legislative right to determine *ad libitum* upon the adequacy of punishment. * * * We had existed for a considerable time as a community, regulated by laws guarded by penal sanctions, when this Bill of Rights was declared. We consider these sanctions as sufficiently rigorous, and we knew that the best heads and hearts of the land of our ancestors had long and loudly declaimed against the wanton cruelty of many of the punishments practiced in other countries; and this section in the Bill of Rights was framed effectually to exclude these, so that no future Legislature, in a moment perhaps of great and general excitement, should be tempted to disgrace our Code by the introduction of any of those odious modes of punishment."

In *Wyatt's Case*, supra, 6 Rand. (27 Va.) 694, the statute involved provided:

"That henceforth when any person shall be convicted of any crime, or offense, now punishable by imprisonment in the public jail and penitentiary house for a period not exceeding two years, such person shall, instead of the punishment now prescribed by law, undergo imprisonment in the jail of the county or corporation where such conviction shall take place, for a period not more than six months, nor less than one month, at the discretion of the court, and * * * shall moreover be punished with stripes, at the discretion of the court, to be inflicted at one time, or at different times during such confinement, as such court may direct, provided the same do not exceed thirty-nine at any one time."

The court held that the statute was not contrary to the section of the Bill of Rights

under consideration, and in this connection said:

"The punishment of offenses by stripes is certainly odious, but cannot be said to be unusual. This court, regarding the discretion delegated by the act in question, as being of the same character with the discretion always exercised by common-law courts to inflict fines and imprisonment, and subject to be restrained by the same considerations, does not feel itself at liberty in this case to refuse to obey the legislative will, nor to execute that will by its judgments."

[7] The punishment of death by electrocution (which is the present mode of inflicting the death penalty in Virginia), as is well settled, cannot in itself be regarded as a cruel or unusual mode of punishment. *People ex rel. Kemmler v. Durston*, 119 N. Y. 577, 24 N. E. 6, 7 L. R. A. 715, 16 Am. St. Rep. 859; *In re Kemmler*, 136 U. S. 436, 10 Sup. Ct. 930, 34 L. Ed. 519; *Hobbs v. State*, 133 Ind. 404, 32 N. E. 1019, 18 L. R. A. 774; *State v. Wanisley*, 68 W. Va. 103, 69 S. E. 475; *State v. Woodard*, 68 W. Va. 66, 69 S. E. 386, 30 L. R. A. (N. S.) 1004; *McElvaine v. Brush*, 142 U. S. 155, 12 Sup. Ct. 156, 35 L. Ed. 971—to mention only a few of the authorities on the subject.

As said in consideration of the Eighth Amendment to the federal Constitution (which is practically in the same language as section 9 of the Virginia Constitution) in *Re Kemmler*, supra, 136 U. S. 436, 447, 10 Sup. Ct. 930, 933, 34 L. Ed. 519, 524:

"Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous—something more than the mere extinguishment of life."

However, there has been for a long while a difference of judicial opinion on the subject under consideration. And while a large majority of the American courts have taken the same view of the subject as that of the Virginia court, a minority of them have held that the constitutional provision in question imposes a limitation, not alone upon the legislative right to determine and prescribe by statute the mode of punishments, but also upon the quantum of punishments, upon the theory that punishment should be proportional to the gravity of the offense, and that punishment may by its length, or other severity, be so disproportioned to the offense as to constitute cruel and unusual punishment within the meaning of the constitutional prohibition. There is a comprehensive review of the authorities on the subject in the majority and minority opinions of the Supreme Court in the case of *Weems v. United States*, 217 U. S. 349, 30 Sup. Ct. 544, 54 L. Ed. 793, 19 Ann. Cas. 705, which renders it unnecessary

for us to do more in review of the authorities than to refer to those opinions. Only seven of the judges of the Supreme Court sat in that case and only six of those were on the bench when the case was decided, of whom two dissented, leaving the majority opinion that of only four judges, a minority of the whole court of nine judges. Mr. Justice White filed an elaborate dissenting opinion, in which Mr. Justice Holmes concurred. The majority opinion was delivered by Mr. Justice McKenna. The latter opinion adopted the aforesaid view of the minority of the American decisions on the subject under consideration; but as the number of judges holding that view was less than a majority of the full court, that case cannot be considered to have settled the question, and it may be fairly said to be still an open question in so far as the authority of the Supreme Court is concerned.

However, we do not mean to say that the question under consideration is a closed question in Virginia. We feel that there is great force in the view that a statute might be enacted prescribing a punishment in quantum so severe for a comparatively trivial offense that it would be so out of proportion to the crime as to shock the conscience; that we would hold, and the courts of the state should hold, the statute void as in conflict with section 9 of the Virginia Constitution, although the mode of the punishment were not unusual. But such holding, even according to the majority opinion in the *Weems* Case, would have to be based upon the conclusion that plainly there could be found nothing in the conditions existing in the state and the circumstances of terror and danger accompanying the species of crime dealt with to give character and degree to it commensurate with the punishment prescribed by the statute, and that the legislative action was manifestly induced by some momentary impulse or passion, and was not well founded when considered from the standpoint of penal justice.

As said in the majority opinion in the *Weems* Case:

"We disclaim the right to assert a judgment against that of the Legislature of the expediency of the laws or the right to oppose the judicial power to the legislative power to define crimes and fix their punishment, unless that power encounters in its exercise a constitutional prohibition. * * * There must be a comprehension of all that the Legislature did or could take into account—that is, a consideration of the mischief and the remedy. * * * There is a certain subordination of the judiciary to the Legislature. The function of the Legislature is primary, its exercises fortified by presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of their wisdom or propriety. * * * We have expressed these elementary truths to avoid the misapprehension that we do not recognize to the fullest the wide range of power

that the Legislature possesses to adapt its penal laws to conditions as they may exist and to punish the crimes of men according to their forms and frequency. We do not intend in this opinion to express anything that contravenes those propositions."

Referring with approval to the holding in *Territory v. Ketchum*, 10 N. M. 718, 65 Pac. 169, 55 L. R. A. 90, that a statute, which imposed the death penalty upon any person who should make an assault upon any railroad train, car, or locomotive, for the purpose and with the intent to commit murder, robbery, or other felony upon a passenger or employee, etc., was not in violation of the Eighth Amendment to the federal Constitution, the Supreme Court majority opinion continues as follows:

"The Supreme Court of the territory * * * rested its decision upon the conditions which existed in the territory and the circumstances of terror and danger which accompanied the crime denounced. So also may we mention the legislation of some of the states enlarging the common-law definition of burglary, and dividing it into degrees, fixing a severer punishment for that committed in the nighttime from that committed in the daytime, and for arson of buildings in which human beings may be from arson of buildings which may be vacant. In all such cases there is something more to give character and degree to the crimes than the seeking of a felonious gain, and it may properly become an element in the measure of their punishment."

[8] The same is true of the case before us. It is a matter of history of the state, and of common knowledge among its people, that the crime of attempted rape is well-nigh, if not altogether, as heinous as the consummated offense of rape. It is well known that public indignation is as much aroused by the one offense as the other, where the full accomplishment of the criminal purpose is thwarted only by some extraneous circumstance. And the almost universal repugnance which exists in the public mind to the making of the degree of the crime depend upon whether there has been an actual penetration or merely an attempted penetration, and the general aversion to the putting of the prosecutrix through the indecent and harrowing ordeal of having to testify in court upon such a subject, are well known. The likelihood of the resort to lynch law, unless there is a prompt conviction and a severe penalty imposed, and thus a resultant grave shock to the peace and dignity of the commonwealth, is well known to exist, almost, if not quite equally, in the case of an attempted as of a consummated rape. These are considerations which the Legislature properly could, and which, therefore, we must conclude the Legislature did, take into account as an element of the measure of the punishment in enacting the statute under consideration, and fully justified the severity of the extreme penalty allowed by the statute to be imposed, even from the standpoint of

the holding of the majority opinion in the Weems Case. Indeed the changes in the statute itself since the Code of 1887, which have been referred to, making the maximum and minimum punishment more nearly alike for attempted rape with that for the consummated crime, furnishes internal evidence in the statute itself that the Legislature in its enactment in its present form has followed and conformed the law to a matured public sentiment on the subject of the punishment deemed commensurate with the crime, and has not acted under the influence of any momentary impulse engendered by excitement or passion.

It will be observed, however, that the statute law on the subject still recognizes some difference in the heinousness of the respective offenses, in that the minimum penalty prescribed for rape is 5 years, whereas that for attempted rape is only 3 years, in the penitentiary; and the maximum confinement in the penitentiary for rape is 20 years, whereas that for attempted rape is 18 years.

Therefore, without at this time deciding the general question of whether the constitutional provision under consideration does or does not impose a limitation upon the legislative power of prescribing the quantum of punishments for crimes, we hold that the statute in question in the instant case is not violative of the Constitution, and that the punishment imposed upon the accused in the instant case, in accordance with the authority of such statute, was a lawful punishment, and cannot be disturbed by us as prohibited by the Constitution of Virginia.

The authorities, consisting of 1 Bish. New Cr. Law, § 604 (5); 1 Wharton's Cr. Law (11th Ed.) §§ 238, 308, referred to and relied on in argument for the accused on the subject of punishments, address themselves to the philosophic theories upon which penal legislation is, or should be, based, and do not at all treat of the power, or lack of power, in the courts to hold such legislation invalid because not in accord with what may be considered the correct theory. The former subject has furnished a theme for endless discussion among philosophers, criminologists, and other writers, both in ancient and modern times. See sections 1, 10, 12, of 1 Wharton's Criminal Law, and notes thereto, among which is a reference to a philosophic article by Sir Edward Fry, which points out that there are cases in which the attempt to commit an offense completes the crime so far as it relates to the criminal, as (to quote the example instanced by the learned writer), where "the gun has been loaded, the victim has been tracked, the watch has been kept through long hours of patient wickedness, the gun has been aimed and discharged, but the victim escapes." The writer adds:

"On the primary principles of punishment, that man appeared to be worthy to be punished as a murderer."

So, in the instant case, the cloth to smother the outcry has been gotten ready, the victim has been tracked, the watch has been kept through the hours of wickedness needed to accomplish the waylaying (how long does not appear in the record), the assault has been made upon a girl of 17 and continued in the darkness in a manner demonstrating an absolutely fixed intent to accomplish the crime intended; this conduct is persisted in against the desperate struggles of the victim until she is about exhausted, but the victim escapes. The jury were fully warranted by the facts proved in concluding that the escape was not due to any voluntary relenting on the part of the assailant, but solely to one of two extraneous and unexpected happenings, or to both of them, namely: to the fact that he looked back over his shoulder and saw that the two men, Cressman and Southards "had stopped about 20 or 30 feet from the accused and * * * were observing him," at which time "he turned the girl loose"; or to the fact that, in the struggle, the discharge of seminal fluid, mentioned in the certificate of facts, had rendered the accused impotent to accomplish his purpose for the time being. And the parting kiss, and the blandishments, bestowed under the circumstances, were sufficient evidence to warrant the jury in believing that the aforesaid purpose of the accused still remained fixed, notwithstanding the unanticipated miscarriage of the undertaking upon that occasion, if haply he might later find, or make, another and a more propitious occasion. And this continued purpose, coupled with the presence of the two observers, was sufficient evidence to account to the jury for the fact that no other violence was used against the prosecutrix following the abortive assault.

[9] 3. Was the accused given reasonable opportunity to employ counsel and prepare for trial?

This question must be answered in the affirmative.

We find nothing in the record indicating that the accused was not given reasonable opportunity to employ counsel and prepare for trial. No motion was made for a continuance of the case. We cannot assume that if there had been any reasonable ground for a continuance a motion would not have been made by the counsel assigned by the court, who represented the accused upon his two trials in the court below. There is no indication in the record that the accused was not entirely ready for trial on both occasions. The fact that there was a hung jury on the first trial would indicate that the defense of the accused was fully and ably presented by his counsel on that trial. The second trial occurred two days after the beginning of the first trial, and the same counsel then represented the accused as on his first trial.

In *Harris v. State*, 9 Okl. Cr. 658, 132 Pac. 1121, relied on in behalf of the accused, the

trial was had on the very day the amended information was filed on which the defendant was tried. But this was over the objection of the defendant made at the time, the court overruling his motion for a delay (which, by the way, asked for a postponement of only 24 hours), and forcing him into immediate trial.

The sole remaining question presented for our decision by the assignments of error is the following:

[10] 4. Is the verdict contrary to the evidence?

This question also must be answered in the negative.

It is contended in behalf of the accused that the verdict is so plainly contrary to the evidence as to shock the conscience of and to satisfy the court that the jury must have been influenced by passion or prejudice. We find ourselves unable to agree with this view of the subject.

In this connection we refer to what we have said above concerning the facts of the case and the inferences we think the jury were reasonably warranted in drawing therefrom. To what we have there said we think it necessary for us to add but little here.

Woodson's Case, 107 Va. 895, 59 S. E. 1097, is strongly relied upon in argument for the accused as authority for the position that there is not sufficient evidence in the instant case to show that the accused intended to attempt to commit the crime of rape. The distinguishing feature in Woodson's Case was that in that case there was no attempt to use force—only solicitation. In the instant case there was no solicitation, and there is the uncontroverted fact of the use of violent force by the accused in the effort to overcome the desperate struggle of the prosecutrix, which force was continued until the latter was almost exhausted, and was then terminated only because of one or both of the extraneous reasons above indicated, as the jury were warranted in believing from the facts proved.

As to the intent with which the assault was made: The mode of the attack and the manner in which the force was exerted, unaccompanied by any explanation or indication in the facts certified tending to show any other motive, was sufficient to warrant the jury in finding that the accused intended the natural result indicated by his conduct as intended—namely, the rape of the prosecutrix. Moreover, it was shown in evidence that on his first trial the accused admitted that the assault was made with that intent.

There are various other positions taken in argument for the accused, which are not taken in the assignments of error, and which therefore ordinarily would not be considered by us. But, in view of the fact that human life is involved, we have not allowed this consideration to deter us from considering every argument presented in behalf of the accused. We deem it sufficient to say, however, con-

cerning the positions not embraced in the assignments of error, that we have carefully considered them all, and have been unable to find any merit in them.

This case must therefore be
Affirmed.

(121 Va. 814)

SNARR v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Nov. 17, 1921.)

1. Criminal law \S 365(2)—Testimony as to defendant's arrest for driving automobile while intoxicated, in prosecution for transporting liquor, held admissible.

In prosecution for unlawful transportation of liquor following discovery of liquor in defendant's possession after being arrested for driving automobile while intoxicated, testimony as to his arrest on such other charge held admissible as against contention that it related to another offense, being part of the *res gestæ*.

2. Criminal law \S 899—Defendant waived objection to testimony as to certain facts by testifying and by cross-examining witnesses as to such facts.

In prosecution for unlawful transportation of intoxicating liquors, defendant, having cross-examined witnesses for state as to his arrest on the charge of driving automobile while intoxicated and circumstances preceding arrest, and having himself fully testified as to such facts, could not complain of the admission of testimony as to such facts, having waived objections thereto.

3. Intoxicating liquors \S 138—Carried by automobile driver in pocket of coat not carried in his "baggage" within prohibition act.

Prohibition Act, \S 39, permitting traveler to carry certain amount of liquor in his "baggage," did not permit automobile driver to carry whisky bottle in coat being worn by him, such liquor being carried on his person, and not in his "baggage," within the statute.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Baggage.]

4. Intoxicating liquors \S 131—Transportation of liquor unlawful, though not for purpose of sale.

Under Acts 1918, c. 888, \S 3, making it unlawful "to manufacture, transport, sell, keep or store for sale" the transportation of liquor is unlawful, regardless of whether it is transported for the purpose of sale, since the words "for sale" merely qualify the preceding words "keep or store," and not the words "manufacture" and "transport."

5. Criminal law \S 419, 420(10), 1169(12) — Witnesses \S 246(1) — Testimony on court's examination that witness had heard defendant had driven automobile while intoxicated held hearsay and reversible error.

In prosecution of a physician of good reputation for unlawful transportation of liquor, in which defendant disclaimed having intentional-

ly violated the law and asked for instruction precluding a jail sentence under Acts 1918, c. 388, § 5, court's examination of witness as to whether witness had heard, prior to the transaction leading to defendant's arrest, that defendant had operated automobile while under the influence of liquor, and answer of witness that he had so heard, *held* irrelevant, hearsay, and prejudicial error on appeal from judgment based on verdict fixing punishment as confinement in jail.

6. Criminal law \Rightarrow 369(6)—Statute precluding imposition of jail sentence in event of unintentional violation does not justify admission of evidence of other offenses.

Acts 1918, c. 388, § 5, providing that, if it shall appear to the court in the prosecution for a violation of the prohibition act that there has been no intentional violation, the court shall instruct the jury not to impose a jail sentence, did not authorize the court in prosecution for unlawful transportation of liquor to make inquiries as to other possible offenses by defendant in violation of prohibition law, but merely relates to the punishment to be inflicted in case it appeared that the violation of a particular charge was unintentional after a trial under the same rules of evidence and according to the same methods of practice and procedure as in other criminal cases.

7. Criminal law \Rightarrow 1152(1)—Exercise of discretion not reviewed unless abused or unless ruling was based on irregular and inadmissible evidence.

In prosecution for violation of the prohibition act, refusal to charge jury not to impose jail sentence under Acts 1918, c. 388, § 5, requiring court to so charge, if it shall appear that the violation of the statute was not intentional, will not be reviewed on appeal except in case of clear abuse of discretion or where based upon irregular and inadmissible evidence.

8. Intoxicating liquors \Rightarrow 242½, New, vol. 13A Key-No. Series—Requiring reputable physician to execute bond against violation of prohibition act on conviction of transportation of liquor held improper.

In prosecution for transportation of liquor, in which defendant was a physician of good reputation and of high standing, and claimed the violation of the statute to have been unintentional, action of court in requiring defendant to execute a bond conditioned that he would not violate the prohibition act for the term of one year under Acts 1918, c. 388, § 43, *held* improper in absence of evidence that defendant was likely to again violate the act.

Error to Circuit Court, Rockingham County.

S. S. Snarr was convicted of unlawful transportation of intoxicating liquor, and he brings error. Reversed and remanded, with directions.

E. D. Ott, of Harrisonburg, and M. L. Walton, of Woodstock, for plaintiff in error.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazile,

Second Asst. Atty. Gen., for the Commonwealth.

PRENTIS, J. The accused was convicted of the unlawful transportation of intoxicating liquor, and sentenced to pay a fine of \$50 and be confined in the county jail for one month.

The facts shown are that he is a physician of high standing and reputation in his community, who left his home at Mt. Jackson for Harrisonburg, driving his own automobile, his purpose being to meet his brother, a physician and surgeon of Harrisonburg, intending to go from there to Staunton to board a train at 7:30 in the evening for Danville, to attend the wedding of a nephew, which was to take place there the next day. Before starting he took a drink of intoxicating liquor in his own home. He claims that he discovered that there was something wrong with the steering gear of his automobile before he left Mt. Jackson; that when he called the attention of a mechanic to it he was told, in substance, that the trouble was slight, and that probably it would not give him any serious trouble. On his way he had two collisions with other travelers on the highway, as the result of the second of which his car was left in the ditch on the side of the road and could not be further operated. He claims that the cause of these collisions was the failure of the steering apparatus of the machine to operate properly. On the other hand, the commonwealth attributes his inability to control his car and these collisions to the fact that he was very much intoxicated. After the second collision, he transferred his valise to a motortruck which was returning towards Mt. Jackson, his purpose being to return home. On this return journey he was overtaken by the sheriff and his deputy, who had a warrant charging him with reckless driving, which warrant had been issued upon the complaint of a commercial traveler with whose machine he had collided, for which offense he has since been tried and fined. When the officers arrested him upon this warrant he had in his overcoat pocket, which he was at that time wearing, a pint bottle partly filled with whisky. There is some confusion in the testimony as to the precise quantity of liquor remaining in the bottle. This prosecution and conviction is the result of this discovery.

It was shown by a large number of highly reputable witnesses, and no attempt was made to contradict them, that the accused is a man who had a very high reputation for truth and veracity; that he was well beloved and respected both as a physician and as a man; and that he was in full practice. He testified that he did not know that he violated any law; that when he left home the partly filled bottle was put in his valise, and that

afterwards, when he took the truck to return home, the bottle rattled against a mirror, or perhaps some other articles in the valise, and for fear that one or the other might break he took the bottle out and put it in his overcoat pocket; that he thought that the law allowed him thus to carry not exceeding one quart of intoxicating liquor for his personal use.

Taking up the errors which are assigned, we find that certain witnesses for the commonwealth were allowed to testify as to the events which preceded the finding of the liquor in his overcoat pocket, and it is claimed that, inasmuch as the prosecution is for the unlawful transportation of liquor, the testimony relating to the other misdemeanor with which he had been charged—that is the reckless driving—was impertinent and irrelevant to the issue.

[1, 2] Of course, this rule is universally accepted, but it would have been difficult for the witnesses to have detailed the pertinent facts without at least some allusion to this charge of reckless driving. The officers, for instance, had to explain why they were about to arrest him, and the testimony which was received merely gave the attending circumstances. It was properly admissible as part of the *res gestæ*. In addition to this, the attorneys for the accused, on cross-examination, inquired into these occurrences which preceded the discovery of the liquor at the time of his arrest, and the accused himself also fully related his recollection of all the circumstances immediately preceding his arrest. He therefore must be held to have waived his original objection to this testimony, so that, even if incompetent, it furnishes no ground for reversal. *New York Life Ins. Co. v. Taliaferro*, 95 Va. 522, 28 S. E. 879; *Moore Lumber Corp. v. Walker*, 110 Va. 775, 87 S. E. 374, 19 Ann. Cas. 314; *Chesapeake & Ohio Ry. Co. v. Barger*, 112 Va. 688, 72 S. E. 693.

Another assignment of error is the giving to the jury at the instance of the commonwealth an instruction which reads thus:

"The jury are instructed that, if they believe from the evidence that the accused, S. S. Snarr, had on his person while traveling on the Valley turnpike ardent spirits, even though the quantity be only six ounces, then he is guilty of unlawfully transporting liquor, as charged in the indictment."

[3] It is urged that this instruction ignores that provision of section 39 of the prohibition act (Laws 1918, c. 388) which permits a traveler to carry "in his baggage for the bona fide use of himself or his family, and not as a means of evading the intent and meaning of this act, ardent spirits not in excess of one quart." It is insisted that this provision authorizes one to carry with him, under his personal control, not to exceed one quart of intoxicating liquor, without reference to the manner in which it is carried.

It seems to us that the language of the act is so clear as hardly to need interpretation, and that it fails to sustain this contention. The language creates an exception to the general inhibition, and permits a traveler to carry a limited quantity of liquor in the baggage. The general inhibitions of the statute are qualified by the language of the permission authorizing it to be carried in the baggage, and the inference therefrom is that it cannot be carried on the person outside of his baggage.

We have been referred to several cases arising between travelers and common carriers defining baggage. A typical case is that of *Toledo, Wabash & Western R. Co. v. Hammond*, 33 Ind. 379, 5 Am. Rep. 221, in which the traveler's opera glasses, which were in his trunk, which was lost, were held to be a part of his baggage, and it is shown from the definitions referred to in that case that baggage consists of apparel, ornaments, a few books for the amusement of reading, a watch, ladies' jewelry, and, according to 1 *Bouvier's Law Dict.* 180, it is said:

"From analogy to the foregoing articles, it will be obvious that the term 'baggage' must comprehend an almost infinite number and variety of articles not enumerated here."

Then in *Macrow v. The Great Western Railway Co.*, L. R. 6 Q. B. 612, 3 *Albany Law Journal*, 476, this definition of "baggage" is found:

"We hold the true rule to be that whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities, or the ultimate purpose, of the journey, must be considered as personal luggage. This would include not only all articles of apparel, whether for use or ornament, * * * but also the gun case or the fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of an analogous character, the use of which is personal to the traveler, and the taking of which has arisen from the fact of his journeying."

Then the question of what is baggage has arisen under the statutes imposing customs duties on importations, and it has been held that a package of precious stones found in the pocket of a passenger is forfeitable under the federal statute (U. S. Comp. St. § 5490) forbidding the concealment of dutiable articles and imposing duties on such articles "found in the baggage of any person arriving within the United States." *Two Hundred and Eighteen and One-Half Carats Loose Emeralds v. United States*, 154 Fed. 830, 83 C. C. A. 475.

These questions raised in these two lines of cases, however, are not similar to that here involved. This question is not whether intoxicating liquor is baggage, nor is there any question as to the concealment of imported

articles with intent to evade the customs duties. The language here does not require us to ascertain whether or not, under certain circumstances, intoxicating liquor may or may not constitute baggage of the traveler. The statute assumes that the traveler has baggage, and expressly authorizes him to carry as much as one quart of ardent spirits therein. Elaboration is confusing rather than illuminating. As above indicated, the express permission to carry in the baggage is here equivalent to an inhibition against carrying it on the person; and intoxicating liquor carried in the pocket of the traveler's clothing which he is at the time wearing is being carried on his person, and not in his baggage. It may very well be that a traveler, by means of a shawl strap, or some other container, may lawfully carry one quart of liquor in his overcoat pocket, that overcoat being not on his person, but carried as a separate bundle or package; but, the evidence here being that the overcoat was at the time worn by the accused as a part of his apparel, it seems to us perfectly clear that the liquor was carried on his person, and not in his baggage. So that the refusal of the instruction was clearly right.

The law prohibiting the carrying of concealed weapons has long been in force, and we think we risk nothing in saying that one who carries a weapon in his baggage does not violate the statute prohibiting the carrying of concealed weapons on his person, and by implication the prohibition against the carrying of intoxicating liquor upon the person is by this statute as clear and undoubted as the prohibition against carrying weapons concealed on the person.

It is not difficult to appreciate the policy which permits one to carry a limited quantity of liquor concealed from common view in his baggage, while it prohibits the carrying of liquor upon the person, easily accessible for immediate use as a temptation to public drinking, both to the traveler himself and to others.

[4] It is also claimed that this instruction was erroneous because it was clear that the liquor was not being transported for sale. This contention is based upon the language of section 3, reading thus:

"It shall be unlawful for any person in this state to manufacture, transport, sell, keep, or store for sale, offer, advertise or expose for sale, give away or dispense or solicit in any way, or receive orders for or aid in procuring ardent spirits, except as hereinafter provided." Acts 1918, p. 578.

We think the language clearly does not bear the construction contended for. The words "for sale" there merely qualify the words immediately preceding, "keep, or store." It is lawful under some circumstances to keep or store a limited quantity of intoxicating liquor, but it is unlawful to keep or store such liquor for sale, except as

it is expressly authorized for sacramental, medicinal, scientific, mechanical, or pharmaceutical purposes. The context and punctuation of the sentence demonstrates this. It is generally unlawful to manufacture liquor, whether for sale or not, as well as to transport liquor, whether for sale or not, and as to these offenses there is no qualification suggested by the structure of the sentence, for immediately following the prohibition against transportation of liquor is the prohibition against the sale of liquor as an independent misdemeanor under the statute. *Burton v. Commonwealth*, 122 Va. 847, 94 S. E. 923.

There is no error in the instruction; for under the circumstances it was unlawful for the accused to transport liquor in this state, except in his baggage, whether for sale or not.

The court also refused other instructions based upon the same erroneous view of the law, and what we have said is sufficient to indicate our opinion that these were also properly refused.

The assignment of error which raises the gravest doubt and demands the most careful consideration is based upon that provision of the statute, section 5 (Acts 1918, p. 579), reading thus:

"* * * But where upon the trial of any charge of a violation of this act, it shall appear to the court trying the case that there has been no intentional violation of any provision thereof, but an unintentional or inadvertent violation thereof, then such court shall instruct the jury that they cannot impose a jail sentence."

The accused asked the court to instruct the jury under this section not to impose a jail sentence, upon the ground that there had been no intentional violation of the act, but the court refused to do so. This refusal to give this instruction should be considered in connection with an exception to certain evidence to which the accused also excepted.

While the witness Paxton Williamson was under examination, and after he had testified to the excellent reputation of Dr. Snarr for veracity as a physician and as a citizen, the record shows the following questions and answers:

"The Court: Did you ever hear of his operating his car too rapidly, as a fast driver, reckless driver, when under the influence of liquor?"

"Witness: Your honor, I can't say to my certain knowledge that I ever saw Dr. Snarr—"

"The Court: Did you ever hear of Dr. Snarr operating his car when under the influence of liquor?"

"Mr. Ott: Your honor, please, with all deference to the court, I want to object to the questions you have asked. I did not know the charge here was reckless driving, but thought it was for bootlegging. (Objection overruled. Exception.)"

"Witness: No, sir; I can't say that I have. I want to qualify my statement to this extent:

Rumor has it that he operated a car under the influence of liquor, but whether he did or not I do not know.

"The Court: The question of the court was, did you ever hear that he did that, ever hear any rumor of that sort?"

"Witness: In this case at the bar I have heard it.

"The Court: But prior to this occurrence on the pike down there did you ever hear that he had operated his car while under the influence of liquor?"

"Witness: I don't think I have.

"The Court: You never heard it before that time?"

"Witness: No, sir; I don't think I did.

"The Court: Did you ever hear anybody speak of any other occasion when it was done by him?"

"Witness: That Dr. Snarr operated his car when under the influence of liquor?"

"The Court: Yes, sir; prior to this case here.

"Witness: Yes, sir; I have."

[5] The accused was on trial for the unlawful transportation of liquor, and it is clear that this testimony was irrelevant and immaterial on that issue. Under the inquisitorial questions of the court, the witness was led to testify that he had heard prior to the case on trial that Dr. Snarr had operated his car while under the influence of liquor. The testimony did not remotely affect the charge that the accused had unlawfully transported liquor, and its relation to the general reputation of Dr. Snarr was also remote. The examination proceeded further, and the witness testified that he did not know anything about the truth or falsity of that accusation; that he had seen Dr. Snarr quite frequently in his car; never saw him when he was operating his car under the influence of liquor; that he had a large practice; was going about in his car every day; was regarded as one of the best citizens in the community; and was generally loved in the community as a physician and as a man. One result of the introduction of the testimony is to show that the witness had heard that Dr. Snarr had violated some other provision of the law. Our first impression as to this testimony, which seems to us so clearly inadmissible, both because it was hearsay and irrelevant, was that it should be held to be harmless error, because the other evidence showed without contradiction that Dr. Snarr was carrying intoxicating liquor upon his person, and, the jury having given him the minimum penalty, this error constitutes no ground for reversal, because no prejudice to the accused was shown. Upon mature consideration, however, we feel that the error was injurious, when considered in connection with Dr. Snarr's testimony that his violation of the statute was inadvertent, because he thought that he had the right to carry that quantity with him in any way that he saw fit.

[6] This clause of the statute was enacted with the manifest purpose to relieve against undue hardship which might arise where it was shown that the offense was inadvertent, slight, with little relation to the general intent to prohibit traffic in intoxicating liquor, and in such cases to provide a slighter punishment to be inflicted on guilty persons, if it appeared to the trial court that the ends of justice would be thereby subserved. It was not the legislative intent to change the rules of evidence or the methods of practice and procedure in criminal cases; nor was it thereby intended that the conduct of prosecutions under this act should differ from prosecutions for other misdemeanors. The General Assembly apparently intended to provide that, if in such a prosecution this defense was made, where not made as a mere subterfuge by habitual or deliberate violators of the law, and it did not appear from the other legitimate evidence introduced upon the trial that there had been other violations of the statute, then that there should be no imprisonment. Such other violations might very well incidentally appear from the evidence. For instance, under a prosecution for the unlawful transportation of liquor, it might appear that liquor was being illegally sold or unlawfully dispensed during the journey. We do not think, however, that it could possibly mean that during the trial for a specific offense the court could divert attention from the crime charged, for which the accused was being prosecuted, and investigate other possible offenses in order to determine whether the extreme or the modified punishment should be inflicted. To make such an investigation before the jury would certainly have a tendency to prejudice the accused as to the specific offense for which he was being tried, and to induce the jury to inflict a heavier punishment therefor, leaving him still liable to be prosecuted for the other offenses. Of course, it could not mean that the judge should exclude the jury and suspend the trial in order that he might make independent investigations as to these other offenses prohibited by the statute.

These considerations lead us to conclude that the introduction of this testimony was highly prejudicial to the accused.

We note from the Attorney General's brief and in the memorandum of the court that it appears to be assumed that the prisoner must have been violating the law against drinking on a public highway, because the bottle was partly emptied, and because the prisoner's intoxication was apparent. We do not think that the testimony justifies this conclusion as inevitable. He left home at about 4:30 o'clock in the afternoon, and expected to be in Staunton, a distance of something like 50 miles away, by 7:30 of the same day. He does not tell us the precise quantity of liquor which he took before leaving

home, but says that he took a "right good drink." We do not know the percentage of alcohol in the liquor, and its intoxicating effect would depend as well upon this as to some extent upon his habits and physical condition. It seems to us that it is a surmise that he had violated the law against drinking on the highway, that there is nothing improbable in his positive statement that the only drink he had taken was the one he took in his home, and that it is neither impossible nor even improbable that his intoxicated condition resulted from that lawful act. Feeling, as the members of this court do, that if they had been vested with the discretion which is vested in the trial court, the instruction would have been given, we are of opinion that the error in admitting this irrelevant testimony must have prejudiced the prisoner's cause with the learned and upright judge when he was asked to instruct the jury not to impose a jail sentence, and therefore that he should review his own judgment on that point. That the accused is a man of very high character cannot be doubted from the testimony; and we think that the case is of that general character which was in the contemplation of the General Assembly when it provided for an amelioration of the punishment. Of course, the law is no respecter of persons, and the higher the position, character, and intelligence of the accused, the more certain and sure should be his punishment for any violation of the law; but the good or bad reputation of the accused for veracity in every case affects his credibility, either favorably or unfavorably, and we find nothing in this record to justify discrediting the testimony of Dr. Snarr on this point.

Our conclusion is that the court erred in admitting this testimony, if it was admitted for the purpose of showing other violations of the prohibition statute, for which violations, if they can be proved, he was liable to punishment, and that his punishment in this case should not be enhanced solely because of such inadmissible evidence.

[7] The provision of the statute of which we have been speaking was not intended to change the maxim that ignorance of the law excuses no man, but it does mean that the commonwealth, in the administration of its criminal laws, does not intend to inflict excessive punishments which do not fit the crime under investigation. The statute imposes upon the trial courts the responsibility of applying the ameliorative punishment of fine without imprisonment in every case where it appears that the crime is inadvertent and where punishment by fine is sufficient to vindicate the law. The exercise of discretion so vested in the trial court will not be reviewed by this court except in cases of

clear abuse of that discretion, or where based upon illegal and inadmissible testimony, but that the statute was enacted for application to cases of this general character we have no doubt.

[8] The court also required the accused, under section 43 (Acts 1918, p. 608), to execute a bond of \$1,500, conditioned that he would not violate any of the provisions of the act for the term of one year. The bond authorized by the statute is intended as a precautionary measure to prevent future violations of the law by a convicted person who is likely to do so. Apparently there are many men habitually engaged, for gain, in the illegal manufacture, transportation, and sale of intoxicating liquor in violation of the statute. When these habitual or other deliberate lawbreakers are convicted, bonds like this should be required, but in a case like this, where a useful citizen of high reputation has violated one of the provisions of this statute, and there is no evidence indicating that he is likely again to do so, it seems to us that to require him to give such a bond is an unnecessary humiliation, and not in the contemplation of the General Assembly.

Upon the whole case we are of opinion that the court erred in the admission of the testimony which we have criticized, that under the peculiar circumstances this was prejudicial error, and hence that the verdict should be set aside; so that the case will be remanded for a new trial in accordance with the views here expressed.

Reversed.

(131 Va. 581)

VIRGINIA HOT SPRINGS CO. v. SCHRECK.

(Supreme Court of Appeals of Virginia. Nov. 17, 1921.)

1. Appeal and error \S 914(1)—Notice of proceeding by motion for judgment assumed returned in prescribed time.

Notice of proceeding by motion for judgment will be assumed to have been returned to the clerk's office within five days after service, as prescribed by Code 1919, \S 6046; the date of service not appearing from the record, and no objection being made on this account.

2. Judgment \S 184—Notice of proceeding by motion for judgment must be returnable within 90 days from date.

By analogy to Code 1919, \S 6055, requiring "process from any court" to be returnable within 90 days after its date, the notice which section 6046 requires for commencing a proceeding by motion for judgment, without fixing any appearance day therefor, and which therefore must be returnable within a reasonable time, will be held returnable within such 90 days, and, so being made returnable after such time, is, as a writ to commence the proceeding,

a void process, giving the court no jurisdiction to hear and determine the controversy; and motion to quash the notice and dismiss the proceeding should be sustained.

Error to Circuit Court, Bath County.

Proceeding by motion for judgment by one Schreck against the Virginia Hot Springs Company. Judgment for plaintiff, and defendant brings error. Reversed, with directions.

J. T. McAllister, of Hot Springs, and Allen & Walsh, of Charlottesville, for plaintiff in error.

John W. Stephenson & Son, of Warm Springs, Geo. A. Rivercomb, and Timberlake & Nelson, of Staunton, for defendant in error.

BURKS, J. [1, 2] This is a proceeding by notice of a motion for a judgment for damages which the plaintiff, Schreck, alleged he had sustained by the wrongful conduct of the defendant, Virginia Hot Springs Company. The proceeding was taken under section 6046 of the Code (section 3211, Code 1904), which requires the notice to be returned to the clerk's office within 5 days after service. The date of service does not appear from the record, but no objection is made on this account, and we assume that it was within the 5 days required by the statute. The notice was returned to the clerk's office November 3, 1919, and notified defendant that the judgment would be asked on the 1st day of the March term, 1920 (March 20, 1920), the day appointed therefor by law. The notice passed over the November term, 1919 (November 20), although there was ample time to mature the case for that term, and notified the defendant to appear 138 days after it was returned executed to the clerk's office. Section 6055 of the Code (section 3220, Code 1887) declares that unless otherwise provided, "process from any court, whether original, mesne, or final * * * shall be returnable within ninety days after its date," and we have held that process which on its face is not so returnable is void. *Lavell v. McCurdy*, 77 Va. 763. We have also held in a number of cases that a proceeding by motion for a judgment under section 6046 is an action at law. *Gordon v. Funkhouser*, 100 Va. 675, 42 S. E. 677; *Reed & McCormick v. Gold*, 102 Va. 37, 45 S. E. 868; *Newport News, etc., R. Co. v. Bickford*, 105 Va. 182, 52 S. E. 1011.

It will be observed, however, that the language of the statute is, "process from any court," etc., and it is said that the section does not apply to motions of this character, which are controlled entirely by section 6046, and that the latter section is complete in itself, and fixes the time of service and return of the process, but leaves open the question of the day for the appearance of the defendant. It is insisted that if any

limitation was intended to the appearance day of the notice it would have been prescribed by section 6046. It is further insisted that the question is put at rest by *Kain v. Ashworth*, 119 Va. 605, 89 S. E. 857. That case was rested upon the construction of section 3211 of the Code of 1887 as amended in 1914 (now section 6046), read in connection with other sections of that Code, especially section 3207 (now section 6041), and it was held that a motion for a judgment under section 3211 of the Code of 1887 as amended (now section 6046) could be sent out of the county to be executed, although the only ground of jurisdiction was that the cause of action arose in the county where the motion was returnable, and process in a formal action, under such circumstances, could not be sent out of the county to be executed. Shortly thereafter the Legislature amended the statute in this particular so as to provide expressly that, in such case, the notice should not be sent out of the county to be executed (Code, § 6046), thus making the rule in this respect the same whether the proceeding was by a regular formal action or by motion. To this extent the Legislature manifested an intent to harmonize process in the different forms of procedure. *Kain v. Ashworth*, therefore, is not controlling in the present controversy.

We have held in a number of cases that the notice under section 6046 takes the place of the writ and declaration. *Morotock Ins. Co. v. Pankey*, 91 Va. 259, 21 S. E. 487; *Security Loan Co. v. Fields*, 110 Va. 827, 67 S. E. 342, and cases cited. This does not mean, of course, that they are identical; but that the notice serves as a citation of the defendant mentioned therein, and also states the ground of the action. No rules are taken as in a regular action, but the procedure is largely informal. The notice, however, so far as it serves as a substitute for the declaration, must state, in substance, a good cause of action, else it will be bad on demurrer (*Security Loan Co. v. Fields*, supra; *Matthews v. La Prade*, 130 Va. —, 107 S. E. 796), and so far as it serves as a writ it must fix a time and place for the defendant to make defense, and otherwise conform to law. It would seem that if all process "from any court" must be returnable within 90 days, that which is to take its place when emanating from a private person should have a similar limitation. We can conceive of no reason applicable to the one which is not equally applicable to the other, and, in the absence of any statute authorizing or compelling a different conclusion, the same limitation should be placed on notices as is placed by the statute on "process from any court." It is true that section 6046 fixes no appearance day for the notice, but the general rule requiring an act to be

(199 S.E.)

done in a reasonable time where no time is fixed should be applied to the case. What is a reasonable time is a very indefinite term, varying as to the act to be done and the circumstances of the particular case. Frequently there is no guide to its definition except the judgment of reasonable men, judges, or jurors. Here, however, we have the guidance of a legislative act which has remained unchanged for over 60 years. Acts 1852, p. 76. It is that "process from any court" shall, unless otherwise provided, be returnable within 90 days from its date. If such process is to be so returnable, why should not notices from private persons be subject to the same rule? Can any sound reason be assigned for a difference? In the case in judgment, the plaintiff had not only passed over a term of the court, but had exceeded the limit prescribed by section 6055 by 48 days, or about 7 weeks. If he may exceed it by 7 weeks, why not by 7 months, or 7 years? Where shall the limit be fixed? Unless the limit prescribed by the statute to "process from any court" be adopted, we are hopelessly at sea as to how to measure "reasonable time." What is "reasonable time" for the return of a judicial writ ought also to be "reasonable time" for that which is allowed to take its place. We conclude, therefore, that the trial court should have sustained the motion of the defendant to quash the notice and dismiss the action, and that its failure to do so was error. The objection was not merely formal, but fundamental and substantial. It went to the jurisdiction of the court to hear and determine the controversy. *Lavell v. McCurdy*, supra.

The plaintiff was fully warned of the objection to the sufficiency of the notice. When the case was first called for hearing on March 22, 1920, there was a motion to quash the notice and dismiss the action, which motion the court overruled, and thereafter, on June 22, 1920, the defendant demurred to the notice for misjoinder of causes of action. The demurrer was sustained, with leave to amend, and, instead of commencing a new action, with a notice that was unobjectionable as to the return day, the plaintiff elected to amend the original notice and pursue his remedy by that proceeding, which was accordingly done.

We are of opinion, for the reason we have stated, that the notice as a writ to commence the action was a void process, and consequently that the verdict of the jury and the judgment of the court founded thereon are likewise void. An order therefore will be entered in this court, directing the clerk of the circuit court of Bath county to enter on his order book where the said judgment is entered and on the judgment docket where it is docketed that the said judgment has been

declared void by this court. An order will also be entered here in favor of the plaintiff in error for its costs incurred in this court and in the circuit court.

Reversed.

(131 Va. 752)

HITT v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Nov. 17, 1921.)

1. Indictment and Information \S 191(1/2)—General blanket form indictment would not support conviction for drinking whisky or of receiving ardent spirits.

Defendant, being prosecuted for violation of the prohibition act under indictment in the general blanket form suggested in section 7 thereof, charging that defendant "did unlawfully manufacture, sell, offer, keep, store and expose for sale, give away, transport, dispense, solicit, advertise and receive orders for ardent spirits," could not be convicted of drinking whisky, in violation of section 37, or of receiving ardent spirits, in violation of section 40.

2. Intoxicating liquors \S 138—Whisky bottle carried in coat pocket or in automobile not carried in "baggage" within prohibition act.

A bottle of whisky carried in coat pocket or in automobile held not carried in baggage within prohibition act, permitting traveler to carry certain amount of liquor in his "baggage."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Baggage.]

3. Intoxicating liquors \S 131—Transportation of liquor to be unlawful need not be for purpose of sale.

Transportation of liquor, to be unlawful under Prohibition Act of 1918, \S 3, 39, need not be for purpose of sale in view of blanket form of indictment set out in section 7.

4. Criminal law \S 883 — General verdict in prosecution under general blanket form of indictment held sufficient.

In prosecution for violation of prohibition act under the general blanket form of indictment set out in Prohibition Act of 1918, \S 7, verdict held not defective for failure to specify the particular offense of which defendant was found guilty.

5. Criminal law \S 881(4)—General verdict of guilty upon indictment charging several offenses will protect defendant from subsequent prosecution for any thereof.

A general verdict of guilty upon an indictment charging several offenses will protect a defendant from a subsequent prosecution for any thereof.

6. Intoxicating liquors \S 167—Occupant of automobile who drank from whisky bottle handed him by driver held not guilty of unlawfully transporting liquor.

Occupant of automobile who took a drink from bottle of whisky handed him by driver, and who thereupon handed bottle back to driver, held not guilty of unlawfully transporting liq-

uor in violation of Prohibition Act of 1918, § 3, or section 39, not being a principal in the first degree because not an actor in the transportation nor an accessory under section 3a, because present during the commission of the offense nor a principal in the second degree because in no way aiding or abetting the transportation.

7. Criminal law §59(3) — "Accessory" defined.

An "accessory" is one not present at the commission of the offense, but who is in some way concerned therein either before or after as contriver, instigator, or adviser, or as a receiver or protector of the perpetrator.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accessory.]

Error to Circuit Court, Rockingham County.

Tony Hitt was convicted of violating the state prohibition act; and he brings error. Reversed.

F. C. Stipes, and John Paul, of Harrisonburg, for plaintiff in error.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazile, Second Asst. Atty. Gen., for the Commonwealth.

KELLY, P. The defendant, Tony Hitt, was indicted for violation of the state prohibition act. Laws 1918, c. 388. The indictment was in the general blanket form suggested in section 7 of the act, and charged that Tony Hitt—

"* * * did unlawfully manufacture, sell, offer, keep, store and expose for sale, give away, transport, dispense, solicit, advertise and receive orders for ardent spirits, against the peace and dignity of the commonwealth of Virginia."

The verdict was in the following form:

"We, the jury, find the accused, Tony Hitt, guilty as charged in the indictment, and fix his punishment at a fine of \$50 with confinement in jail for one month."

The trial court sentenced the defendant accordingly, and to that sentence this writ of error was awarded.

Briefly stated, the material facts are these: Hitt lived at Elkton, in Rockingham county, about 20 miles from Harrisonburg. One Saturday afternoon he met on the street in Elkton an acquaintance named Pittington, who invited him to go to Harrisonburg that night in an automobile. Hitt had some personal business to attend to in Harrisonburg, and said he would go. It was agreed between them that they should start from Pittington's home after supper. Pursuant to this arrangement, Hitt went to Pittington's house later, where he found Pittington and another acquaintance named

Simmons ready to start in the car. On entering the car Hitt noticed a suit case on the floor in front of the rear seat. Pittington and Simmons rode on the front seat and the defendant in the rear. He did not know and did not ask what the suit case contained, had no reason to suppose it contained whisky, and did not know that his companions had any whisky with them. After they had proceeded a short distance outside of the town of Elkton, Simmons, who was driving, stopped the car, and he and Pittington offered Hitt a drink from a bottle which they had on the front seat. He took a drink and returned the bottle to them. Before reaching Harrisonburg he took one other drink from the same bottle. Pittington and Simmons drank a number of times on the way and were intoxicated when they arrived at Harrisonburg. Hitt was not intoxicated, and at no time before their arrival did he know that there was any whisky in the car except that which was contained in the bottle above mentioned. The radiator of the engine was hot when they reached Harrisonburg, and it was decided to take the car to a garage to get some lubricating oil. Pittington left the car, for some reason not satisfactorily explained, and Simmons and Hitt started on to a garage for the oil. As they were going around the courthouse square Simmons drove into another car. A crowd assembled, and Hitt, seeing a policeman approaching and thinking that Simmons would probably be arrested on account of the accident, mingled with the crowd without letting himself be known, and walked off down the street, where he met Pittington and related the occurrence. Pittington expressed concern about the suit case, telling Hitt that it contained whisky, and this was the first time the latter had been apprised of that fact. Simmons was arrested and taken to jail. Pittington was unwilling to claim his suit case, and later in the night hired another car in which he and Hitt returned to Elkton. On the following Monday Pittington came to see Hitt, said that he had been advised to leave, urged Hitt to go with him, and they both left the state and went to Pennsylvania. A few days later Hitt left Pittington and went to the home of his brother in Baltimore, where he learned that warrants had been issued for Simmons, Pittington, and himself. Upon advice received in a letter from his father, Hitt shortly afterwards returned and surrendered to the officers in Rockingham county.

We have omitted some of the details of the evidence, but have considered it all most carefully, and, as we view the case, no responsibility can be placed upon the defendant in so far as the suit case is concerned. He was in bad company, but he cannot be convicted of a crime upon mere suspicion, and, unless we resort to that, we must treat

the charge against him as if the bottle of whisky above referred to contained the only ardent spirits in the car.

The question then is whether the defendant could, by reason of his conduct with respect to the bottle, be lawfully convicted of any offense charged in the indictment under which he was tried.

[1] He was not tried for drinking whisky contrary to section 37 of the prohibition act. That charge is not embraced in the indictment. The conviction here complained of could not be sustained by reason of the provisions of that section, and this, we understand, is conceded.

It appears to be also conceded by the Attorney General (though the trial court thought otherwise) that, even if section 40 of the act prohibiting all persons from receiving ardent spirits, except under certain specified circumstances, could be held to apply to the conduct of the defendant in taking two drinks from the bottle, he could not be convicted for that offense under the indictment here. In our opinion the section does not apply; and, further, we agree with the Attorney General in the view that a charge of its violation is not embraced in the so-called blanket indictment.

These conclusions seem clear from the terms of the act, and are sustained by the decision of this court in *Lané v. Commonwealth*, 122 Va. 916, 95 S. E. 466.

The indictment does, however, charge the defendant with unlawfully transporting ardent spirits, and the real question in this case is whether under the evidence he can be held guilty of that charge.

[2] It is insisted that as to the bottle of whisky *Pittington* and *Simmons* themselves were not violating the law, because they had the right to carry as much as a quart for personal use in their baggage, and that a quart of whisky in one's pocket or in his automobile may properly be considered in his baggage within the meaning of the act, even though not inclosed in any other receptacle than the bottle itself. This contention is disposed of adversely to the defendant in the case of *Snarr v. Commonwealth*, 109 S. E. 590, decided to-day.

[3] It is further contended that the transportation prohibited by section 3 of the act (containing substantially the language of the indictment) is a transportation for sale, and that, since the evidence shows the whisky in the bottle not to have been transported for sale, the indictment must fall. The case of *Pine and Scott v. Commonwealth*, 121 Va. 812, 848, 93 S. E. 652, is relied upon to support this contention. In that case we held that the words "for sale" qualified the word "keep" as used in section 3, and that the "keeping" there prohibited was a keeping for sale, and, further, that a transportation for sale was likewise prohibited; but we did not there decide that such was the only kind

of transportation made unlawful by that section. Furthermore, it will be noted that the act of 1916 (Laws 1916, c. 146), under which the *Pine* and *Scott* Case was decided, has since been replaced by the act of 1918, which in prescribing the form of indictment uses the word "transport" in such a way as clearly indicates that it was not intended to be limited to a transportation for sale. As pointed out by Judge *Burks* in the *Pine* and *Scott* Case, *supra*, the word "transport" did not appear at all in the form of indictment set out in section 7 of the act of 1916. In the corresponding section of the act of 1918, however, this word not only appears in the suggested form of indictment, but is so placed as to clearly negative any intention to limit the offense charged to a transportation for sale, the language being, "did unlawfully * * * keep, store, and expose for sale, give away, transport," etc. Reading section 3 in the light of this change in the original form of the indictment, we have no doubt that the former section prohibits every transportation of ardent spirits, whether for sale or not, subject only to the express exceptions in the prohibition act provided; and we so hold. Furthermore, section 39 clearly prohibited the transportation of the bottle in the way in which it was being carried by *Pittington* and *Simmons*, and, if the defendant was a guilty participant in the transaction, the indictment sufficiently charged the offense under the latter section. The provisions of section 7 do not necessarily restrict the form of indictment therein prescribed to use under the specified sections 3, 3a, 4, and 5 of the act, but merely provide that it or any other good form of indictment shall be sufficient for any such violations. There was no demurrer or objection to the indictment. It charged an unlawful transportation, and was sufficient even if the conviction depended solely upon the establishment of a violation of section 39.

[4, 5] It is said that the verdict ought to have been set aside because it was fatally defective in form. The contention here is that, as the indictment charged a number of offenses, it is impossible to say from the verdict for which one the defendant was convicted, and hence he might be subjected to a future prosecution for the very same offense for which the jury found him guilty. This position is not tenable. A general verdict of guilty upon an indictment charging several offenses will protect a defendant from a subsequent prosecution for any thereof. 22 Ency. Pl. & Pr. p. 845.

This brings us to the final question in the case, namely: Was the defendant under the evidence guilty of transporting whisky? There is no room for any claim that he was guilty as a principal in the first degree. In no reasonable or just sense can it be said that within the meaning of the law he became an actor in transporting the whisky

bottle or its contents merely by reason of the fact that he momentarily had it in his hands while he was drinking from it.

By the common law with respect to misdemeanors there is no distinction between principals and accessories; all participants being regarded as principals. Min. Syn. Cr. Law, p. 12. Section 3a of the prohibition act provides that on an indictment for the violation of any of its provisions "the jury may find the defendant guilty of an attempt, or of being an accessory, and the punishment shall be the same as if the defendant were solely guilty of such violation."

[8, 7] We have seen that the defendant was not a principal in the first degree because he was not an actor in the transportation. Min. Syn. Cr. Law, p. 11. Neither was he an accessory, because an accessory is one not present at the commission of the offense, but who is in some way concerned therein, either before or after, as contriver, instigator, or adviser, or as a receiver or protector of the perpetrator; and the defendant does not fall within any of these classes. Min. Syn. Cr. Law, p. 12. If guilty at all, he was guilty as a principal in the second degree upon the theory that, being present, he aided and abetted the act. We do not think he can be said to fall within this classification. Nothing that he did before or after the discovery in any way aided or abetted their transportation of the whisky. His conduct in drinking from the bottle may have indicated an approval of what they had done and were continuing to do, but we do not think that it can be fairly said to have constituted him a participant in the transportation either as a principal or an accessory. Such a holding would mean that, whenever one man takes a drink unlawfully which is given to him by another, he almost certainly renders himself liable to prosecution not only for that act, but for the act of the other party in unlawfully carrying whisky with him. The act itself shows that the unlawful transportation of whisky is regarded as a more serious offense and is more severely punished than the unlawful drinking of whisky. We do not think it was the purpose of the act to go as far in the punishment of the offense of unlawful drinking as it would be necessary to go in this case to sustain the conviction.

The trial court, over the objection of the defendant, gave the following instruction:

"The court instructs the jury that the transportation of even one quart of intoxicating liquor, or less, from Elkton to Harrisonburg, is an unlawful act under the prohibition law, and that, if the defendant accompanied Pittington and Simmons on the trip from Elkton to Harrisonburg, knowing there was liquor in the car, and drank with them from a bottle, then he is guilty under the law, whether he knew the suit case contained liquor or not."

This instruction left the jury no discretion, and was very probably the cause of the verdict. Whether so or not, the instruction was erroneous, and, furthermore, the verdict was without sufficient evidence to support it.

The provisions of the prohibition act, as stated by the learned and upright judge of the trial court in his written opinion, were intended to be drastic, and they must be firmly enforced in order to make the law effective. We feel, however, that an affirmation of the judgment in this case would visit a punishment upon the defendant for one violation of the act upon proof of his guilt of another violation, the latter not being charged, and, furthermore, carrying a lesser penalty than the former.

For the reasons indicated, the judgment complained of will be reversed, the verdict of the jury set aside, and the case remanded to the circuit court for such further proceedings as the commonwealth may be advised to take therein, not inconsistent with the views herein expressed.

Reversed.

(39 W. Va. 511)

KINGMAN MILLS v. FURNER. (No. 4266.)

(Supreme Court of Appeals of West Virginia.
Nov. 15, 1921.)

(Syllabus by the Court.)

1. Pleading \S 155—Affidavit failing to identify cause and not stating that amount claimed was on demands in the declaration fatally defective.

An affidavit by plaintiff, pursuant to section 46 of chapter 125 of the Code 1913 (sec. 4800), which fails to identify in any way the cause or action in which it is proposed to be filed, or which in stating the amount he verily believes is due and unpaid from the defendant to him, omits the words "upon the demand or demands stated in the declaration," is fatally defective, and on motion of the defendant should be quashed.

2. Parties \S 69—Declaration describing plaintiff as a branch of a named company not subject to demurrer for failure to identify plaintiff.

A declaration describing the plaintiff as "The Kingman Mills, a branch of the Kansas Flour Mills Company, a body corporate," sufficiently identifies the plaintiff as the Kansas Flour Mills Company, a corporation, the real plaintiff, and a demurrer to the declaration for want of parties or of proper description of plaintiff, is properly overruled.

3. Parties \S 95(5)—Where plaintiff was misdescribed in declaration, it should be permitted to amend.

Such misdescription of plaintiff corporation is not good ground for demurrer, and it should of right be permitted to amend its declaration

if desired, pursuant to section 14 of chapter 125 of the Code 1913 (sec. 4768).

Poffenbarger and Lynch, JJ., dissenting in part.

Error to Circuit Court, Harrison County.

Action by the Kingman Mills, a branch of the Kansas Flour Mills Company, against Noah C. Furner. Verdict and judgment for the defendant, and the plaintiff brings error. Reversed, and new trial granted.

Harvey F. Smith, of Clarksburg, for plaintiff in error.

Harvey W. Harmer, of Clarksburg, for defendant in error.

MILLER, J. This action was by and against the parties as styled in the above caption, and the final judgment of nil capiat complained of, pronounced after verdict for defendant, set aside, and, on motion of plaintiff overruled, for leave to amend its declaration by substituting its correct name, The Kansas Flour Mills Company, a body corporate, trading as The Kingman Mills, in the place of the name in the declaration.

[1] The first point of error urged is that the circuit court, upon defendant's motion, improperly quashed plaintiff's statutory affidavit of the amount which it claimed it was entitled to recover in the action, and permitted defendant to plead to issue without having filed his counter-affidavit, as required by section 46, chapter 125 of the Code (sec. 4800). As this statute is in derogation of the common law and designed to cut off defenses without compliance therewith, it should, according to well recognized rules of construction, be strictly construed, and strict compliance therewith required. The affidavit contains no caption showing the style of the action, nor does it show where the action was pending in which it was intended to be filed. The venue is laid in the "State of Kansas, County of Kingman," and is as follows:

"This day E. F. Erbacher, personally appeared before me, Scott Williamson, a Notary Public in and for said county and state and being by me first duly sworn, deposes and says, that he is the manager of the Kingman Mills, a branch of the Kansas Flour Mills Company, a body corporate; that he is familiar with the facts involved in this case and with the books and accounts of his said company generally; that he is authorized by it to make this affidavit; that there is as he verily believes due and unpaid to his said company, as aforesaid from the defendant, Noah C. Furner, including principal and interest, after deducting all credits, payments and sets-off made by the defendant and to which he is entitled the sum of six hundred eighty six dollars and seventy cents (\$686.70) that said sum is due, owing and unpaid.

E. F. Erbacher.

"Taken, subscribed, sworn to and given under my notarial seal this 16th day of August, 1918.

"Scott Williamson, Notary Public."

By said section 46, the plaintiff, to cut off defenses without counter-affidavit, is required to swear that,

"There is, as he verily believes, due and unpaid from the defendant to him upon the demand or demands stated in the declaration, including principal and interest, after deducting all payments, credits and sets-off made by the defendant, and to which he is entitled, a sum certain to be named in the affidavit."

It is apparent that the affidavit is not only wanting in identifying the action in which it was intended to be filed, but that it omits the very important words of the statute, "due and unpaid from the defendant to him (it) upon the demand or demands stated in the declaration." An affidavit which said "there is due him a certain sum" instead of "there is due and unpaid," was held insufficient to call for judgment under the statute, by reason of the omission of the words "and unpaid." *Marsteller v. Ward*, 52 W. Va. 74, 43 S. E. 178, approved in *Hutton v. Holt*, 52 W. Va. 672, 44 S. E. 164. The case of *Vinson v. N. & W. Ry. Co.*, 37 W. Va. 598, 16 S. E. 802, holds fatally defective an affidavit which omitted the words "after deducting all payments, credits and sets-off made by the defendant, and to which he is entitled." In *Virginia* it was held that an affidavit was defective for failing to state the time from which plaintiff demanded interest. *Merriman Co. v. Thomas & Co.*, 103 Va. 24, 48 S. E. 490. Plaintiff's affidavit in this case, we think, was fatally defective, and was properly quashed.

[2] The next ground relied on for reversal is that the court, by its order entered on May 29, 1920, after having overruled it by a previous order, sustained defendant's demurrer to plaintiff's declaration. And a third point, which may be considered with the second, is that after sustaining said demurrer, the court by the same order denied plaintiff the right to amend, already referred to. The second point presents the question whether the suit brought is in the name of any party plaintiff. It is said that "The Kingman Mills, a branch of the Kansas Flour Mills Company" is neither a natural person nor a corporation, capable of suing and being sued. Who is the plaintiff in this case? Is it not plainly the Kansas Flour Mills Company, a body corporate, owner of the Kingman Mills branch of its business? How can there be any doubt or misunderstanding about this? We think the name of plaintiff as pleaded might, without any violence to the rules of practice prescribed by statute and recognized by general law, have been paraphrased so as to more correctly state its name, as for example, "The Kansas Flour Mills Company, a body corporate, The Kingman Mills Branch," or "doing business as the Kingman Mills Branch," or by simply omitting altogether

the words, "The Kingman Mills Branch," and specifically averring the fact of plaintiff's ownership of the mills, and that the contract was made in that name and for its use and benefit, followed by proof of the fact. Our opinion is that as stated in the writ and declaration the name pleaded did not in fact or in legal effect constitute a misnomer calling for amendment. In the case of Board of Education of Walton District, Roane County, v. Board of Trustees of Walton Lodge No. 132, I. O. O. F., 78 W. Va. 445, 447, 88 S. E. 1099, the suit was upon a contract signed "Walton Lodge I. O. O. F. 132, By C. D. Moore, Its Agent," whereas the defendant was described in the bill, "Board of Trustees of Walton Lodge No. 132, Independent Order of Odd Fellows, a corporation." It was said that because the two names were not identical, they did not describe the same corporation or entity. In that case Judge Williams says, 78 W. Va. at page 447, 88 S. E. 1100:

"It does not follow that, because the two names are not identical, they do not describe the same corporation, or entity."

And in the same connection it is said:

"The name signed to the contract may not be defendant's strictly correct name; yet, if it contracted in that name, it is bound. A corporation, like a natural person, may contract in different names."

And quoting from cited cases it is further said:

"A contract entered into by a corporation under an assumed name may be enforced by either of the parties, and the identity of the company may be established by the ordinary methods of proof," citing *Marmet Co. v. Archibald*, 87 W. Va. 778, 17 S. E. 299; *Culpepper Agri. & Mfg. Soc. v. Digges*, 6 Rand. 165; *National Bank v. Distilling Co.*, 41 W. Va. 530, 23 S. E. 792, 56 Am. St. Rep. 878; *Grafton Grocery Co. v. Home Brewing Co.*, 60 W. Va. 281, 54 S. E. 349; and *Varney & Evans v. Lumber & Mfg. Co.*, 64 W. Va. 417, 63 S. E. 208.

In the principal case it was held that the alleged variance could not be taken advantage of, by demurrer, and that by virtue of section 14 of chapter 125 of the Code (sec. 4768), the error in names could be corrected by mere motion on affidavit stating the correct name.

[3] Assuming in this case that the plaintiff was misnamed in the declaration, was the name correctable on motion? We think it was. We think the case falls clearly within the provisions of said section 14 of chapter 125, Code. In the more recent case of *Duty v. O. & O. Ry. Co.*, 70 W. Va. 14, 78 S. E. 331, we decided that the name of the defendant described in the declaration as a corporation under the laws of a different state than the one described in the declaration, when the right one had been intended and served with

process, might be corrected by motion under the statute.

Cases from other jurisdictions where similar statutes were involved are substantially in accord with our decisions. In *Bank of Havana v. Magee*, 20 N. Y. 355, it was held that the prosecution of a suit by an individual banker in a name importing a corporate character, under which he carried on business, was a merely formal error amendable in the court of original jurisdiction and to be disregarded in the appellate court, and that where the plaintiff miscalls himself by a name which represents no person, natural or artificial, the remedy is by motion and not by demurrer or answer. In *Barber v. Smith*, 41 Mich. 138, 144-145, 1 N. W. 992, it was decided that this remedy by amendment was properly applied in an attachment suit. In that case the distinction was drawn between a case where the suit is in a partnership name without naming the individuals composing it, as was that case, and cases like *Smith v. Canfield*, 8 Mich. 493. In the latter case, however, the court withheld its opinion whether the writ was a nullity in a sense excluding all possibility of making anything valid out of it by admissions or amendment. In *Morgridge & Merrick v. Stoeffer*, 14 N. D. 430, 104 N. W. 1112, where the statute is quite similar to our own, the court decided that a summons which contained only the partnership name, was not a nullity, but might be amended by inserting the name of each partner. A similar holding is found in *Kleinert v. Knoop*, 147 Mich. 387, 110 N. W. 941, which decided that a petition in the name of *Fursternberg Bros.* might be amended by setting out the names of the persons composing the firm. In *Morrison & Co. v. Tate* (Ky.) 1 Metc. 569, the suit was in the name of *A. J. Morrison & Co.* It did not appear from the petition whether or not the plaintiff was a firm composed of more than one person. If it was, the court said it devolved upon defendant to show it, and that he then could have compelled an amendment. In *Loewenberg v. Gilliam*, 72 Ark. 314, 79 S. W. 1064, we find a like holding in a suit in partnership name where the names of the individual partners were not set out in the writ or pleadings.

A case or two may be found which may not be in accord with our decisions and those cases cited from other states. For example, we find the case of *Proprietors of Mexican Mills v. Yellow Jacket Silver Mining Co.*, 4 Nev. 40, 97 Am. Dec. 510, where, in construing the statute relating to the amendment of pleadings, the court held it to be inapplicable to cases where no person, natural or artificial, is named as plaintiff. In the case here an artificial person is named as plaintiff, namely, the *Kansas Flour Mills Company*; and the motion for leave to amend the dec-

laration falls clearly within the meaning and intent of our statute. Of course the party plaintiff or defendant must be capable of suing and being sued. Associations of individuals not incorporated cannot sue or defend in the name of the association. *St. Paul Typothetæ v. St. Paul Bookbinders' Union*, 94 Minn. 351, 102 N. W. 725, 3 Ann. Cas. 695; *Schuetzen Bund v. Agitations Verein*, 44 Mich. 313, 6 N. W. 675, 38 Am. Rep. 270; *Simpson & Smith v. International Brotherhood of Locomotive Engineers*, 83 W. Va. 353, 98 S. E. 580. In the latter case we held, however, that a corporation contracting under an assumed name may be sued by such name and is estopped to deny its existence for the purposes of the litigation, though proof of the incorporation of the individuals so contracting is essential to the maintenance of the suit. A steamboat, hotel, toll-gate or race-horse, though having a name, and to which notes or other obligations may be made, may not sue, but suit thereon may be maintained in the names of the real parties in interest. *Steamboat Pembina and owner v. Wilson*, 11 Iowa, 479. So in the case at bar, the Kingman Mills, not a corporation, but a branch of the real plaintiff named in the declaration, may not be competent to sue, but its owner is competent to sue; and the Kansas Flour Mills Company, named as the real owner, is a corporate entity and competent to maintain the suit in the name of the non-entity which it owned and controlled, if it elected to do so. The case of *Western & Atlantic Railroad Co. v. Dalton Marble Works et al.*, 122 Ga. 774, 50 S. E. 978, we do not regard as being in conflict with the views herein expressed, for that case holds that though a suit can be maintained only in the name of a natural or artificial person capable of suing, nevertheless it holds that if a corporation suing fails to fully or correctly describe its legal entity, it may amend by setting out in the pleading its correct name, distinguishing that class of cases from others cited and relied on by counsel. The case of *Lilly v. Tobbein*, 103 Mo. 477, 15 S. W. 618, 23 Am. St. Rep. 387, an action to upset a will, was commenced in the name of an unincorporated church society, and it was decided that members of such church suing in their own behalf as well as in behalf of all the members, might be substituted as plaintiffs by an amended petition.

Upon the authority of the foregoing decisions, and upon our statute properly construed, we think the court erred, not only in sustaining the defendant's demurrer to the declaration, but also in overruling plaintiff's motion to amend according to the fact then appearing by depositions filed in the case, though in our opinion no amendment of the declaration was actually necessary.

The only other error assigned which may

be considered is the giving of defendant's instruction number eight. This instruction is no part of the record of the case by any order or bill of exception, and though copied in the brief of defendant's counsel, cannot be considered. The case was finally disposed of by the judgment of *nisi* capiat on May 29, 1920, before the act of April 15, 1921, Acts 1921, chapter 68, became effective. It can be given no retroactive effect.

Our conclusion is to reverse the judgment, and grant the plaintiff a new trial.

POFFENBARGER, J. (dissenting in part). I am unable to concur in so much of the opinion filed by Judge MILLER as holds that the writ and declaration or either of them is amendable.

The name "Kingman Mills" does not purport signification of either a natural or an artificial person, and the plaintiff has no other name. The appellation is not a defective or erroneous designation of any person. It is a designation of an inanimate thing incapable of suing. The alteration the court allows is a substitution of an artificial person for no person at all.

The annexed descriptive matter, "a branch of the Kansas Flour Mills Company, a body corporate," is only descriptive. It does not purport to give the name of the plaintiff. It merely tells who owns the Kingman Mills, or to whom the Kingman Mills belong, which, of course, amounts to the same thing. It would perform that function just as well, if it were wholly separated from the name, Kingman Mills, and placed in the middle of the declaration or at the end thereof, in different terms. To say the Kansas Flour Mills is named as plaintiff, either accurately or erroneously, is to ignore the terms used and insert new ones. It cannot be interpretation of the language used, for it goes outside of and beyond it.

None of our decisions cited in the opinion are in any sense analogous. They all affirm liberality of construction of the statute authorizing amendments, but, in every one of them, a natural or an artificial person was named as plaintiff. In *Board of Education v. Board of Trustees*, 78 W. Va. 445, 88 S. E. 1099, both parties were correctly or sufficiently described in the pleadings, and the erroneous designation appeared only in an exhibit. In *Duty v. O. & O. Ry. Co.*, 70 W. Va. 14, 73 S. E. 331, the erroneous designation appeared in only one count of the declaration, and it was clearly a mere misnomer of a person described as a corporation. All of the others cited are equally lacking in analogy. In *Bank of Havana v. Magee*, 20 N. Y. 355, the decision was based upon a statute, requiring the courts to ignore and disregard every error or defect in pleadings or proceedings, not affecting the substantial rights of the adverse party. We

have no such statute. *Barber v. Smith*, 41 Mich. 138, involved the law of collateral attack, and, moreover, the court held that the plaintiffs were partially described as being natural persons. In *Smith v. Canfield*, 8 Mich. 493, a writ of replevin issued in the firm name of partners was treated as void and quashed. In *Morgridge & Merrick v. Stoeffer*, 14 N. D. 430, 104 N. W. 1112, the court held that the use of a firm name was a partial description of natural persons. In *Morrison & Co. v. Tate* (Ky.) 1 Metc. 569, the court treated "A. J. Morrison & Co." as the name of a natural person, and the appellation did set forth the name of such a person. The phrase "Kingman Mills," used for designation of the plaintiff, is not, in any sense or to any extent, descriptive of the "Kansas Flour Mills Company." The only identical word in both phrases is "Mills" and it does not signify any person of any kind.

I would reverse the judgment and dismiss the action, with a saving clause against prejudice, though I hardly think such a clause is necessary.

LYNCH, J., joins me in this dissent.

(89 W. Va. 520)

FLYNN et al. v. YEAGER et al. (No. 4193.)

(Supreme Court of Appeals of West Virginia.
Nov. 15, 1921.)

(Syllabus by the Court.)

1. Fraud \S 50—Not deducible from facts and circumstances consistent with honesty.

Fraud is not deducible from facts and circumstances plainly consistent with honest intentions, either upon a demurrer to a pleading or in a finding upon evidence.

2. Trusts \S 365(2)—Laches held not inapplicable to express trusts.

Laches is not inapplicable to express trusts, but it is not so readily applied to them as it is to contracts not involving any relation of confidence or trust.

3. Trusts \S 176—Trustee does not make unauthorized delegation of authority in employing agent to assist in execution.

In the employment of an agent to assist him in the execution of his trust, a trustee does not make any unauthorized delegation of his authority.

4. Appeal and error \S 1010(1)—Findings as to existence of relationship supported by sufficient evidence will not be disturbed.

The findings of a trial court upon issues as to the existence of the relation of principal and agent between parties, and the capacity in which the alleged agent holds certain real estate conveyed to him and partly paid for by the alleged principal, supported by facts, circumstances, conduct, and correspondence very strongly tending to corroborate the oral evidence in their fa-

vor and to overthrow the opposing oral evidence, will not be disturbed by the appellate court.

5. Property \S 9—Agent's payment of part of purchase price is not conclusive of his ownership of land.

Payment by an agent of part of the purchase money of land conveyed to him and claimed by him as his own is not conclusive evidence of his individual ownership thereof, since an agent may expend his own money in the execution of his agency and, in such case, is entitled to be reimbursed therefor in settlement with his principal.

Appeal from Circuit Court, Pocahontas County.

Suit by James Flynn, trustee, and others against C. A. Yeager, trustee, and others. From a decree adjudicating plaintiff's right to enforcement of an express trust in real estate and referring the cause to a commissioner for ascertainment of facts essential to final settlement, the defendant C. A. Yeager appeals. Affirmed.

A. P. Edgar, F. R. Hill, and Andrew Price, all of Marlinton, for appellant.

T. N. Read, of Hinton, and L. M. McClintic, of Marlinton, for appellees.

POFFENBARGER, J. On this appeal from a decree adjudicating right in the plaintiffs to enforcement of an express trust in real estate and referring the cause to a commissioner for ascertainment of facts essential to final settlement and determination of the rights of the parties, it is contended that the demurrer to the bill should have been sustained on the ground of its alleged disclosure on its face of fraud on the part of the plaintiffs, laches, and lack of equity, and also that the trial court's finding on the issue of fact, made by the pleadings, is contrary to the weight of the evidence.

[1] No revelation of fraud is found in the allegations of the bill. They show that the plaintiffs employed the defendant Yeager as their agent to procure extensive and valuable tracts of timber and timber rights in Pocahontas county, upon his representation that he was a real estate agent and could procure said properties for them at reasonable prices, and that it was agreed, among other things, that, in every case in which the owners of the lands optioned should refuse or fail to pay him a commission of 5 per cent. on the purchase price, they, the plaintiffs, should pay it. There is no occasion to inquire whether a secret arrangement or connivance between them and Yeager as agent of the vendors of the timber and lands, by which the transactions should be so conducted or manipulated as to make his principals pay the commissions, would preclude the relief sought by the bill, on the ground of fraud.

It suffices to say the bill makes no admission of concealment, secrecy, or obliquity of conduct on the part of the agent, participated in by the plaintiffs. The allegation relied upon as being an admission or making a disclosure of fraudulent purpose respecting the vendors is clearly consistent with openness and frankness on the part of the agent with all parties concerned in every transaction. Not a word in the bill imports an admission or charge that knowledge of the relation between the plaintiffs and Yeager was to be withheld from the vendors. An agent or broker, and especially a mere middleman, may represent both parties to a contract and be compensated by each of them, if both are fully informed as to his attitude and all elements of the transaction, as these parties may have been in all of the instances mentioned or referred to in the bill. *Peters v. Riley*, 73 W. Va. 785, 81 S. E. 530; *Runnion v. Morrison*, 71 W. Va. 254, 76 S. E. 457; *Cassiday Fork B. & L. Co. v. Terry*, 69 W. Va. 572, 73 S. E. 278.

[2] Nor is there any disclosure of facts or circumstances on the face of the bill constituting laches. The properties in question are but 2 of more than 30 tracts with reference to which the parties dealt, and part of the timber on another, and the time intervening between the acquisition of the titles by Yeager and the institution of this suit was less than four years. In that period they transacted a large amount of business, and the lands in question were not fully paid for until a date within two years just preceding the institution of this suit. The plaintiff James Flynn, trustee, paid \$100 on it as late as April 4, 1916, and this suit was brought in August, 1917. The bill sets forth correspondence dated in September and December, 1915, containing admissions by Yeager of Flynn's interest in these two tracts of land. Laches runs against an express trust, but the rule does not apply with the same degree of rigidity as in the case of contracts in which there is no relation of trust or confidence. The illustrations of its application in cases of express trusts, found in *Roush v. Griffith*, 65 W. Va. 752, 65 S. E. 168, make it manifest that the elements essential thereto do not appear here.

In the evidence the argument submitted on the theory of laches has less foundation than in the bill. Flynn testifies that from the beginning of his transactions with Yeager, in 1913, down to June, 1917, there was no repudiation of the alleged trust by Yeager, and the correspondence between them corroborates his testimony. The Spice Run Lumber Company, a corporation, represented by Flynn, as trustee, in his transactions with Yeager and, through him, with others, seems to have become financially embarrassed about the year 1916, and its enterprise was taken over and operated by the Brookville

Title & Trust Company. About the time it took charge of the property, the general manager of the Spice Run Lumber Company, appointed at its instance, approached Yeager for information concerning these two tracts of land, and was told they did not belong to the company. He reported this to Flynn, who says Yeager denied it when he spoke to him about it and promised to make up a statement of the cost of the land and convey it to Flynn or his company. The dates of these alleged conversations are not disclosed; but in April, 1916, Flynn made a payment on the purchase money of these lands, and on June 1, 1917, he requested Yeager in writing to make up a statement of the amount due on the property, and told him the president of the Brookville Title & Trust Company would pay it at once. This demand was repeated by a letter dated July 6, 1917. The fact that Yeager had conveyed one of the tracts to S. A. Sparks by a deed dated February 14, 1914, and recorded April 7, 1914, reserving the timber, has no important bearing upon this inquiry. If Flynn knew it, he did not abandon his claim of right. He probably had no objection to the conveyance of the land, since his real interest centered in the timber, which Yeager still held. As the bill does not seek disturbance of Sparks' title, the element of estoppel is not involved. The delay has not been unreasonable in point of time, no loss of evidence has occurred, and no disturbance is sought of any right acquired by a third party.

[3] The bill does not admit any delegation of discretionary powers by the trustee, if, in the event of his having done so, Yeager could complain of it. He simply employed Yeager as his agent to make contracts or procure offers of sale, subject to approval by his employer.

As the bill alleges an express trust and the relation of principal and agent, making Yeager a trustee as to the tracts of land in their entirety, and not a resulting trust, it was not necessary to disclose the proportion the money paid by the principal bears to the whole amount of purchase money. *Shaffer v. Fetty*, 30 W. Va. 261, 4 S. E. 278, has no application.

[4, 5] The two tracts of land contained, respectively, 234 acres and 135 acres, and were owned by the heirs of William Dean. Yeager claims to have commenced his negotiations for purchase thereof in 1912, but he had accomplished nothing with reference to them in June, 1913, when he seems to have succeeded in enlisting Flynn's interest in the timber of the section in which they are situated, and he included them in lists of prospective purchases he rendered to Flynn. No money was paid on account of either tract earlier than July, 1913. On September 29, 1913, Flynn gave his check for \$900 to J. A. Sydenstricker, cashier of the First Na-

tional Bank of Marlinton, to pay for four interests in one of the tracts and five in the other, and the money was so applied. A check for \$400, drawn September 30, 1913, by Yeager, and payable to him out of Flynn's account, was applied on the Dean land purchase money. Another for \$318, drawn by Flynn, trustee, payable to Yeager and dated September 21, 1914, was so applied. One for \$100, drawn by Flynn, payable to the cashier and dated April 4, 1916, was applied on a purchase-money note owned by Mrs. Nancy R. Dean. The purchase-money notes were executed by Yeager and the conveyances made to him. Admitting these payments or advancements by Flynn, he claims they were loans made to him with which to make payments on his own purchases. To sustain him in this contention, he produces two witnesses, Geo. M. Sutton and William Bruffey, who say they heard conversations between Flynn and Yeager concerning the purchase of the Dean lands, in which the former encouraged the latter to buy them and told him that, if he should need money for the purpose, he knew where to get it, meaning that he (Flynn) would furnish it. Admitting the possibility of conversations between them heard by Sutton and Bruffey, Flynn denies that they ever heard him agree or offer to advance money for any purchase by Yeager on his own behalf, and says he was unable to furnish more money than was needed for his own purposes. Three of the Deans say they understood from Yeager that he was buying the land for Flynn or the Flynn Lumber Company. John F. Clark, billing clerk for the Spice Run Lumber Company testified that Yeager had told him he was buying the lands for Flynn, or the company, and taking the title in his own name, on account of the number of the interests to be acquired and the probability that he could obtain them at lower prices in that way. The uncontroverted facts and circumstances the trial court may have invoked in the determination of this conflict in the oral evidence against the defendant are amply sufficient. It is improbable that the plaintiffs, in buying up and consolidating numerous tracts of timber and building an expensive railroad for access to it, were willing to finance their agent in the acquisition of a part of the timber for his own account. It is unlikely that they would want to give their agent the benefit of the enterprise. Such undertakings require large amounts of money, and all the circumstances tend to prove

the plaintiffs had no more money than they needed. The correspondence and memoranda concerning the Dean lands bear no evidence of a loan transaction. On the contrary, they are perfectly consistent with the theory of the trust relation asserted by the bill. As Yeager was acting for the plaintiffs as their agent, their correspondence ought to be taken, in the absence of anything to the contrary appearing in it, as relating to agency transactions. Nowhere in any of it is there an intimation that the Dean lands were bought in an individual capacity. The only circumstance that could be treated as evidence of it are the taking of the title in the name of the agent and execution of his own notes for purchase money. But these are negated by large payments of the notes by the principal. Yeager made some payments on the land out of his own funds, but not until after he had induced Flynn to buy timber in that section, with intent to extend his railroad to it. He was working for Flynn in June, 1913. He took a conveyance of two interests in the Dean lands from Sutton, July 18, 1913. This was his first purchase. Before and after that date he treated the purchase as having been made on behalf of his principal. For these two interests he seems to have paid about \$350, and after that Flynn began paying his notes for other interests. In addition to what he paid Sutton he seems to have paid about \$1,100 or \$1,200 more. This has not been refunded, but failure to refund it may be attributed to two causes. Yeager never tendered a conveyance nor sought reimbursement as to his outlay. Before all of the purchase money was paid, financial embarrassment overtook the Spice Run Lumber Company and Flynn, by reason of conditions growing out of the war. When this was overcome, Yeager attempted to repudiate his trust. Payments of purchase money by Yeager are not conclusive in his favor. The right of an agent to advance money for his principal in the execution of his agency, and to be reimbursed, is incontrovertible. *Ruffner v. Hewitt*, 7 W. Va. 535; *Mechem, Agency*, 1600 et seq.

Having carefully considered the evidence, facts, and circumstances, we are of the opinion that the findings of the trial court as to the relation between the parties and the status of the land and timber in controversy cannot be disturbed and ought not to be; wherefore the decree complained of will be affirmed.

(89 W. Va. 485)

PAULEY v. DECKER. (No. 4335.)(Supreme Court of Appeals of West Virginia.
Nov. 15, 1921.)*(Syllabus by the Court.)*

1. Evidence \S 480(3)—In action for breach of covenants of warranty, oral evidence may be heard to locate part of land lost in ejectment action.

In a suit for damages for breach of covenants of warranty of title in a deed, where the breach is alleged to be for a failure of title to a part of the land conveyed, caused by an adverse judgment in an ejectment suit, in which the grantor and covenantor was plaintiff and a third person was defendant, pending at the date of the deed, parol testimony, properly introduced, may be heard to establish and locate the portion of the land so lost.

2. Covenants \S 134—In action for breach of warranty, where vendor lost part of land in ejectment and evidence can be secured to show part lost, it is error to direct verdict for defendant.

In such action where, because of misconception by plaintiff of the evidence offered, it is not clearly shown how much of the land has been so lost to plaintiff, and it is apparent that legal evidence is in existence and readily obtainable whereby it may be fully shown; and there is sufficient legal evidence introduced in the trial to prove that plaintiff has so lost title and possession to some portion of the land, it is error to direct a verdict for defendant.

3. Appeal and error \S 1177(7)—Where evidence showed purchaser entitled to nominal damages for breach of warranty, but not the amount, held that there should be a new trial.

Where, upon such trial, it is clear that plaintiff is entitled to recover nominal damages, and there is competent evidence introduced showing that his damages will amount to more than \$100, although the true amount is not sufficiently proved on which to predicate a verdict and judgment, for reasons stated, the appellate court will reverse the judgment for defendant rendered on a directed verdict, and award a new trial.

Error to Circuit Court, Kanawha County.

Action by C. E. Pauley against A. A. Decker. Directed verdict and judgment for the defendant, and the plaintiff brings error. Reversed and remanded for new trial.

J. Howard Hundley, of Charleston, for plaintiff in error.

Maynard F. Stiles, of Charleston, for defendant in error.

LIVELY, J. In an action of covenant for breach of general warranty in a deed, the circuit court of Kanawha county, at the conclusion of plaintiff's evidence and on motion of defendant, A. A. Decker, directed a

verdict for defendant, and rendered judgment thereon on March 11, 1921. Plaintiff, C. E. Pauley, now prosecutes this writ of error.

[1] On August 5, 1919, A. A. Decker and wife conveyed to C. E. Pauley, with covenant of general warranty, a certain lot in Miami, Kanawha county, which lot is described in the deed as follows:

"Beginning at an iron pin set in the ground forty (40) feet from the westerly rail of said railway, at a corner of an alley between the lot hereby conveyed and the land of W. R. Blair, two hundred and fifty-seven and one-half (257½) feet northerly from a point on the line dividing lands formerly owned by Thomas Crawford from the lands of H. R. Epperly, forty (40) feet distant from said railroad track; thence N. 78° 15' W. ninety (90) feet along said alley to an iron pin set in the ground; thence S. 8° 38' W. 56 feet to a stake; thence S. 78° 15' E. ninety (90) feet to an iron pin set in the ground forty feet westerly from said railroad rail; thence N. 8° 38' E. fifty-six (56) feet to the place of beginning," etc.

At the time of this conveyance, and for some time previous thereto, a suit in ejectment, brought by A. A. Decker against L. H. Creasey, was pending in the circuit court of Kanawha county. Decker's declaration in this ejectment suit described the property then alleged to be owned by him by the same metes and bounds as were used by Decker in his description of the property in the deed to Pauley on August 5, 1919, detailed above. Creasey disclaimed all of the land described in Decker's declaration except the portion covered by a deed from John D. Kittinger and wife to L. H. Creasey, bearing date "the _____ day of _____ 19____," and entered a plea of not guilty as to that portion. On December 5, 1919, the jury having returned a verdict in favor of defendant Creasey, the court rendered judgment thereon, dismissing Decker's suit and awarding costs to Creasey. Pauley filed his declaration in covenant against Decker at August rules, 1920, and Decker's failure to successfully assert his title to the property in the ejectment suit is the breach relied on. Pauley introduced in evidence Decker's declaration, Creasey's disclaimer, and the final order of the court in the ejectment suit. The judgment in the ejectment suit as set out in the final order introduced in evidence did not show what portion of the Decker lot was held by Creasey and confirmed to him; and questions were propounded to plaintiff and J. D. Kittinger in an attempt to show the exact amount and where located; but upon objections the court struck out the answer of plaintiff in this regard, and sustained an objection to the question asked Kittinger.

Plaintiff testified that he and Decker measured the 56 feet frontage of the lot previous

to his purchase from Decker, and that during the measurement he (Pauley) held the end of the line at the pin at the corner of the alley (the beginning corner mentioned in Decker's deed to Pauley), and Decker was at the other end; that the 56 feet called for in his deed extended about 6 feet beyond a fence which had been erected by Creasey, and which ran the full depth of the lot, namely 90 feet; that Decker promised "he would establish the line, guarantee the line to me." B. M. Green, a civil engineer, surveyed the block of lots in which the Creasey and Decker lots were situated on April 28, 1919, and his testimony, together with a map of his survey, was to the effect that, measuring from the Epperly line, "an old established line," the correct line between the Decker lot and the Creasey lot was practically the same as the fence line erected by Creasey, and that the northeast corner of the Decker lot (the beginning corner in Decker's deed to Pauley) would have to be extended between 5 and 6 feet over into the alley to make the 257½ feet northerly from the Epperly line. There was also testimony to show that the distance along the front between the iron pin, mentioned as the beginning point in Decker's deed to Pauley, and the fence erected by Creasey, is 50 feet. Creasey testified that the iron pin described in Decker's deed as marking the southeast corner is 6 feet on the inside of his (Creasey's) lot. Creasey also stated that he moved some posts over to straighten his line after the decision of the court in the ejectment suit, but did not say that he did it in accordance with that judgment, nor did he give any testimony explaining just what was decided as the correct line. Testimony was introduced as to the amount plaintiff had been damaged as a result of the loss of 6 feet of ground; witness Blair stating that he would put it at \$500. It was further shown that J. A. Hamilton, who purchased the lot from Pauley as having a frontage of 50 feet, paid \$1,600 for the property, \$400 less than the price paid by Pauley to Decker. At the conclusion of his evidence plaintiff moved for leave of the court "to amend his declaration by adding thereto a count based on ouster by paramount title without reference to the ejectment suit." The court refused the proposed amendment, but offered to permit the plaintiff to take a nonsuit, which plaintiff declined to do. Thereupon the court upon motion by defendant directed the jury to find a verdict for defendant, and a judgment was rendered on the verdict so directed.

The testimony of plaintiff as to what portion of the Decker lot was held by Creasey and confirmed to him in the ejectment suit was as follows:

"Q. Do you know, or have any knowledge, of a part of this lot that you purchased having been involved in an ejectment suit? A. I heard it talked of. Q. Do you know it now? A. I

know it now. Q. Between what parties? A. Between A. A. Decker and L. H. Creasey. Q. Do you know what part, if any, of this lot was involved in that suit? A. I suppose it was the 6 feet, that is what I am short now."

The court properly sustained defendant's objection to the foregoing answer and struck it out. The answer is indefinite, not responsive to the question, and merely states plaintiff's supposition as to what was decided in the ejectment suit. The only question in regard to the ejectment suit propounded to witness Kittinger was the following:

"Do you know anything about this ejectment suit that was brought by Decker against Creasey; what it involved?"

This question is inaptly framed. There had been no evidence to show that Kittinger knew anything about the ejectment suit, and he was therefore not qualified to speak on "what it involved." The objection of defendant to this question was properly sustained by the court. Parol testimony, properly introduced, to locate and establish the portion of land lost in the ejectment suit, would have been admissible.

[2, 3] The action of the court in directing a verdict for defendant and rendering a judgment of nil capiat thereon is the main error relied upon by plaintiff for reversal. Inasmuch as the calls in Decker's declaration in the ejectment suit describing the property then alleged by Decker to belong to him and the calls in the deed from Decker to Pauley are identical, and since in the ejectment suit there was a disclaimer by Creasey of all the property so described in Decker's declaration except that portion covered by a deed from J. D. Kittinger and wife to Creasey, and since in the ejectment suit there was a judgment for Creasey, it is clear that by reason of the judgment in the ejectment suit Pauley lost some portion of the land conveyed to him by Decker. It is true that competent evidence was not adduced to show the exact number of feet of ground lost to Pauley as a result of Decker's failure to successfully assert his title in the ejectment suit for all claimed by him under his deed from D. P. Thomas; but it is shown that he lost some part of it, and for that reason was entitled to at least nominal damages for the breach of the covenant of general warranty. It further appears that Pauley failed to be put in possession of between 5 and 6 feet of the ground conveyed to him by Decker, and the damage for the loss of this amount of ground was shown to be at least \$400. Although plaintiff did not produce competent evidence to connect the loss of any exact amount of ground with the judgment in the ejectment suit, it is reasonably certain that such evidence exists. In the case of *Indian Refining Co. v. Chilton*,

109 S. E. 487, decided at this term, Judge Ritz says:

"Where an erroneous judgment has been entered denying the plaintiff even nominal damages when the evidence clearly warranted the same, this court will not refuse to take jurisdiction of a writ of error to reverse such erroneous judgment where it appears that the plaintiff in all probability is entitled to recover, if at all, more than \$100, but, by inadvertence, or by misconceiving the nature of the evidence necessary to establish his rights, failed to properly present the case at the hearing."

Also in *Shapiro v. Benenson*, 181 App. Div. 19, 167 N. Y. Supp. 1004, it is held:

"Although a case will not be reversed to allow a recovery of nominal damages, where one was entitled to nominal damages and it can be seen that on another trial he may show substantial damages, and it would be an injustice to allow the judgment to stand, he will be given another trial."

In addition see *Harman v. Washington Fuel Co.*, 228 Ill. 298, 81 N. E. 1017.

Here the plaintiff because of a misconception of the force of his evidence or for some other reason did not properly present his case to the jury, therefore he does not prevail in this court so as to entitle him to recover costs.

We reverse the judgment complained of, set aside the verdict of the jury, and remand the cause for a new trial.

Reversed and remanded.

(89 W. Va. 548)

STATE v. UNDERWOOD. (No. 4093.)

(Supreme Court of Appeals of West Virginia.
Nov. 15, 1921.)

(Syllabus by the Court.)

1. Weapons — 7—Defendant possessing pistol only to examine at invitation of owner not guilty of carrying a pistol.

Upon the trial on an indictment for carrying a pistol, if it be shown that the defendant had the pistol in his possession only for the purpose of a casual examination, upon the invitation of the owner, who has it at a place at which he has a right to carry it, and without any intention or purpose on the part of the defendant to control the use or possession of such weapon, he should be found not guilty.

2. Criminal law — 338(6)—On trial for carrying pistol, the state should not show that arresting officer had warrants for some of defendant's relatives for other offenses.

Upon the trial on an indictment for carrying a pistol, it is improper to permit the state to prove that, at the time the defendant was arrested upon the charge, the officer who arrested him had warrants for some of his relatives for other offenses.

Error to Circuit Court, Nicholas County.

George Underwood was convicted of carrying a pistol, and he brings error. Reversed and remanded for new trial.

Brown, Wolverton & Ayres, of Summersville, for plaintiff in error.

E. T. England, Atty. Gen., and R. A. Blessing, Asst. Atty. Gen., for the State.

RITZ, P. Plaintiff in error, George Underwood, was indicted, tried, and convicted in the circuit court of Nicholas county for carrying a pistol, and by this writ of error he seeks to reverse the judgment of conviction against him.

The facts proved by the state are that just prior to the time of Underwood's arrest, one of his nephews, a young man by the name of Ward, had been killed, and on the day of the arrest he accompanied the remains of this nephew from a hospital at Richwood where he died to his home at Tioga. It seems that there was some feeling between the relatives of the dead boy and the relatives of the man charged with the killing. An any rate, a deputy sheriff of the county had a peace warrant for the arrest of Underwood. When the train, upon which Underwood was a passenger, arrived at Tioga, he and another nephew got off and accompanied the remains of the dead boy to his home about a mile from the station, and there remained until some time in the afternoon, when they went to the home of Underwood's sister, a Mrs. Ward, the mother of the young man who was accompanying Underwood. While there the sheriff and two of his deputies came for the purpose of placing Underwood and the nephew who had accompanied him to Tioga under arrest upon the peace warrant. The deputy sheriff who was leading the party testifies that he knocked at the door, and receiving no response opened it and walked in; that when he got inside he observed Underwood going into an adjoining room, at the same time pulling his pistol from his hip pocket; that he immediately covered Underwood with his pistol, observing which Underwood dropped his weapon into a flour sack; that he at once went into the room and recovered the pistol from this receptacle, and it was produced upon the trial of the case. Underwood admits that he had the pistol in his possession, and that he dropped it into the flour sack, but he denies that he ever had it in his hip pocket, or even attempted to draw it on the deputy sheriff. His defense is that after he and his nephew came to the house of Mrs. Ward they sat down in the living room with the other members of the family, consisting of Mrs. Ward, her married daughter, and another son, and that while in conversation the Ward boy who had accompanied him, and

who had been in the military service of the government in France, remarked that he would show him a real gun; that Ward thereupon got up, unlocked the dresser drawer, and took from it the pistol which Underwood had at the time the officers entered; that the boy handed it to him, and he was simply looking at it at the time of the entrance of the officers, and that he got up and attempted to dispose of it in the adjoining room for the reason that he knew there were suspicions of trouble, and he did not want any one to see any firearms in the possession of any of the family at that time; that he did not at that time even know that the parties who were coming were officers. In this statement he is corroborated by his nephew who claims to have handed him the pistol, and by his niece who was present at the time. His sister, who was also in the room at the time, was not produced as a witness, it being suggested that she was too ill to attend the trial; and another nephew who was present in the room, and who was introduced as a witness, stated that he knew nothing about it, that he was sick in bed, and did not recollect of waking up until the officers came into the room and aroused him. On this state of the evidence the defendant requested the court to instruct the jury that if they believed that he received the pistol only for the purpose of incidental examination, without any intent to carry it or retain the possession of it, that he was not guilty under the law, which instruction the court refused to give, and this action of the court is the basis of the principal assignment of error.

The defendant contends that he would not be guilty of an offense under the statute if at the home of another he had in his possession a pistol simply for the purpose of examination, as he contends was the case here, without any intention of carrying it or retaining or having the possession or control of it. While the state contends that his intent is entirely immaterial; that if he had a pistol in his possession, with however innocent an intent, at a place other than his own home, he is guilty of an offense. If the intent in a case like this is not material, and if the mere possession of the weapon under any circumstances is sufficient to establish the offense, then one would be guilty if he carried a pistol or had a pistol upon his person without knowledge that it was there. Certainly no one would contend for a conviction under such circumstances. The act inveighed against by this statute is carrying about the person a dangerous and deadly weapon. The manifest purpose of the act was to prevent the many casualties arising from the promiscuous possession of such weapons, not only those arising from the deliberate use thereof, but from their accidental discharge as well. On this occasion Underwood's nephew Ward was at his own

house, and under the law had an undoubted right to have the weapon in his possession. If the jury believed that Underwood simply took this weapon into his possession at Ward's invitation for the purpose of looking at it, it being what his nephew described as a real gun, is he guilty of the offense interdicted by the law?

[1] It seems to us that this statute contemplates some possession of the weapon more or less permanent in its character, and not simply a possession for such a casual purpose as was attempted to be shown here—in other words, a possession of the weapon indicating an intention to control its use for at least a short time. We do not mean that the intention must exist to use it for any unlawful purpose. If the jury come to the conclusion that the party who has the weapon in his possession has it with the intention to control its use for any length of time, no matter what the use may be, then he would be guilty. If, however, his possession of it is under the direction of the owner, at the owner's home, and simply for the purpose of permitting the owner to gratify his pride in the exhibition of a weapon of which he is particularly proud, as is contended by Underwood in this case, there would be no offense under this statute. We have been able to find few adjudicated cases having any direct bearing upon the question involved here. A very similar question did arise in the case of *Jackson v. State*, 12 Ga. App. 427, 77 S. E. 371, and the court came to the same conclusion in that case that we have reached in this. There is also some discussion of the construction to be placed on such statutes as this in the case of *Strickland v. State of Georgia*, 137 Ga. 1, 72 S. E. 260, 36 L. R. A. (N. S.) 115, Ann. Cas. 1913B, 323.

We do not want to be understood as saying that the contention of Underwood in this case is necessarily true. The fact that he carried this weapon into the kitchen and attempted to secrete it in a flour sack, together with the evidence introduced by the state to show the character of his possession, makes it a question to be determined by the jury under proper instructions. The court, however, gave an instruction on motion of the state which in effect excluded from the jury's consideration Underwood's defense, and refused to give to the jury an instruction which required them to pass upon that defense.

[2] The defendant also insists that the trial court erred in the admission of certain evidence over his objection. The sheriff was permitted to testify over the objection of the defendant that on the occasion of Underwood's arrest he had peace warrants for several other Underwoods, relatives of the defendant. This evidence could have no purpose in this case, unless it was to show that Underwood belonged to a family whose dis-

position was generally bad. This is not the kind of evidence to be introduced upon the trial of such an issue as was presented to the jury here. Whether Underwood's relatives were good or bad people was not material, and the court should not have admitted the evidence.

For the errors pointed out above, we reverse the judgment, set aside the verdict of the jury, and remand the case for a new trial.

(89 W. Va. 526)

SHARP et al. v. CAMPBELL. (No. 4288.)

(Supreme Court of Appeals of West Virginia.
Nov. 15, 1921.)

(Syllabus by the Court.)

1. Appeal and error §1010(1)—Trial court's finding based upon sufficient evidence will not be disturbed.

The finding of a trial court that a sale of personal property, evidenced by a written contract incomplete and uncertain as to time of payment, was absolute and not conditional, and made upon credit, though not upon time, supported by conduct of the parties and other facts and circumstances tending to prove its correctness, cannot be disturbed by the appellate court.

2. Sales §202(1)—Where seller has done all the contract requires, title passes whether payment has been made or not.

If the vendor of personal property has done all that execution of the contract requires him to do, the title passes, whether payment has been made or not, unless the contract provides otherwise in express terms or by necessary implication.

3. Sales §299—Rightful stoppage in transitu does not require buyer to enter into new contract, while wrongful stoppage constitutes breach by seller.

A rightful stoppage of goods in transitu does not work a rescission of the contract of sale, nor require the vendee to enter into any new or different contract, in order to obtain the goods, except in respect of the matter of payment. It merely restores the seller's lien relinquished by the shipment, and, if the vendee promptly tenders payment, the vendor must accept it and deliver the goods, and his refusal to do so renders him liable for a breach of his contract. A wrongful stoppage in transitu amounts to no more than a breach of the contract by the vendor.

4. Sales §299—Stoppage in transitu does not rescind executory contract or relieve seller on buyer's prompt tender of payment.

Nor does the stoppage of a shipment of goods under an executory contract rescind the contract or relieve the vendor, if the vendee promptly tenders payment.

Error to Circuit Court, Harrison County.

Action by N. R. Sharp and others against Granville Campbell in the Justice Court,

where plaintiffs prevailed, and upon appeal to the circuit court there was a judgment for plaintiffs, and defendant brings error. **Affirmed.**

H. G. Kump, of Elkins, and Charles O. Scott, of Clarksburg, for plaintiff in error.

William W. Walters, of Clarksburg, for defendants in error.

POFFENBARGER, J. The sole inquiry arising on this writ of error goes to the question whether the trial court, on a submission to it of issues raised between the parties, has made a correct finding or one that cannot be disturbed here, under the rules of procedure; the facts being somewhat dependent upon conflicting oral evidence. No complaint as to anything else is found in the petition or the brief filed for the plaintiff in error.

The action commenced in a justice's court, where the plaintiffs prevailed, and tried again in the circuit court, on an appeal, with a like result, except as to the amount of the judgment, was instituted to recover damages for nondelivery of 100 bushels of potatoes, sold by the defendant to the plaintiffs, at \$3.50 per bushel, in Randolph county, and to be shipped to Clarksburg in Harrison county. They were shipped under a bill of lading which does not appear in the record, but it seems to be conceded that they were consigned to the vendees, on the one hand, and, on the other, that the consignees were to pay the freight. The breach of contract, if any, occurred at Clarksburg, after arrival of the shipment. After delivery of the potatoes to the carrier, the vendor undertook to notify the vendees, the Country Produce Company, of the shipment, by telephone, but was unable to locate them. Fearing something wrong, he went to Clarksburg, before it arrived, forbade delivery by the carrier, and, through the agent by whom the purchase had been made, succeeded in finding Sharp, one member of the firm. The firm had no conspicuous place of business in the city. It conducted its business in the basement of Sharp's residence situated in a suburban section. Still uneasy and fearful, in view of these facts, the vendor tried to induce Sharp to pay for the potatoes in advance of their arrival. Sharp offered to pay \$100 on them and give his postdated check for the balance. This offer was declined and the parties concluded to await arrival of the shipment. On the day of its arrival, or soon afterward, the vendor again appeared early in the forenoon, and, again through the agent, located Sharp and apprised him of the arrival and insisted upon acceptance of the potatoes and payment. Sharp told him he would be unable to do so before 2 o'clock p. m. or about

that time, because he was otherwise engaged. Campbell waited at the courthouse, until a few minutes after 2 o'clock, and, Sharp not having arrived, sold the potatoes to Shingleton Bros., at \$4 per bushel, less the freight. If the testimony of Sharp and his brother is true, they were at the railway station before 2 o'clock, with a truck driven by the latter, to take possession of the potatoes, and the former had provided himself with \$400 in cash with which to pay for them. Not finding Campbell there, Sharp went to the courthouse, seeking him, and arrived soon after he had left for the station. On his return to the station, he found Campbell there, paying the freight, claiming a breach of the contract by the vendees and ordering delivery of the potatoes to Shingleton Bros. from whom he had had an offer of purchase, before the shipment arrived. Sharp protested against the delivery to Shingleton Bros., and says he produced the money and tendered payment, and the court could have found that the time of the tender, if made as Sharp says it was, without contradiction, was prior to the delivery.

[1] There was a written, but very informal contract between the parties, in pursuance of which the shipment was made. As to time of payment it is silent, unless the incomplete phrase, "which due arrival," at the conclusion of it, can be deemed to have been intended for application to such time. Whether it was or not is a question of fact, the trial court has passed upon. If it found that the sale was made on credit, but not on time, that is, that delivery was to be made in advance of payment, but payment to be made immediately afterward, its finding cannot be disturbed. Likely the bill of lading evidenced shipment to the vendees, for the vendor deemed it necessary to stop the potatoes in transitu. If he had consigned them to himself, to be delivered to the vendees, pursuant to an assignment of the bill of lading, stoppage in transitu would have been unnecessary, for, in that case, delivery could not have been made without his consent. The vendor must have thought he had authorized delivery in advance of payment, else he would not have deemed it necessary to forbid it.

[3] If the contract was one of sale on such credit, as the court could have found it was, and not a conditional sale, what afterwards transpired between the parties did not change it. There was no consideration for any alteration of it, and the seller's exercise of his right of stoppage in transitu, if any, and the court could have found there was no justification for it, because there is no proof of insolvency, did not effect any alteration thereof. It merely restored constructive possession with a lien to secure payment of the purchase money. *Gibson v. Carruthers*,

8 M. & W. 321, 338; *Morris v. Shryock*, 50 Miss. 590; *Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489; *Mechem, Sales*, sec. 1528. It did not work a rescission of the contract of sale and render it necessary for the vendees to enter into a new one on different terms, in order to obtain the potatoes. *Cross v. O'Donnell*, 44 N. Y. 661, 4 Am. Rep. 721; *Rucker v. Donovan*, 18 Kan. 251, 19 Am. Rep. 84; *Rowley v. Bigelow*, 12 Pick. (Mass.) 307, 23 Am. Dec. 607; *Rogers v. Thomas*, 20 Conn. 53; *Jordan v. James*, 5 Ohio, 88; *Mechem, Sales*, § 1612. If they came prepared and willing to pay and offering to do so, while the goods were still actually or constructively in the possession of the vendor, he was bound to accept the money and deliver the goods to them, or make himself liable for damages by his refusal to do so, even though he had rightfully stopped the shipment, unless there was unreasonable delay in the offer of payment, and there was none.

[2] It is equally manifest that the court could rightfully have found that the title to the potatoes passed by delivery thereof to the carrier for shipment to the vendees. The vendor says they were to be taken upon the weight as given by him. If that be true, nothing remained to be done by him, in execution of his contract, after he had delivered the goods to the carrier, under a consignment to the vendees. Under such circumstances, the title passes, in the absence of an express stipulation to the contrary. *Acme Food Co. v. Older*, 64 W. Va. 255, 268, 61 S. E. 235, 17 L. R. A. (N. S.) 807; *Buskirk v. Peck*, 57 W. Va. 360, 50 S. E. 432; *Morgan v. King*, 28 W. Va. 1, 57 Am. Rep. 633; *Hood v. Bloch*, 29 W. Va. 244, 11 S. E. 910.

[4] Even if the sale was executory and conditioned upon payment before delivery, so as to preclude passage of the title, the vendor's power to stop his own goods in transitu did not relieve him from his contract, nor change its terms, unless the vendees were insolvent or refused performance. *Pattison v. Culton*, 33 Ind. 240; *Mechem, Sales*, §§ 1614-1617. And the court could have found, upon the evidence, that there was no insolvency, nor any refusal to pay within the time allowed by the terms of the contract. On the first interview between the vendor and one of the vendees, the latter avowed his eagerness and ability to take and pay for the goods, on arrival. After arrival, he came with the money and offered payment on the day of the demand therefor. The vendor's nervousness over the situation imposed no new obligation or duty upon the vendees, nor were they bound to respect his mere convenience. There was no occasion for his great haste, in reselling. He had a standing offer from Shingleton Bros. and

could safely have waited until 3 o'clock or even 4 o'clock, and then resold and caught the train by which he desired to go home. Besides, his assembling of witnesses to the time of his leaving the courthouse, the slowness of his allowance of time after 2 o'clock, the haste with which he resold, his refusal to deliver on tender of the money, while the goods were still within his power, and other circumstances strongly tend to prove lack of good faith and an ulterior motive on his part.

Subsequent insolvency of Sharp, one of the vendees, is not shown in the record. We cannot take it from the brief filed, if it is material, and we express no opinion as to whether it is or not.

Perceiving no error in the judgment, we will affirm it.

(89 W. Va. 531)

MALCOLM et al. v. TALLEY. (No. 4313.)

(Supreme Court of Appeals of West Virginia.
Nov. 15, 1921.)

(Syllabus by the Court.)

1. Appeal and error §1011(1)—Trial court's finding on conflicting evidence sustained.

Sustained by facts and circumstances making probability of its correctness so strong that the contrary thereof cannot reasonably be supposed, the finding of a trial court upon an issue as to which the oral evidence is in irreconcilable conflict will not be disturbed by the appellate court.

2. Witnesses §159(8)—Grantor is competent to testify to agreement with grantee and her deceased husband, who paid the purchase money.

In a suit against the grantee in a deed for correction of an error therein, the grantor is competent to testify to the agreement with the grantee and her deceased husband, in pursuance of which the deed was made, notwithstanding payment of the purchase money by the husband and his participation in the transaction.

3. Reformation of instruments §25—In suit to reform deed, plaintiff will not be denied relief for merely constructive fraud in stating the quantity.

If, in such suit, it is ascertained and determined that, by mutual mistake in the execution, delivery, and acceptance of such deed, land was included, which the vendors did not intend to sell nor the vendee to buy, relief will not be denied the plaintiffs, because the bill or the evidence discloses an actual or possible liability on the part of the vendors in favor of the vendee, for compensation for injury occasioned by a false representation as to the quantity of the land actually sold and intended to be conveyed, amounting to a merely constructive fraud.

4. Equity §66—In favor of defendant calling for denial of relief to plaintiff upon his failure to accord, it must be embraced in the particular cause of action.

An equity in favor of the defendant, calling for denial of relief to the plaintiff, on his failure to accord it, must be embraced in and a part of the particular cause of action constituting the basis of the relief to which the plaintiff is conditionally entitled, not one arising out of a different or collateral cause of action, even though both causes of action emanated from the same transaction.

Appeal from Circuit Court, Cabell County.

Suit by Pearl G. Malcolm and others against Caroline H. Talley, and from the decree therein, the defendant appeals. Affirmed.

Wm. R. Thompson, of Huntington, for appellant.

W. W. Smith, of Huntington, for appellees.

POFFENBARGER, J. By way of reformation of a deed conveying a city lot, upon the theory of a mutual mistake in the execution thereof, the appellants were required by the decree now under review to reconvey to the grantors a strip of land $1\frac{1}{2}$ feet wide and 200 feet long, and they complain of it.

The facts as alleged in the bill and found by the court are substantially as follows: For and in consideration of \$7,200 paid in cash, the plaintiffs conveyed to the defendant a city lot on which there was a brick dwelling house, describing it as being lot No. 20 of block No. 14, and the westerly two and one-half feet of lot No. 19 of block No. 14, fronting together $32\frac{1}{2}$ feet on Fifth avenue of the city of Huntington. What the parties had actually agreed upon was a sale and conveyance of the lot in accordance with monuments which made the frontage only 31 feet. The determining monument was the center of a concrete walk between the house sold and another retained by the grantors, to be used by both owners for access to the basements and back yards of their houses. Under the impression that the contractors, in constructing the two houses, had so placed them that a line drawn along the center of the walk would put $2\frac{1}{2}$ feet of lot No. 19 into lot No. 20, the vendors informed the vendee that the ground they were selling would be limited and bounded on the east by a line drawn along the center of the walk, and extended to the avenue, and the alley in the rear, and that, as so sold, the property would include lot No. 20 and $2\frac{1}{2}$ feet of lot No. 19. The deed was executed and delivered in exchange for the purchase money, upon that theory and with that understanding. It was soon discovered, however, that the contractor had not located the buildings as directed, that the line agreed upon would take only

1 foot out of lot No. 19, and that the deed had passed all of the walk between the two houses and carried land right up to the wall of the house on lot No. 19, and under the eaves thereof and portions of the chimneys built partly on the outside of the wall. Refusal on the part of the grantees to reconvey the portion of lot No. 19 not sold nor intended to be conveyed was followed by this suit for reformation of the deed.

There was no actual fraud on the part of the vendors in the transaction, but, on well-settled principles, their false representation, if prejudicial to the vendee, amounted to a fraud in law, for they could not rightfully make it without knowledge as to its correctness, and, having so made it, the vendee is entitled to compensation for the injury occasioned thereby, if it was of such character as entitled her to rely upon it as an inducement to the purchase, and she did so. *Crislip v. Cain*, 19 W. Va. 438. Hence, it constitutes no obstacle to right in the vendors to have reformation of the deed so as to correct the mistake in it, even though, treated as a false representation as to the area of the land, it may constitute the basis of a cause of action on the part of the vendee.

[1] The evidence is highly conflicting as to whether the center of the walk was agreed upon as the line, but we are of the opinion that neither the vendors nor the vendee could have intended the consequences resulting from the deed as executed and delivered. The vendee, her husband, and her daughter all inspected the property before the contract was made or the deed delivered. It is highly improbable that they thought they were buying the projection and chimneys of the adjoining house and cutting off access to its basement and back yard. Mrs. Malcolm testified that she had taken them to the walk and pointed it out as the limit of their purchase. While they deny this strenuously, they saw the relation and arrangement of the two houses, and it cannot well be supposed or even imagined that they thought, in dealing for one house, they were seriously impairing another, and actually buying part of it.

[2] The evidence of Mrs. Malcolm, upon which this finding is based, is objected to as being testimony to a personal transaction between her and a deceased person, the husband of Mrs. Talley, who took the contract of purchase, paid the purchase money, and caused the deed to be made to his wife, and is now dead. This objection is obviously untenable, because neither of the parties to this controversy claims title under the deceased husband. Mrs. Talley claims under her deed and by purchase from Mrs. Malcolm. The husband's payment of the pur-

chase money was a gift of money to her, which is in no way involved.

[3, 4] Our conclusion as to what was actually sold and intended to be conveyed, and the existence of a mistake in the deed, would affirm the decree, but for the suggestion that reformation cannot be had except upon condition of payment by the plaintiffs of compensation for the foot and a half of ground falsely represented as being included in the land actually sold. That cause of action, if it exists, has not been asserted in this suit by any pleading of any kind. The only issues made by any of the pleadings pertain to the existence of the mistake and mutuality thereof. Some of the evidence adduced goes beyond them, and tends to prove right of compensation in the vendee, but she has not asked it nor sought it in any way. As it and the cause of action set up in the bill grew out of the same transaction, no doubt it could have been set up by way of a demand for cross-relief.

But it is not such an equity as bars relief to the plaintiffs, conditionally, under the well-known maxim invoked, which does not extend to every case in which a defendant may have relief by a cross-bill. Its applicability depends upon the character of the defendant's equity or legal right which must in some form amount to a charge upon, or equity against, the particular demand set up in the bill, or a covenant or condition limiting it. If a mortgagor wants to redeem, or to cancel the mortgage, he must pay the mortgage debt, the right to which is embodied right in the instrument from which he seeks to be relieved. A taxpayer seeking to enjoin a tax, part of which is valid and part invalid, must pay the valid part. A creditor seeking reformation of a deed of trust or mortgage to secure his debt, by inclusion of property inadvertently omitted, must pay back or credit on the debt usurious interest he has received, because the right to such payment or credit is inevitably involved in the ascertainment of the amount of the debt sought to be made a lien on the omitted property by reformation. An owner of land seeking cancellation of a void tax deed must offer to reimburse the purchaser for the purchase money and taxes paid by him, because the statute governing the subject makes such offer a condition of the relief sought. A plaintiff seeking an accounting in equity must allow all mutual credits shown to be due the defendant. In a bill by which the plaintiff seeks an interest in property, the legal title or possession of which is held by the defendant, on the theory of a trust in his favor, he must pay all proper charges against the interest he seeks to obtain. In all of these instances of the application of the maxim, and every other in which it has been properly applied, the defendant's right,

whether legal or equitable, is part and parcel of the specific cause of action asserted by the plaintiff or necessarily involved in it. Upon analysis, they are all found to be inseparable or reciprocal rights embodied in the same cause of action, not rights involved in separate or clearly separable causes of action.

Defining this rule, Vice Chancellor Wigram said in *Hanson v. Keating*, 4 Hare. 1:

"It decides in the abstract that the court giving the plaintiff the relief to which he is entitled will do so only upon the terms of his submitting to give the defendant such corresponding rights (if any) as he also may be entitled to in respect of the subject matter of the suit."

Illustrating it, he observed:

"If, for example, a plaintiff seeks an account against the defendant, the court will require the plaintiff to do equity by submitting himself to account in the same matter in which he asks an account; the reason of which is that the court does not take accounts partially, and perhaps ineffectually, but requires that the whole subject be, once for all, settled between the parties. It is only (I may observe as a general rule) to the one matter which is the subject of a given suit that the rule applies, and not to distinct matters pending between the same parties."

Later in his opinion, he cites *Agabeg v. Hartwell* and *Colvin v. Hartwell*, 5 Cl. & Fin. 484 (House of Lords), as holding that relief cannot be denied the plaintiff, because it appears that the defendant is entitled to a set-off which he may recover in another action. This is his clear and concise analysis of that case:

"The Vice Chancellor of England and Lord Brougham, on appeal upon the general ground that he who would have equity must do equity, required the plaintiff in the latter cause to submit to an account of certain moneys he had in his hands, in which the defendants claimed an interest, as the price of a decree for an account against the defendants; there being no necessary connection between the two accounts. This decree, therefore, went to the House of Lords under every circumstance of disadvantage. The House of Lords investigated the case with a view to the question whether the defendants were entitled to have the two accounts blended; and, being of the opinion that the defendants had no such equity, the decree was reversed."

The rule was interpreted in accordance with the view above expressed and here asserted in *Gibson v. Goldsmid*, 5 De G. M. & G. 757, holding, as stated in the headnotes, that—

"The rule that he who seeks equity must do equity is restricted to an equity in respect of the subject-matter of the suit. Where, therefore, in a deed of dissolution of partnership, one partner assigned certain foreign shares (which were recited to be transferable, as it was believed, by delivery), and covenanted for

further assurance, and the other partner covenanted to indemnify the former against certain liabilities, and it afterwards appeared that the shares were not transferable by delivery, but required a formal act to complete the assignment, held, in a specific performance suit instituted by the assignee of the shares, that he was entitled to have the assignment complete, although there might in the meantime have been on his part a failure to perform the covenant of indemnity."

Nothing inconsistent with this interpretation of the rule has been found in any of the hundreds of American decisions involving the principle. The following text from 21 *Corpus Juris*, p. 174, based upon a great many of them, is well expressed and perfectly harmonizes with it:

"The maxim requires that any person seeking the aid of equity shall have accorded, shall offer to accord, or will be required to accord, the other party all the equitable rights to which the other is entitled in respect to the subject-matter. Relief inconsistent with the equities of the adverse party will be denied, and where the granting of relief raises equitable rights in favor of the defendant, the according of such rights will be imposed as a condition of granting the relief."

Mark the limitation of the reciprocal equities so protected to "the subject-matter." That means the cause of action set up in the bill, not every cause of action arising out of the transaction or circumstances giving birth to it. The protected equities of the defendant must be embodied in that cause of action, or grow out of it, in some form. Merely collateral relationship to it, of another distinct cause of action arising out of the same transaction, does not suffice, as precedents above referred to clearly disclose.

The cause of action set up in the bill in this case is right to reformation of the deed, so as to exclude part of the land conveyed by it, but not sold nor intended to be sold. If the defendant has a cause of action against the plaintiff, it is for compensation for injury by wrongful inducement to pay more money for what she did buy than it was worth, or than she otherwise would have paid. This she could recover in an independent suit, either at law or in equity, the cause of action being one of concurrent jurisdiction. These two causes are in no way dependent upon one another. If the deed had been correctly drawn and the false representation made, the defendant would have the same cause of action she now has, if any. That supposed unliquidated liability in her favor is not a lien on the strip she never bought, and which the decree excludes from the deed. In no sense has she a contractual hold upon it, and, in my opinion, the maxim invoked does not give it. If she had spent money in improving the strip in ignorance of the mistake in the deed and in reliance upon

its terms, she might have an equity in the subject-matter of the bill. If this were a suit for the purchase money, the compensation she is entitled to, if any, would be an equity against the demand set up, the subject-matter of the bill, for it would reduce the amount to be recovered. It would be a mutual credit upon the money demand, and so be necessarily included in that particular cause of action.

Under this interpretation of the maxim, which is manifestly correct, the plaintiffs are not required to pay the defendant compensation for the injury occasioned by the false representation, as a condition precedent to right to have correction of the mistake in the deed, even if we could see that they are liable for it. Hence, it is immaterial whether the defendant's supposed right appears on the face of the bill or has been revealed in the evidence. Being an independent cause of action, but related because it grew out of the transaction giving rise to the other, it probably could have been set up in this cause, and, not having been asserted, it may be prosecuted in another action; but it constitutes no ground for withholding the relief to which the plaintiffs are entitled.

The cases illustrating the application of the maxim show that the denial of relief under it is necessary to the protection of the defendant. In all of them, unconditional award of relief to the plaintiff would forever bar right in the defendant to the equity due him. That is not true of separable and distinct causes of action, which may or may not be set up by cross-bill, at the will and pleasure of the defendant. If the principle is not limited to the defendant's equity involved in the plaintiff's cause of action, much confusion and even hardship may result from its application. To broaden the scope of litigation and make one clear case of relief await determination of a lot of collateral controversies, not even raised by any pleadings, would be decidedly inequitable.

Upon these principles and conclusions, the decree complained of will be affirmed.

(89 W. Va. 504)

ABNEY BARNES CO. et al. v. DAVY POCAHONTAS COAL CO. et al. (No. 4205.)

(Supreme Court of Appeals of West Virginia.
Nov. 15, 1921.)

(Syllabus by the Court.)

1. Judicial sales §46—Where property was sold, sale reopened, and again sold to same purchaser, defects in first sale not applicable to second.

Where the court decreeing a sale of property by special commissioners, and before the

report of the sale by the commissioners is confirmed, upon an upset bid filed opens up the sale and entertains competitive bidding in open court, and finally knocks down the property to the purchaser at the former sale at a greatly advanced price, the prior exceptions filed to the report of the special commissioners for supposed defects in the notice of sale and unsupported charges of efforts on the part of the purchaser and others to stifle bidding, will not be applied to the sale so made by the court and duly confirmed, and to which no exceptions were taken prior to confirmation.

2. Mortgages §529(3)—Proposition by mortgagor to special commissioner at sale not entertained not ground for setting aside sale.

Nor will the proposition of a mortgage debtor, made to such special commissioners during the crying of the sale, to redeem the property by complying with some provisions of the mortgage, not entertained by such special commissioners nor reported by them to the court, be good ground for setting aside a sale made by the court in open court under a decree directing the property to be sold, not only for the benefit of the mortgage creditors, but also for the benefit of other lien creditors who instituted the suit and whose claims and their priorities were thereby decreed, such proposition not having been renewed to the court before confirmation of the sale upon an upset bid filed and entertained by the court.

3. Judicial sales §43—To justify setting aside evidence must be strong and convincing.

To justify the setting aside of a judicial sale, the evidence to support the motion must be strong and convincing, else it should be denied.

4. Judicial sales §31(2)—Sale may be made in open court on upset bid without special commissioner, and objections to former sale by commissioner are unavailing to latter.

The court having jurisdiction may make sale of the property proceeded against by creditors without the intervention of a special commissioner, and upon entertaining an upset bid, may conduct such sale in open court, and when a sale is so made and confirmed, exceptions filed to a prior report of sale by special commissioners, not pertinent to the sale made by the court, need not be considered, and will be unavailing in this court upon appeal.

Appeal from Circuit Court, McDowell County.

Suit by the Abney Barnes Company and another against the Davy Pocahontas Coal Company and others, and from a decree therein the said coal company appeals. Affirmed.

E. C. Marshall and Litz & Harman, all of Welch, for appellant.

Strother, Sale, Curd & Tucker, of Welch, for appellees.

MILLER, J. On May 12, 1919, the circuit court, by a decree agreed to and signed by the

attorneys representing all parties to the cause, after reciting therein that the court had ascertained and decreed all liens and debts on the property of the Davy Pocahontas Coal Company, and disbursed on the prior liens as adjudged and decreed in prior decrees all the available funds in the hands of its special receivers except such as had been received by them since the last preceding term of the court, in accordance with the opinion and mandate of this court on a former appeal, and it still appearing that there were various creditors who had not been paid by the disbursements made, and the court being of opinion that it was proper to do so, did thereby adjudge, order and decree that said special receivers, Jaeger and Atkinson, thereby appointed special commissioners for the purpose, be and they were thereby authorized and directed to sell all of the real estate described in a former decree, and other property of each and every kind, of the said company, except monies, bills and accounts receivable, as a whole, at public auction, in McDowell County, at the court house door, on or before the 2nd day of September, 1919, to the highest bidder upon the following terms: One-third in cash, and the balance in equal payments at six and twelve months after date, evidenced by the notes or bonds of the purchaser payable to said receivers, bearing interest from date, to be secured as directed by the court, with good and approved security. And said decree contained and directed that said special receivers before making said sale should first advertise the same by publishing the time, terms and place of sale in some newspaper published in the town of Welch, McDowell County, and in some daily newspaper published in the city of Baltimore, Maryland, for eight consecutive weeks, once each week in each of said papers, and by posting a copy of said advertisement, for the same period, at the front door of the court house of said county. And said decree also required of said special commissioners that they execute a bond as such in the penalty of \$175,000.00. And it was by agreement also adjudged that every other thing that might otherwise be required or necessary to such decree of sale and not therein expressly provided for, was thereby expressly waived and done away with by those consenting to the decree. And said special receivers were thereby also directed to make a report of said sale at the first day of the September term of the court, 1919.

And pursuant to said decree of sale, said special commissioners, having first qualified by giving bond as required, and after advertising the sale as directed, proceeded to and did sell said property upon the terms decreed, on said 2nd day of September, 1919, at which sale they reported to the court on September 9, 1919, that the Marine and Commerce Corporation of America, a

corporation of the state of Delaware, being the highest bidder, had become the purchaser for the sum of \$400,000.00, upon the terms provided by the decree, the commissioners however reporting, that as the purchaser had shown by affidavits and otherwise that it was the owner of 214 of the 297 six per cent sinking fund gold bonds of the Davy Pocahontas Coal Company, of the face value of \$1,000.00 per bond, which entire issue was secured by the deed of trust of said defendant company to the Mercantile Trust & Deposit Company of Baltimore, trustee, dated July 1, 1910, and which bonds secured by said deed of trust were the first lien upon the property sold, and since only 83 of said outstanding bonds were not owned by said purchaser, they had required the purchaser to pay them in cash only such proportion of the one-third cash payment provided for in the decree of sale as the amount of the 83 bonds bore to the amount of the entire 297 bonds, namely, \$37,333.34, and had permitted the purchaser to deliver to them, on September 3, 1919, in accordance with the memorandum of sale, 96 of said bonds as the balance of the one-third cash payment; that September 6, 1919, said purchaser had paid them \$96,000.00 in cash, in place of said 96 bonds, for which they had receipted to it, as a result of which they had received the entire one-third of the total cash selling price for the property; and in further compliance by said purchaser with the terms of the sale, its agent had tendered itself ready and willing to execute for the deferred payments its interest bearing notes or bonds secured as directed, as soon as the court should determine the form of such notes or bonds and security to be executed.

Upon the filing of the report of sale, on September 9, 1919, the defendant Davy Pocahontas Coal Company, by James Thomas, its solicitor, and Henry Rawie, a stockholder, tendered and filed three several exceptions in writing thereto, substantially alike, in substance and effect as follows:

First, that on the day of sale and before the sale was completed, the said company through its said solicitor tendered and offered to pay to said special commissioners a sum of money sufficient to cover and be equal to all arrears of interest upon said bonds with interest upon overdue installments of interest, and that said special commissioners would not and did not receive or accept such tender of payment, and did not restore the said Davy Pocahontas Coal Company and the holders of its bonds to their respective positions in respect to said bonds, in which they stood before default in the payment of said installments of interest, contrary to the provisions of Section 2 of Article 14 of the deed or mortgage, in regard to the redemption of the property from the sale or sales

thereof for the purposes of the mortgage, providing that—

"If at any time after the principal of said bonds shall have been so declared to be due and payable, all arrears of interest upon said bonds (with interest upon overdue installments of interest) and all expenses, incurred by the Trustee or holders of said bonds, shall be paid by the Coal Company, or be collected out of the mortgaged premises before any sale thereof, or any part thereof, shall have been made, and then and in every case the Coal Company, the Trustee and the holders of said bonds may, at the demand of the Coal Company, be restored to the respective positions in which they stood before such default occurred, without, however, in any manner or way affecting or prejudicing any right or remedy consequent upon any other default hereunder."

Second, that the said Marine and Commerce Corporation of America and Walter L. Taylor, president and director of said coal company, who had bought and bargained for certain of the securities, open accounts and indebtedness of said coal company, but not, as the exceptors verily believed, bought or secured all of the indebtedness, securities or common stock outstanding against said company, publicly represented themselves before the date set for the public sale of said property, namely, September 2, 1919, as having acquired all but a minute percentage of the stock, bonds, securities, open accounts, judgments and other indebtedness of said company, and further holding out to the public that said property through their efforts would be withdrawn from public sale or auction thereof, under the provisions of said Section 2, Article 14; and the exceptors believed and state the fact to be that such statements, rumors and affirmations nullified the effect of the notice of sale of said property as published by said special commissioners pursuant to said decree, and whereby there was created in the public mind the belief that said property would be withdrawn from sale and would not be sold as advertised, and whereby bidders were prevented and deterred from attending said sale, and competitive bidding therefor was prevented and the property sold to the only bidder, the said Marine and Commerce Corporation of America, for the sum of \$400,000.00.

Third, that the entire property of the said Davy Pocahontas Coal Company, as the decree directed, was not included in the advertisement of the public sale thereof, nor the decree therein properly set forth, in that there was included therein only the one-half undivided interest in all that certain real estate which was conveyed to said company by Killey S. French and others, by deed of February 5, 1912, when in fact the said company was the owner in fee of the whole estate in said property; and that the said prop-

erty was sold for a grossly inadequate price.

[1] We find in the record no substantial bases for either of these three exceptions. As to the first there is not a particle of evidence to show any tender or offer of the Davy Pocahontas Coal Company, or of any one for it, to the said special commissioners on the day of sale, to comply with the provisions of said Section 2 of Article 14 of said mortgage. The exceptors stand wholly on the unsupported statements of their exceptions. Besides, the special commissioners were not authorized to entertain or accept any such offer. No such tender was made to the court prior to the sale, nor afterwards, on the report of the sale, nor before confirmation of the sale, a sale in fact made in open court following said report of sale and an upset bid made after the sale conducted by said special commissioners, at which sale so conducted by the court, the exceptors, if they were acting in good faith, were given the opportunity to make their proposition; but they did nothing of the kind, so far as the record shows, and thereby waived their rights, if any they had, at the time, to comply with the provision of said mortgage.

[2] But at the time of the alleged offer to redeem, the court, at the suit of others than the mortgage creditors, had decreed the property to be sold for their benefit as well as for that of the holders of the bonds secured by the mortgage, and the exceptors had no right to be restored to the possession of the property decreed to be sold as against other lien creditors. To have put itself in position to take advantage of said provision, said company was obliged to satisfy the debts of all subsequent lienors whose rights had been adjudicated by the decrees in the cause. The report of sale by the special commissioners contains no mention of the alleged offer of the exceptors, nor did they at any time prior to said sale propose to the court to redeem the property under the provisions of said Section 2 of Article 14. So that the first exceptions are wholly without merit, or evidence to sustain the fact of such offer, and were properly overruled. To justify the setting aside of a judicial sale, the evidence to support it must be strong and convincing. Here there was in fact no evidence. *Connell v. Wilhelm*, 36 W. Va. 598, 15 S. E. 245; *Moran v. Clark*, 30 W. Va. 358, 4 S. E. 303. 8 Am. St. Rep. 66; *Tracey v. Shumate*, 22 W. Va. 474; *Beaty v. Veon*, 18 W. Va. 291; *Schmertz v. Hammond*, 51 W. Va. 408, 41 S. E. 184; *Atkinson v. Washington and Jefferson College*, 54 W. Va. 32, 46 S. E. 253.

[3] The second exception was also without foundation in fact to support it. It stood upon the unsupported and unverified statement in the exception. Besides, whatever may have been the fact as to the efforts of the purchaser at the sale by the special commissioners to stifle bidding, that sale was not con-

firmed, but disregarded in the subsequent sale by the judge in open court, on receipt of an upset bid, and the final sale of the property by the court to the same purchaser at an advance of \$40,000.00 over its bid at the first sale, or \$440,000.00, to which sale no exceptions were filed by any of the parties, and the same was confirmed. That the court had the power and jurisdiction to make sale of the property without intervention of special commissioners, is well settled in this state. *Core v. Strickler*, 24 W. Va. 689, 696; *Castleman's Adm'r v. Castleman*, 67 W. Va. 407, 412, 413, 68 S. E. 34, 28 L. R. A. (N. S.) 393; *Klapneck & White v. Keltz*, 50 W. Va. 331, 334, 335, 40 S. E. 570; *Kable v. Mitchell*, 9 W. Va. 492; *Estill v. McClintic*, 11 W. Va. 399.

[4] Nor do we see any merit in the third exception, of default in the advertisement of the one-half interest instead of the whole interest in the land conveyed by Killey S. French and others to the said coal company. As the sale was made in open court of all the land and property of said coal company, and not as advertised, any defect in the advertisement was nugatory and unimportant. Whatever was decreed to be sold, was sold by the court and confirmed, and if any interest was not decreed, it was not sold, and the record discloses no prejudice to debtor or creditors. And as the property was sold by the court, as shown, and brought \$40,000.00 over the price at which it was sold by the special commissioners, and there were no exceptions to this sale on any grounds, we need not further consider this point.

For the foregoing reasons we will affirm the decree.

(89 W. Va. 491)

VASEY v. NEW EXPORT COAL CO et al.
(No. 4058.)

(Supreme Court of Appeals of West Virginia.
Nov. 15, 1921.)

(Syllabus by the Court.)

1. Corporations §175—Stockholders whose stock was issued as fully paid and nonassessable, not to be excluded from participating in corporation, or required to pay par value.

Where a corporation issues stock as "fully paid and nonassessable," with the consent and participation of all the stockholders, and there is no charter, statutory or constitutional provision rendering the transaction void, the agreement is valid and binding as against the corporation, and it cannot afterwards repudiate the agreement, and exclude the holders of the stock from participation in the company's affairs, or compel them to pay the difference between the par value of the stock and what has been paid or agreed upon as full payment for it.

2. Corporations §175—Agreement whereby lease is transferred to corporation in return for entire stock given to promoters as "fully paid and nonassessable" held binding on corporation.

Where a corporation is organized by promoters, who desire to take a mining lease on coal properties, but prefer that the lease be executed in the name of the corporation, rather than in their own names, and the corporation, in consideration of the lease, issues to such promoters its entire capital stock as "fully paid and nonassessable," there being at the time no innocent incorporator upon whom the transaction might operate as a fraud, and no charter, statutory, or constitutional provision rendering the transaction void, the agreement is valid and binding upon the corporation, and cannot be questioned by it alone in a suit charging that the stock had not in fact been paid for.

3. Corporations §110—May not cancel stock for holders' failure to pay installment, but must foreclose unless by-laws provide for cancellation.

If a stockholder of a corporation, other than a railroad company, fail to pay any installment due upon his shares of stock, when required to do so by appropriate corporate action, and the company desires to enforce its claim for such unpaid balance by a direct proceeding against the stock itself, instead of against the owner, it cannot summarily cancel such stock, but must follow the foreclosure procedure prescribed by sections 29 and 30, chapter 53, Code (secs. 2862, 2863), unless by a by-law the corporation has provided for the method of cancellation.

4. Parties §71—Secretary-treasurer named as defendant in bill against corporation held not party in his own right.

Though a secretary-treasurer of a corporation be named in a bill as defendant by his official designation, he does not thereby become a defendant in his own right, nor does he by the adoption of the corporation's cross-bill answer to the bill, when neither the bill nor the answers show cause for relief in his favor or pray relief against him in his own right.

Appeal from Circuit Court, Kanawha County.

Suit by Joe Vasey against the New Export Coal Company and others. Decree in favor of defendants, and plaintiff appeals. Reversed, and decree for defendant New Export Coal Company for \$72.22, and costs awarded to plaintiff appellant.

W. J. Donaldson, of Knoxville, Tenn., and W. E. R. Byrne, of Charleston, for appellant. S. B. Avis and A. M. Belcher, both of Charleston, for appellees.

Conley & Johnson, of Charleston, amici curiæ, for Fischer and others.

LYNCH, J. Joe Vasey, plaintiff below, appellant here, complains of a decree cancel-

ing a certificate held by him representing 30 shares of the capital stock of the New Export Coal Company, the appellee, and directing that the latter do recover of and from the plaintiff the sum of \$272.22, "that being the balance due from him to said defendant company upon a statement of the accounts between him and said company as made by the court and now ascertained." The suit was instituted in November, 1916, its main purpose being enforcement of a lien reserved by a paper writing in the nature of a deed of trust, given by defendant to secure a loan of \$2,000 made by plaintiff to it August 23, 1915. The cross-bill answer, filed September, 1917, by way of affirmative relief prayed for a decree requiring plaintiff to pay the balance of the purchase money then due and unpaid for stock of defendant company theretofore issued to him, and for other incidental relief. The supplemental cross-bill answer, filed two years later, after reciting defendant's unsuccessful efforts to obtain payment of such unpaid purchase money, sought a decree compelling plaintiff to surrender for cancellation the certificate representing such stock. From a decree in favor of defendant plaintiff prosecutes this appeal.

In 1915 the Perryville Coal & Mining Company owned about 166 acres of coal land in Kanawha county, in process of development, and fully equipped with tracks, chutes, triples, cars, and other appliances necessary to successful mining operations. Desiring to lease, instead of operate, its mines, lands, and equipment, it empowered its attorney, G. A. Bealor, to interest prospective lessees in the property. He brought the matter to the attention of the plaintiff, and succeeded in inducing him, together with Thomas Haggerty, J. L. Williams, and Patrick Gilday, to take a lease of the property and operate it for their common benefit and profit. Instead of taking the lease to themselves directly, plaintiff and his associates, including Bealor, organized the defendant New Export Coal Company, with capital stock of \$30,000, divided into 150 shares of a par value of \$200. The preliminary understanding was that the five shareholders were to share equally in the new enterprise, 30 shares to each, but Bealor, in order to speed its organization, voluntarily offered to give to plaintiff one-half of his stock if he would "push this thing along and get things going." Plaintiff, however, accepted only $7\frac{1}{2}$ shares of the proposed gift, directing that the other $7\frac{1}{2}$ be given to Haggerty. On April 12, 1915, the stock was issued in the following proportions: Vasey, $37\frac{1}{2}$ shares; Haggerty, $37\frac{1}{2}$ shares; Williams, 30 shares; Gilday, 30 shares; Bealor, 15 shares. The certificates expressly provided on their face that they were "fully paid and nonassessable." To the New Export Coal Company, thus organized, as lessee, the Perryville Coal & Mining Com-

pany executed a lease dated April 27, 1915, for a term of 20 years with royalty provision of 8 cents for each ton of 2,000 pounds mined and shipped from the premises; the minimum royalty prescribed being \$2,500 per annum.

This lease constituted the sole assets of the defendant corporation. The incorporators paid nothing into its treasury at the time of the organization. The only consideration furnished by them for their stock was the lease from the Perryville Coal & Mining Company to the defendant, which they permitted the former to execute direct to the latter, instead of through themselves as intermediate lessees. Defendant being thus without funds, the incorporators agreed among themselves to provide a small amount of working capital until the company was on an independent operating basis, and decided that \$2,500 or \$3,000 would be sufficient for the purpose, each to pay in proportion to his stock interest. About the same time, attractive opportunities presented themselves for increasing their coal holdings by the purchase of adjoining tracts. In particular they acquired one tract of 444 acres, and in order to provide funds for the cash payment, plaintiff loaned the company \$2,000, August 23, 1915, taking its note secured by a paper writing in the nature of a deed of trust on the land purchased. Similar demands for funds continued, and finally, after plaintiff had advanced between \$1,300 and \$1,600, in addition to the loan of \$2,000, he refused to contribute further, and his associates likewise declined to make further advancements unless he would bear his share of the burden. In order to raise more money, the corporate stock was increased from \$30,000 to \$50,000, later to \$75,000 and \$100,000, and sold at par, bringing new stockholders into the company.

As already noted, plaintiff instituted this suit November, 1916, to recover his loan and advancements, which the company resisted on the ground that such sums, with the exception of the loan, were payments on his stock, and alleged that plaintiff still was largely indebted for the \$7,500 worth of stock which had been issued to him. In the meanwhile plaintiff had sold at par $7\frac{1}{2}$ of his $37\frac{1}{2}$ shares, receiving therefor \$1,500. On February 24, 1917, a stockholders' meeting was held in the law offices of Conley & Johnson, in the city of Charleston, for the purpose of revising and recasting the crudely kept minutes of corporate meetings held since its organization, in order to afford proper legal basis for a \$75,000 bond issue, proposed but never consummated. A. M. Belcher, attorney for the company, and also a stockholder, drew up the minutes, which were signed and accepted by all of the stockholders as expressing the correct corporate history of the company since its inception. On August 1,

(109 S.E.)

1917, defendant's check for \$2,500 was given to plaintiff, without designating its application to any particular item of his claim, as he insists, whereupon he applied it to the extinguishment of his unsecured claim, and credited the balance on the \$2,000 loan, but, as defendant contends, with the express understanding that it was to be applied to the \$2,000 loan, with an agreement to refund any amount in excess of the sum needed to satisfy it.

By resolution of November 24, 1917, the company required that all stockholders, who had not paid in full for stock issued to them, must pay the balance due thereon on or before January 1, 1918, and in the event of their failure or refusal to do so, the secretary-treasurer was directed to cancel all such delinquent stock. Copies of this resolution were mailed to all stockholders listed as delinquent, including plaintiff, but none of the original stockholders have paid, all apparently having decided to await the termination of this suit, though all save plaintiff seem disposed to accept defendant's view that their advancements during the early days of the company's history were in reality payments on stock, and that they are yet liable for the amounts still unpaid. In November, 1918, one year after the adoption of the above resolution, a second resolution was adopted, canceling and forfeiting all such unpaid stock and requiring the return of the certificates, but providing for the issuance of new certificates representing the amounts actually paid into the company on the old stock, at the par value of \$200 per share. It is of this resolution canceling his certificate for 30 shares, as legally enforced by the decree in this cause, that plaintiff complains.

In support of their respective contentions, plaintiff and defendant assert and rely upon two totally inconsistent theories respecting the issuance of the 150 shares of stock to the five original incorporators. It is the claim of the latter that at the time of the company's organization plaintiff and his associates furnished nothing of value in return for the stock which they received; that the lease which defendant acquired from the Perryville Coal & Mining Company proceeded directly from it as lessor to defendant as lessee, and not through the incorporators as intermediaries; and that it was generally understood and agreed that they were to pay for their stock in cash as the company needed the money. In support of this contention, defendant introduced the receipts given by it to plaintiff and others at the times of their various advancements to the company during the early days of its organization, of which the following is a fair representation:

"January 15, 1916. Received of Joe Vasey five hundred dollars, to apply on stock now held by him in the New Export Coal Co. G. A. Bealor, treasurer."

With regard to such understanding, Bealor testified:

"My understanding at the time was from general conversation which was had with the parties connected with the company 'at that time, that they were to furnish sufficient money in lieu of receiving that stock to put the New Export Coal Company on a paying basis. * * * That it was the understanding and agreement that the money would be paid by these persons to whom the company had issued stock as the company made calls or demands for the money, * * * at least to the extent of putting the corporation on a paying basis, self-supporting; that was my understanding all the way through."

And Haggerty testified:

"There wasn't any arrangement beyond that we were to finance the company as to whatever it would take, whatever the account was; if it was of the value of the stock, we were supposed to put the money into the company."

Further, at a stockholders' or directors' meeting, held November 11, 1915, at which plaintiff was present and participated, the following motion was made and adopted, as found at page 27 of the minute book:

"Mr. Haggerty moved that \$50.00 be paid to Joseph Vasey for services as auditor, and that the balance of money due him, upon proper bills being rendered, be placed to his credit on stock now held by him in the New Export Coal Company."

And on May 3, 1915, at the first meeting of the stockholders of the new company, Vasey made this motion:

"That John L. Williams be paid \$100.00 per month, for a period of three months, as general manager of said company; one-half of said salary be, with his consent, retained by said company and same be put to his credit as a payment on the deferred payments on stock which he has subscribed for."

On the other hand, plaintiff admits that these cash advancements were voluntarily paid by the original incorporators in order to put the company on a self-sustaining basis, without any written or oral agreement of the company to repay them. But he denies that they were meant or intended as payments on stock, claiming that all such stock was fully paid for by him and his associates in turning over to the company the lease in question. He explains the use of the word "stock," as found in the receipts and minutes referred to, by stating that it had reference merely to their mutual agreement to advance funds to the company in proportion to the shares of stock each held, and did not mean that such payments were on the stock itself, but pro rata to their respective holdings. In support of this contention, he introduces in evidence the original certificate for 37½ shares, which expressly recites that such

stock is "fully paid and nonassessable." Furthermore, the corrected minutes prepared at the Conley & Johnson meeting on February 24, 1917, at which all the outstanding stock was represented, disclose two resolutions, which, after setting forth the written proposal of G. A. Bealor, acting for and on behalf of the Perryville Coal & Mining Company, for the royalty stated, upon delivery by the latter of 150 shares of its capital stock of the par value of \$200 per share, contain the express finding "that the property and rights offered by said letter to be leased, conveyed and transferred to this company are necessary for the business of this company, and that the same are of the value of \$30,000," corresponding to the par value of the shares to be delivered. These resolutions further accept the proposal referred to, and authorize the delivery to Bealor, "or to whomsoever he designates," of 150 shares of stock, "fully paid up and nonassessable." These corrected minutes are signed by all the stockholders of the New Export Coal Company, "who hereby ratify, approve and confirm all that has occurred at the foregoing meeting, the minutes of which we have read."

Defendant, however, insists that the sole purpose of the corrected minutes was to remove legal obstacles to a proposed bond issue of \$75,000, but no one successfully challenges their essential accuracy in stating the facts as understood by the parties, and it is important to note that on March 1, 1917, one month after the meeting referred to, plaintiff's original certificate for $37\frac{1}{2}$ shares was canceled at his request and a new one issued to him for 30 shares, he having sold $7\frac{1}{2}$ shares prior thereto, and the new certificate like the old one, declared on its face that the stock was fully paid and nonassessable.

[1, 2] Plaintiff argues that since the defendant has by proper corporate action authorized the issuance of such stock as nonassessable and fully paid by the lease in question, as disclosed by its minutes and by the certificates as well, the valuation so placed upon it must be deemed conclusive, in the absence of actual fraud in the transaction, and the stock issued therefor not liable for any further call, as provided in section 24, c. 53, Code (sec. 2857), with regard to mining and manufacturing corporations. See, also, *Bank v. Belington Coal & Coke Co.*, 51 W. Va. 60, 41 S. E. 390; *Maryland Rail Co. v. Taylor*, 231 Fed. 119, 145 C. C. A. 307. Undoubtedly, if plaintiff's theory of the organization of the company is the correct one, then in the absence of actual fraud the valuation placed upon the lease for which the stock was issued is conclusive and now beyond question. He insists that if the original incorporators had taken the lease in their own names and then had assigned it to the company which they had organized, such pro-

cedure clearly would have fallen within the scope and meaning of the statute, and that in substance and effect the result is the same where they direct the Perryville Coal & Mining Company to execute the lease to the New Export Coal Company, instead of through them as intermediary lessees. If plaintiff is correct in this view, the company clearly had no right, under the statute, to demand further payments on the stock, and the decree therefore is erroneous in attempting to cancel it for his failure to respond to those demands.

But without deciding that question, even accepting defendant's theory of the organization, can it now be heard to assert that stock, which it has issued as fully paid and nonassessable, was in fact not paid for? We are of opinion that it cannot. Not only do the original and reissued certificates recite that the stock was fully paid and nonassessable, but the corrected minutes prepared at the Conley & Johnson meeting in 1917, after plaintiff had instituted this suit, at which all the stockholders were present, contain similar recitals, both as to the paid-up character of the stock and the value at which the lease was accepted by the company, and the stockholders signed these minutes as stating the facts. Even those of the original incorporators who testify in support of defendant's position state that the advancements were only for one purpose, and that to the extent necessary to put the company on a self-operating basis. There was no fraud upon the company. The same persons who promoted it were also the original incorporators, and hence on both sides of the transaction. There was no innocent incorporator at that time to be hurt, as was the case in *Davis v. Las Ovas Co.*, 227 U. S. 80, 33 Sup. Ct. 197, 57 L. Ed. 426. Rather the facts of this case are more nearly analogous to those of *Old Dominion Copper Co. v. Lewisohn*, 210 U. S. 206, 28 Sup. Ct. 634, 52 L. Ed. 1025, a case involving secret profits by promoters. As was there said:

"The difficulty that meets the petitioner at the outset is that it has assented to the transaction with the full knowledge of the facts. * * * At the time of the sale to the plaintiff, then, there was no wrong done to any one. Bigelow, Lewisohn, and their syndicate were on both sides of the bargain, and they might issue to themselves as much stock in their corporation as they liked in exchange for their conveyance of their land. * * * If there was a wrong, it was when the innocent public subscribed."

See, also, *Hoffman Motor Truck Co. v. Erickson*, 124 Minn. 279, 144 N. W. 952; *Inland Nursery, etc., Co. v. Rice*, 57 Wash. 70, 106 Pac. 499.

But innocent subsequent purchasers of stock are not complaining as parties in this suit. Nor are creditors' rights involved in

it. Only the corporation is complaining. Doubtless, if it could show that stock issued in such a manner was wholly void and illegal, it could maintain this suit alone in its own name. But, even granting for argument's sake that plaintiff cannot invoke the provisions of section 24, c. 53, Code, in sanction of the procedure followed, nothing therein contained declares void stock issued in violation of its terms. At most, it is only an executed ultra vires transaction of which the corporation cannot complain. 5 Fletcher, Cyclopaedia Corporations, § 3580. As said in section 3583 of the same text:

"It is undoubtedly true . . . that where a corporation issues watered stock or fictitiously paid-up stock, with the consent of all the stockholders, and when there is no charter, statutory, or constitutional provision rendering the transaction void, the agreement is valid and binding as against the corporation, and it cannot afterwards repudiate the same and exclude the holders of the stock, or compel them to pay the difference between the par value of the stock and what has been paid or agreed upon as full payment."

See, also, 1 Cook on Corporations (7th Ed.) § 38; 4 Thompson, Corporations (2d Ed.) § 3907; 14 C. J. §§ 610-613. Under these circumstances and for the reasons stated, defendant cannot now question the paid-up character of plaintiff's stock.

[3] Moreover, since the issuance of the stock was at most only ultra vires and not wholly void, the court erred in attempting to cancel it. Even assuming that plaintiff was to pay the full par value of his stock in cash, his failure to do so did not justify the course adopted by defendant and enforced by the court. Sections 29 and 30, chapter 53, Code (secs. 2862, 2863), provide a summary foreclosure proceeding for just such cases, and this should be followed. Procedure by cancellation is authorized by statute only where stock of railroad companies is involved (section 43, c. 54, Code [sec. 2942]), or where a by-law of a corporation provides for such method (sections 31-33, c. 53, Code [secs. 2864-2866]). The defendant has no such by-law.

But plaintiff, having voluntarily made advancements to the company, pursuant to an agreement among the stockholders, cannot now recover such sums. It is admitted that the company made no written or oral promise to reimburse him for such payments, and defendant's check for \$2,500 clearly cannot be applied to such claims, but only toward the liquidation of the \$2,000 note held by plaintiff. But defendant's check overpaid that note to the extent of \$72.22, and the court properly entered a decree in its favor for such amount, but, for reasons already stated or implied, should not have included therein the \$200 difference between the aggregate of the sums advanced by plaintiff and the

amount received by him from the sale of $7\frac{1}{2}$ shares of his stock. Our order, therefore, will reverse the decree of the circuit court, enter a decree here for \$72.22 in favor of defendant New Export Coal Company, and award costs to appellant.

[4] Upon the petition of New Export Coal Company, Thomas Haggerty, and T. J. Davis, the cause was opened for reargument, upon the theory Davis was in such position as a party to the suit as entitled him to further consideration of his rights as a purchaser of shares of the capital stock of the corporation, issued by it and purchased by him after the exhaustion of the original shares, distributed by Vasey and others, as described in the former opinion. New Export Coal Company alone answered the bill, and filed a supplemental answer to it. Each answer was in the nature of a cross-bill, and prayed for affirmative relief upon the new matter pleaded therein. Neither Haggerty nor Davis joined in any pleading in the cause, except as herein-after noted. Apart from their appearance as witnesses on behalf of the corporation, they were silent spectators as the cause proceeded through its different stages to maturity for final hearing, from the date the bill was filed, February rules, 1917, until October 28, 1919, when they and other defendants, except the corporation, moved, and the court permitted them, to adopt as their own the cross-bill answers, and other pleadings of the corporation.

The first cross-bill answer of the corporation proceeded upon the theory that Vasey owed it \$7,500, less certain admitted credits that reduced the amount to \$5,915.03, for the $37\frac{1}{2}$ shares of the corporate stock, notwithstanding the provision in the certificate to the contrary. For this balance the answer prayed for a decree against plaintiff, but did not, and indeed could not with propriety, pray for such relief from other holders of the original certificates of stock containing the same provisions, as none of them except Gilday and Haggerty were parties to the suit, and Gilday was a party not in his own right, but in the capacity of an officer of the corporation, its president.

The second, or supplemental cross-bill answer, after the insertion of a part of the resolution, passed by the corporation's board of directors, calling upon the holders of the original stock issue to pay the balance alleged to be due the corporation thereon, and notifying them that in the event of their failure to heed the call, and they did not heed it, the board would, as it afterwards did, declare the certificates canceled and annulled; and the relief prayed for was that such holders of the shares be compelled to surrender the certificates for cancellation, and that Vasey be enjoined from selling any of his shares. Each of these pleadings did, as it appears, also pray for general relief.

The course pursued in the adoption by one defendant of a pleading by another defendant, where both are interested alike in the matters so pleaded, and in the relief predicated upon them, is permissible, and is not questioned.

It is not in the exercise of the right to invoke and appropriate the pleading of a co-defendant that any difficulty presents itself, but rather in the situation of Haggerty and Davis as parties defendant. Although in one respect Haggerty is in condition to ask relief, in that he is a party in his own right, not as an officer of the corporation, yet in another he is not in such a condition. He participated in the wrongful issuance and distribution of the stock, if such acts fall within the meaning of the term "wrongful." Having done so, he cannot be heard to complain. And there is nowhere in the pleading so adopted any allegation of payment by him, or willingness on his part to pay the face value of his shares of stock, or that he intends to pay the amount so represented. The resolution referred to applies to him and other incorporators alike, though seemingly designed to affect but one shareholder.

But what may justly and legally be said of Davis' status as defendant? Is he entitled to the relief prayed in the pleadings, whose allegations and prayers for relief he has invoked also? Is his status as a party defendant such that he can obtain the full measure of relief demanded by New Export Coal Company? As to him and his rights, if any he has, the facts and circumstances of the case being considered, there is not in the pleadings, taken as a whole, any allegation upon which to buttress the relief he asks. His name appears nowhere except in the summons to answer the bill, in the caption and body of the bill, and in its prayer;

nowhere else in the entire record, except in the capacity of an officer of the corporation, he being its secretary-treasurer, when this suit was brought, and he may still occupy the same position, so far as the record shows, and finally as a witness on behalf of the corporation, and therein most frequently only by his official designation, secretary-treasurer, without specifically naming him.

The terms used to describe Davis' official relation to the coal company organization are insufficient to justify the application of the rule as to the identification of the person intended to be summoned, or required to answer or respond to the relief sought in the pleading. The purpose of making him a party to the suit, as the bill and its prayer clearly disclose, was that he in his official capacity and Gilday in his official capacity and Haggerty may "be enjoined and restrained from carrying into effect the illegal assessment and illegal order calling in" for cancellation plaintiff's certificate of stock, etc., as directed and required in the resolution of the corporation's board of directors, before referred to. He is in no sense a party, and did not, by the procedure pursued, become a party in his own right. In that respect he stands in the same relative situation as if he were a personal representative, and unless the pleading discloses a purpose, either to enforce against him some personal liability, or prays for relief personal to him, apart from his official relation to the corporation, his rights cannot be considered, except in so far as he is affected officially. 18 Cyc. 980; *Thurmond v. Coal Co.*, 85 W. Va. 501, 506, 102 S. E. 221.

A re-examination of the facts and principles discussed in the first opinion does not warrant its alteration in any respect.

(182 N. C. 577)

HARROLD v. GOOD ROADS COMMISSION.
(No. 512.)

(Supreme Court of North Carolina. Dec. 7, 1921.)

1. Eminent domain §145(1)—Benefit to land cannot be offset against value of soil taken.

The right to have benefits to the land offset against the damages for the property taken is one which the Legislature can grant or withhold in its discretion, so that an instruction denying the right to such benefits in proceedings under Pub. Loc. Laws 1915, c. 345, § 15, which does not provide for the offset of benefits, was correct.

2. Eminent domain §262(5)—instruction as to reasonable price for soil taken for road held favorable to appellant.

Even though the difference between the value of the land before and after the soil was taken for a road is the proper measure of the value of the soil, where it has no market value, an instruction, withdrawing evidence as to such difference from the jury and permitting an allowance only of the reasonable price, was favorable to the highway commission, and it cannot complain of the error.

Appeal from Superior Court, Wilkes County; Shaw, Judge.

Proceeding by H. E. Harrold against the Good Roads Commission to recover damages for land and earth taken for roads. Judgment for plaintiff and defendant appeals. No error.

This was a proceeding under chapter 345, Public Local Laws of 1915, known as the "Wilkes County Road Law." Section 13 thereof relates to compensation for land taken for rights of way for public roads, and provides that where the land is taken for that purpose if the owner and the road commission cannot agree upon compensation, he may apply to the clerk of the court to appoint a jury of three freeholders to go upon the land and assess the damages, with a right to either party to appeal to the superior court. Section 15 of the act provides that:

"If any owner of land * * * from which stone, gravel, soil, sand, clay, or rock or other material was taken, as aforesaid [for repairing road] shall present an account for the same to the good roads commission or to its superintendent, or other duly authorized employee, it shall be the duty of said commission to pay a just and reasonable price for the same"

—and further provides the right to appeal to the superior court. Verdict and judgment for \$50 and appeal by defendant.

F. B. Hendren and Hayes & Jones, all of Wilkesboro, for appellant.

Chas. G. Gilreath, of Wilkesboro, for appellee.

(109 S.E.)

CLARK, C. J. Two actions were brought, one under section 13 and the other under section 15, chapter 345, Public Local Laws 1915, and were consolidated, thus making two causes of action, but as the evidence, the trial, the appeal, and the assignments of error are all under section 15, we need consider only that cause of action.

[1] Section 15 provides as to the measure of compensation for taking the topsoil as follows:

"It shall be the duty of said commission to pay a just and reasonable price for the same."

There is nothing said about either special or any other benefit being considered, and on an examination of the charge, we do not find that the defendant has suffered any damage. The court told the jury:

"In determining what would be a fair and reasonable price for topsoil, you can take into consideration the quantity of land they scraped off in taking the topsoil, how much topsoil was taken off, and in what condition did they leave it—whether anything was growing on the land of any value at the time, and also what effect it had on the land in taking that topsoil off. You can take all this into consideration in enabling you to tell what it was reasonably worth, if there was no market value for it, and there is no evidence of any market value."

The court also charged the jury:

"These witnesses have been permitted to express their opinion about the condition out there and about how much was taken and about what effect it had upon the land that was left and whether it hurt it or improved it. I have also permitted them to express their opinion about the market value of the land before and after, but that is not the test. The test is, What would be the reasonable market value of this topsoil, if it had any, and, if not, what was the reasonable price for it?"

The court also charged the jury as follows:

"In the outset of this case a whole lot of testimony was attempted to be offered whether the building of the road along there improved the plaintiff's property or was any special advantage to the plaintiff's property, but when we got down to the law in the case these things don't have anything to do with your answer to this issue. Whether it decreased or increased the value of the plaintiff's property or was any special benefit, or no special benefit, has nothing to do with it."

In *Miller v. Asheville*, 112 N. C. 768, 16 S. E. 764, the court said:

"The Legislature in conferring upon the corporation the exercise of the right of eminent domain can, in its discretion, require all the benefits or a specified part of them, or forbid any of them to be assessed as offsets against the damages. This is a matter which rests in its grace, in which neither party has a vested right, and as to which the Legislature

can change its mind always before rights are settled and vested by a verdict and judgment."

This case was cited and approved in *Phifer v. Commissioners*, 157 N. C. 152, 72 S. E. 852. To same purport *Railroad v. Platt Land*, 133 N. C. 272, 45 S. E. 589.

In *Campbell v. Commissioners*, 173 N. C. 501, 92 S. E. 323, the court held that—

The Legislature "in conferring the right of condemnation of lands for public use may, in its discretion, and in compensation to the owner, require all the benefits or a specified part of them, or forbid any of them to be assessed as offsets against the damage."

These cases have been cited and approved in *Lanier v. Greenville*, 174 N. C. 317, 93 S. E. 850; *Powell v. Railroad*, 178 N. C. 249, 100 S. E. 424; *Elks v. Commissioners*, 179 N. C. 246, 102 S. E. 414.

All the above authorities are as to whether the condemnor is entitled to have the benefits, or any part of them, accruing to the landowner to be assessed as offsets to the damages which he may sustain, and it is held that this is a matter which rests solely in the legislative discretion. In the statute before us, *Public Local Laws 1915, c. 345, § 15*, there is no such provision, and the defendant, who is the appellant taking the surface soil under the right of condemnation, has no right to complain of the charge of the court in not allowing benefits, if any, to the owner's land to be assessed, as offsets.

[2] There being no proof of the market "value of this topsoil," if such proof indeed was possible, we think a reasonable construction of the statute and a correct charge would have been that the plaintiff was entitled to recover compensation to be measured by deducting the market value of the spot after the surface soil was taken off and the market value before this was done. If there was error, therefore, it was against the plaintiff, who is not appealing. Presumably, the amount allowed him by the jury was satisfactory. The defendant cannot complain that allowance for offsets by reason of benefits to the land, if any, were not considered, for the statute does not provide for this, and they could not have been allowed without statutory authority. The defendant cannot complain of the charge as given.

No error.

(182 N. C. 889)

STATE v. OVERCASH et al. (No. 465.)

(Supreme Court of North Carolina. Dec. 7, 1921.)

I. Indictment and Information \S 176—Variance as to time of offense immaterial where time not of essence.

Unless time is of the essence of the offense charged, a variance between the allega-

tion as to time and the proof is immaterial, and the prosecution, unless otherwise required by the court, is not restricted to the time charged, but may offer evidence as to the commission of the offense at any time before indictment and within the period of the statute of limitations.

2. Criminal law \S 772(4)—Question of guilt properly submitted as presented in evidence, though defendant not connected with offense committed on later date charged.

In a prosecution under an indictment charging larceny as of January 29, where there was evidence of two offenses, one on January 15 and the other on the 29th, with the latter of which defendant was not connected, the court, ignoring the date in the bill, properly submitted the question of defendant's guilt as presented in the evidence.

3. Larceny \S 70(1)—No error in court's reference to evidence of conspiracy; "principals."

The court, in a prosecution for larceny only, did not err, when charging the jury, in referring to evidence that the goods were stolen and delivered to and paid for by defendants pursuant to an arrangement in their presence, though such arrangement amounted to a conspiracy to steal; the evidence tending to show that defendants advised and procured the crime charged.

[Ed. Note.—For other definitions, see *Words and Phrases*, First and Second Series, *Principal*.]

Appeal from Superior Court, Cabarens County; Bryson, Judge.

Harvey Overcash and Arch Pethel were convicted of larceny, and they appeal. Affirmed.

From a perusal of the record it appears that at said April term, 1921, a bill of indictment, No. 78, was submitted to the grand jury, charging that the defendants, Harvey Overcash and Arch Pethel, on January 29, 1921, did feloniously steal, take, and carry away 2,000 yards of cloth of the value of \$200 of the goods and chattels, etc., of the Locke Cotton Mills, and there was also a count in the bill for feloniously receiving said property knowing the same had been stolen.

At the same April term, 1921, there was a further bill submitted, No. 79, charging that on said 29th of January, 1921, Fred Widenhouse, William Sides, and Walt Sides with force and arms, at or in the county aforesaid, did break into the warehouse of said Locke Cotton Mills with felonious intent, and did there feloniously steal, etc., five bolts of cloth, the property of said company, of the value of \$200, and with a count on bill for feloniously receiving the property. In No. 80 at same term a bill was submitted charging in proper terms that on the 15th of January, 1921, William Sides, Dewey Furr, and Roy

Hall feloniously did break and enter the warehouse, etc., of the Locke Cotton Mills, and then and there did feloniously steal, etc., cloth of the value of \$200, the property of said company, with a count for receiving, etc.

These bills were all considered and found by the grand jury to be true bills, and the three causes by consent were tried together at said term and before the one and the same petit jury, and all of the defendants were convicted of the crime of larceny, except Roy Hall, he being acquitted of the offense. There was judgment on the verdict, and defendants, Overcash and Pethel, excepted and appealed.

H. S. Williams, of Concord, and R. Lee Wright, of Salisbury, for appellants.

J. S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

HOKE, J. [1] It is objected to the validity of this conviction that under a bill of indictment charging a larceny as of January 29 the judge submitted the question of the guilt of these appellants, and they have been convicted solely for a larceny as of January 15, 1921. So far as the bill of indictment is concerned and as a matter of form, unless time is of the essence of the offense, it is fully established that a variance between the allegation as to time and the proof is not material, and that the prosecution, unless it is otherwise required by order of the court, is not restricted to the time named in the bill, but may offer evidence as to the commission of the offense charged at any time before indictment found and within the period where no statute of limitations operates to protect the accused. *State v. Newsom & Brindle*, 47 N. C. 173; *Clark, Criminal Procedure*, 237.

[2] In the present case the evidence offered on the part of the state tended to show that there were two distinct offenses committed, each constituting a larceny of cloth, the property of the Locke Cotton Mills, one on the 15th of January, 1921, and the other on the 29th of January; that defendant Overcash was only connected with that of the 15th, and was not involved in the second offense. The court, therefore, ignoring the date of the charged named in the bill, very properly submitted the question of the guilt of these defendants as it was presented in the evidence, and not otherwise. While there may have been at times some apparent confusion in stating the contention of the opposing parties growing out of the fact chiefly that there were three bills of indictment being tried at the same time, and by one and the same jury,

on the issue as to this first bill, No. 78, in which these appellants alone were indicted, the instructions of his honor were both comprehensive and careful, and on perusal of the record we are well assured that the rights of defendant have not been prejudiced in the determination of the issue.

[3] Again it is objected that the court in charging the jury referred to evidence tending to show a conspiracy on the part of appellants with others to commit the offense, and of their being accessories before the fact, when there was no charge against defendants covering these positions, but the bill of indictment contained only a direct charge of larceny, and for which the conviction was had. It has long been held "for settled law" in this state that the distinction between grand and petit larceny has been abolished, and, unless in case of robbery or in connection with some felonious breaking, that "all felonious stealing has been reduced to the grade of petit larceny," and as to this offense our decisions are to the effect that there can be no accessories, but all who "aid, abet, advise or procure the crime are principals." *State v. Stroud*, 95 N. C. 626; *State v. Fox*, 94 N. C. 928.

While there is no proof that either of these appellants were physically present at the time the goods were stolen, on the 15th of January or at any other time, there was testimony on the part of the state from Fred Widenhouse, a defendant in bill No. 80, in effect that on said date of January 15 he, with Will Sides, a codefendant, were at the house of Arch Pethel, where Pethel and Overcash were at the time, and it was then and there arranged between them that the witness and Sides would steal the cloth from the Locke Cotton Mills and bring and deliver it to appellants who were to take same and pay for it, and pursuant to this arrangement the witness and Sides, associating the other defendants with them, did steal the cloth in question from the company's warehouse, delivered same to appellants that same night about 9:30 o'clock, and appellants paid them for it, part in money and part in whisky.

The fact that this arrangement spoken of may have amounted to a conspiracy to steal does not render the evidence incompetent on the issue presented, as it clearly tends to show that appellants "advised and procured the crime" and would justify a conviction for the consummated offense.

There is no reversible error, and the judgment on the verdict is affirmed.

No error.

(182 N. C. 473)

BALLOU v. BOARD OF ROADS COMMISSION OF ASHE COUNTY et al.
(No. 366.)

(Supreme Court of North Carolina. Nov. 23, 1921.)

1. Counties \Leftarrow 183(2)—Provision of bonds prohibiting redemption before maturity held unauthorized.

Under Pub. Loc. Laws 1919, c. 467, as amended February 3, 1921, authorizing the issuance of highway bonds and requiring the board of road commissioners, not later than five years after their issuance, to begin, in its discretion, the payment of the bonds or creation of a sinking fund, a provision in the bonds prohibiting their redemption before maturity at the option of the county, or any officer or board, was unauthorized.

2. Counties \Leftarrow 183(2)—Bonds bearing semiannual interest held contrary to statute.

Under Pub. Loc. Laws 1919, c. 467, authorizing an issuance of highway bonds, and providing, in sections 11 and 12, that the interest coupons shall be payable annually and that it shall be the duty of the board of road commissioners to pay the annual coupons at the time and place fixed, provision for semiannual interest is unauthorized.

Appeal from Superior Court, Ashe County; Long, Judge.

Action by R. L. Ballou against the Board of Roads Commission of Ashe county and others. From a judgment for defendants, plaintiff appeals. Reversed.

Civil action, submitted on an agreed statement of facts, to determine the regularity of certain highway bonds of Ashe county. The following facts, taken from the case agreed, will suffice for our present decision:

"(1) That on November 3, 1921, the defendant board passed a resolution authorizing the issuance of \$365,000 highway bonds of Ashe county, under the authority of chapter 467, Public Local Laws 1919, as amended February 3, 1921, bearing interest at 6 per cent. per annum, payable semiannually, with fixed serial maturities, providing in said resolution for a sinking fund for the payment of said bonds, and determining that no bonds should be redeemed at the option of the county, or any officer or board thereof, before the date of such serial maturities, respectively, and directing the board's secretary, defendant herein, to advertise said bonds for sale upon sealed bids to be received December 3, 1921; further providing that not only the bonds themselves but the advertisement of sale should specifically recite that said bonds would not be redeemable before said serial maturities.

"(2) That all acts, conditions, and things required by the Constitution and laws of North Carolina in connection with the issuance of said bonds, up to and including the said authorizing resolution and direction to advertise, have happened, exist, and have been per-

formed, except that the plaintiff and defendants are not agreed upon any one of these three questions; the defendants contending that said questions should be answered in the affirmative, and the plaintiff contending that they should be answered in the negative: (a) Whether said bonds will be within the debt limit; (b) whether the county may irrevocably waive any right to redeem the bonds before their fixed maturities; (c) whether the interest payments may be made semiannually."

His honor, being of opinion that all three of these questions should be answered in the affirmative, as contended by the defendants, entered judgment accordingly, and plaintiff appealed.

Parke & Johnston, of West Jefferson, for appellant.

W. R. Bauguess, of Jefferson, for appellees.

STACY, J. We will omit any consideration of the first question, as we understand a negative answer to either the second or third inquiry will render it impracticable for the defendants to proceed further with a sale of the present bonds.

[1] Chapter 467, Public Local Laws 1919, under authority of which the bonds in question are to be issued, contains the following provision with respect to their payment:

"It shall be the duty of said board of road commissioners, * * * not later than five years after the issue of said bonds, to begin, in the discretion of the board of road commissioners, the payment of said bonds or the creation of a sinking fund for the payment of the principal of said bonds at their maturity."

In the case of *Com'rs v. Bank*, 181 N. C. 347, 107 S. E. 245, speaking of this identical provision, it was said:

"The present board cannot estop the option which, under the statute, they or their successors may exercise."

To hold otherwise would be to allow the board of road commissioners to amend the statute and to issue bonds of a different kind and tenor than those contemplated by the Legislature. The authority to issue the proposed bonds is derived from the statute, and its limitations and conditions are equally as effective and curbing as its enabling provisions are life-giving. *Proctor v. Com'rs*, 108 S. E. 360, at the present term. Under these decisions, we think the second question must therefore be answered in the negative rather than in the affirmative.

[2] Again, section 11 of the act under consideration provides that the interest coupons attached to said bonds shall be "payable annually"; and, further, in section 12, "it shall be the duty of said board of road commissioners to pay the annual coupons on said bonds at the time and place thereon fixed."

Hence, under the express terms of the statute, we think the bonds should be issued with "annual" rather than "semiannual" interest coupons attached.

From the foregoing, it follows that the second and third questions propounded must be answered in the negative, or in accordance with the plaintiff's contention; and this will be certified to the superior court.

Error.

CLARK, C. J., concurs entirely in all that is said in the opinion of the court, but, to "exclude a conclusion," thinks it proper, as the statute is before us for construction, to call attention to the fact that so much of this statute as authorizes the levy of any tax on the poll for the payment of bonds issued "for the construction and maintenance of roads" is invalid, because in violation of an explicit provision in the state Constitution, which, as adopted in 1868 provides (article 5, § 2):

"The proceeds of the state and county capitation tax shall be applied to the purposes of education and the support of the poor, but in no one year shall more than 25 per cent. thereof be appropriated to the latter purpose."

This provision of the Constitution remains unaltered.

When there has been a levy authorized for general purposes the validity of the poll tax is not necessarily brought in question, because, when collected, presumably the proceeds of the poll tax will be applied to the constitutional purposes to which it is restricted, i. e., "education and the poor." But the act before us is restricted to the specific purpose therein stressed, that the whole of the tax levied is to be applied solely in the construction and maintenance of the roads. So much of the act as levies a poll tax for that purpose is therefore unconstitutional and invalid. This, however, can be struck from the act without impairing the validity of the property tax, as has been held in several cases.

As we now have a declared legislative policy of incurring an indebtedness of \$50,000,000 for the construction and maintenance of roads, it is well to note that, however laudable such purpose may be, the Legislature is explicitly forbidden by the Constitution to derive any funds for that purpose from the collection of a poll tax.

There were formerly conflicting decisions, owing to the requirement of an "equation of taxation" between the poll and property tax, whether when the tax exceeded 66⅔ cents on the dollar on the property the poll tax could be collected to an amount in excess of \$2, and whether such excess could then be applied to other purposes than "education and the support of the poor." These conflicting deci-

sions have now ceased to have any bearing, because under the Constitution, as now amended, the "equation of taxation" between the poll and property has been stricken out, and the Constitution (article 5, § 1) now reads:

"The General Assembly may levy a capitation tax on every male inhabitant of the state over 21 and under 50 years of age, which said tax shall not exceed \$2, and cities and towns may levy a capitation tax which shall not exceed \$1. No other capitation tax shall be levied."

Section 2 of that article of the Constitution, which provides that "the proceeds of the state and county capitation tax shall be applied to the purposes of education and the support of the poor," remains unaltered, and there can be no possible misunderstanding of the language of the Constitution which, as above quoted says, "No other capitation tax shall be levied." It is also clear from this language that no capitation tax can be levied upon women, or upon men except from 21 to 50 years of age, and that so much of this, or any, statute as provides for the levy of any capitation tax for the maintenance and construction of roads is invalid, and must be disregarded.

DUFFY v. PHIPPS. (No. 394.)

(182 N. C. 778)

(Supreme Court of North Carolina. Dec. 7, 1921.)

Appeal and error \Leftrightarrow 1099(4)—Interpretation of contract on prior appeal law of case on subsequent appeal.

The construction of a contract on a prior appeal is the law of the case on subsequent appeal.

Appeal from Superior Court, Guilford County; Finley, Judge.

Action by T. J. Duffy against J. Henry Phipps. Judgment for plaintiff, and defendant appeals. No error.

Civil action to recover damages for an alleged shortage in acreage in a tract of land bought by plaintiff from the defendant.

The contract of purchase is set out and construed in this same case as reported on the former appeal in 180 N. C. 313, 104 S. E. 655.

Upon trial in the superior court, the jury returned the following verdict:

"(1) Was the deed from the defendant to the plaintiff made pursuant to the paper writing offered in evidence? Answer: Yes.

"(2) If so, was there a shortage of acreage in the land conveyed by the defendant to the plaintiff, and, if so, how much? Answer: 40 acres and 43/100.

"(3) What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: \$4,043.50."

From a judgment on the verdict in favor of plaintiff, the defendant appealed.

Fentress & Jerome, of Greensboro, for appellant.

Justice & Broadhurst, Oliver C. Cox, and Brook, Hines & Smith, all of Greensboro, for appellee.

PER CURIAM. From a perusal of the record, it appears that the cause has been tried in accordance with our former interpretation and construction of the contract of sale entered into between the parties. The case was here before on appeal from a judgment overruling the defendant's demurrer, and we deem it unnecessary to repeat our previous holding, which has now become the law of the case. *Public Service Co. v. Power Co.*, 181 N. C. 356, 107 S. E. 226; *Lewis v. Nunn* (at the present term) 108 S. E. 442.

After a full investigation of the defendant's exceptions and assignments of error, we have discovered no sufficient reason for disturbing the result.

No error.

(182 N. C. 571)

BOARD OF EDUCATION OF YADKIN COUNTY v. BOARD OF COM'RS OF YADKIN COUNTY. (No. 506.)

(Supreme Court of North Carolina. Dec. 7, 1921.)

1. **Jury** ⇐ 19(17)—Act making judge's findings as to amount of levy final held not denial of jury.

The provision of C. S. § 5488, governing proceedings by the board of education to compel the board of commissioners to levy a school tax, that the findings of the judge on issues of fact raised by the pleadings are conclusive does not deny the right of trial by jury, contrary to Const. art. 1, § 19, providing that in all controversies at law respecting property the ancient mode of trial by jury is inviolable.

2. **Mandamus** ⇐ 181(1)—Record held not to show duty to levy additional school tax so as to warrant peremptory writ.

The record in an action in the nature of mandamus by the board of education under C. S. § 5488, to compel the board of commissioners to levy a school tax of 41 cents on the hundred dollars, which does not show that the state board of education had apportioned the state funds to the various counties as required by Public Laws 1921, c. 146, § 2, in case a maximum levy of 30 cents for teachers' salaries fund authorized by section 4 is insufficient to maintain the schools for six months, as required by Const. art. 9, § 3, does not raise the question of the right of the board to have the additional levy made in the event that the

authorized levy with the state money will still be insufficient, and does not entitle the granting of the peremptory writ until further findings are made establishing such insufficiency.

Appeal from Superior Court, Yadkin County; Lane, Judge.

Action in the nature of a proceeding for mandamus by the Board of Education of Yadkin County against the Board of Commissioners of Yadkin County. From a judgment granting the relief sought, defendant appeals. Reversed and remanded.

Civil action in the nature of a proceeding for a writ of mandamus, brought under C. S. § 5488, to compel the defendant board of commissioners to levy a special school tax of 41 cents on the \$100 assessed valuation of the taxable properties and polls in Yadkin county for the year 1921; it being alleged that such rate is necessary to make provision for a teachers' salary fund and to maintain a six months' school term in said county, as required by article 9, § 3, of the Constitution.

From a judgment granting the relief sought, to the extent of requiring a tax of 40 cents on the \$100 valuation of all taxable property in the county, the defendant appealed.

Williams & Reavis, of Yadkinville, and H. P. Grier, of Statesville, and T. C. Bowie, of Jefferson, for appellant.

Attorney General J. S. Manning and Assistant Attorney General Frank Nash, for appellee.

STACY, J. [1] The defendant's first exception is directed to the constitutionality of the statute under which this proceeding is instituted, to wit, C. S. § 5488. The act is assailed upon the ground that, where issues of fact are raised by the pleadings and the findings of the judge are made conclusive, the right of trial by jury is thereby denied. We do not think the statute is repugnant to article 1, § 19, of the Constitution, which provides that—

"In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable."

The exact question here presented was before the court in the case of *Board of Education v. Board of Commissioners*, 174 N. C. 469, 93 S. E. 1001, and the following excerpt from the opinion, delivered in that case by Hoke, J., would seem to be decisive of this exception:

"We are not inadvertent to the position earnestly urged for defendant that the act providing for a determination of the amount

required for a four-months [now six months] school by the superior court judge is unconstitutional, in that it attempts to confer legislative powers on the courts, but we do not think the statute is open to such objection. It only empowers the courts to ascertain and determine a disputed fact relevant to a pending issue between the two boards, and thereupon command that the tax be levied accordingly, both the finding of the fact and the judgment thereon being, in our opinion, judicial in their nature. In re Applicants for License, 143 N. C. 1, 6. The tax, however, is authorized, as it should be, by legislative enactment, and is to be levied and collected by the usual and ordinary administrative and executive officers of the county government."

[2] But we do not think the imperative necessity of levying a rate of tax in full compliance with the plaintiff's demand, or that ordered by the judge, is made to appear from the instant record. The defendant has levied a special tax of 30 cents on every \$100 valuation of taxable property within the county and a corresponding tax on every taxable poll for the purpose of raising the necessary teachers' salary fund; and it is provided in section 4, c. 146, Public Laws 1921, that no county shall be compelled to levy more than such amount, and when this maximum rate has been levied, and the funds derived therefrom are insufficient for the purpose aforesaid, then "the county shall receive from the state public school fund for teachers' salaries, an apportionment sufficient to bring the school term in every school district to six months." It is further provided in section 2 of said act that the state board of education shall apportion annually to those counties which are unable to provide a six months' school term, after levying the maximum rate specified in section 4, "an amount to supplement the county funds sufficiently to provide a six months' term for every school in the county." The clear intent of the Legislature would seem to be that when the maximum tax rate of thirty cents on every hundred dollars valuation of property, real and personal, and a corresponding tax on every taxable poll has been levied for this special purpose, by the commissioners of the county, and the amount derived therefrom is insufficient to meet the necessary requirements, then the deficiency shall be supplied, if practicable, by the state board of education out of the state public school fund.

It was suggested on the argument, and it is alleged in the complaint, that the equitable apportionment, or ratable part, of this latter fund, which the state board of education would be authorized in allotting to Yadkin county, together with the local property tax of 30 cents and a corresponding tax on the poll, is still insufficient in amount

to meet the necessary requirement of article 9, § 3, of the Constitution with respect to a six months' school term. But this question is not before us, as no such finding appears on the record, and we are not disposed to enter upon a discussion of so important a matter until it is presented directly for our consideration.

On the other hand, it appears affirmatively from his honor's findings of fact that the state board of education has refused to make any apportionment from the state public school fund, in order to supplement the county funds sufficiently to provide a six months term for one or more schools in every district in Yadkin county, unless and until the defendant board of commissioners shall levy a tax in accordance with plaintiff's demand. This would seem to be contrary to the statute. At least, we are unable to find authority for the position, there being no valid reason assigned therefor, and it is possible that the state board of education, co-operating with the defendant, may be able to meet the deficiency with moneys out of the public school fund, in which event the present controversy apparently may be adjusted without further litigation.

The method adopted by the state board of education in ascertaining the respective amounts which should be apportioned to the several counties out of the state public school fund, while not before us, is no doubt a fair and legitimate one; but this is a separate and distinct matter from the provisions of the Constitution and the law under which the defendant is asked to proceed. It would seem that Yadkin county should be allowed its equitable part of this state fund, regardless of the amount, when it has met the requirements of the statute. Then should the existing tax levy, together with the allotment from the state fund, prove to be inadequate, the defendant may experience the necessity of determining what further means should be employed to meet the exigencies of the situation. But until this occasion arises, we will not undertake to say what policy should be pursued, in the absence of any legislative declaration.

Upon the record and for the want of any sufficient findings of fact to support it, we must hold that the peremptory mandamus was improvidently granted; and, if the appeal was intended to present the question as to whether the defendant board of commissioners should be required to levy a tax in excess of the maximum rate, fixed by the statute, in the event the constitutional requirement cannot be met in any other way, we must remand the case for additional findings, as the necessity for a ruling on this point is not now apparent.

Reversed and remanded.

(182 N. C. 599)

ELAM v. SMITHDEAL REALTY & INS. CO.
(No. 364.)

(Supreme Court of North Carolina. Dec. 7, 1921.)

1. Insurance §103—Broker undertaking to procure policy covering designated risk liable for loss from negligent default.

Generally, where an insurance agent or broker undertakes to procure a policy of insurance for another affording protection against a designated risk, he must exercise reasonable care to perform such duty, and, within the amount of the proposed policy, he may be held liable for loss properly attributable to his negligent default.

2. Evidence §424—Prior or contemporaneous parol inducements admissible in action against broker for failure to procure adequate policy.

The rule that an insurance policy expresses the contract between the parties and shuts off prior or contemporaneous parol inducements and assurances in contravention thereof is inapplicable in an action against a broker for negligent failure to procure a policy covering a designated risk.

3. Insurance §103—Broker assuming duty of procuring policy must exercise ordinary care in performance thereof.

While an insurance agent or broker is not obligated to assume the duty of procuring a policy, without consideration for his promise, he must exercise ordinary care in the performance of such duty when assumed; the promise to take the policy being a sufficient consideration.

4. Damages §62(1)—Injured party must exercise reasonable care to minimize loss.

It is incumbent on one injured by a breach of a definite and entire contract or the commission of a tort to exercise reasonable care and business prudence to minimize the loss, and for damages thereafter occurring, incident to his own breach of duty, no recovery should be allowed, they being too remote.

5. Contracts §93(2)—Deeds §69—Person signing or accepting must read instrument.

It is the duty of a person of mature years of sound mind, who can read or write, to read a deed or formal contract which he signs or accepts, and knowledge of the contents will be imputed to him if he negligently fails to do so, providing nothing has been said or done to mislead him or to put a man of reasonable business prudence off his guard.

6. Insurance §103—Evidence in action for broker's failure to procure adequate policy held to require submission of question of contributory negligence.

In an action against an insurance broker for failure to procure a policy insuring plaintiff's automobile against collision, evidence held to require submission of the question whether plaintiff's failure to hold an adequate policy was due to his own negligence in not reading his policy and taking out one sufficient to protect him.

7. Principal and agent §79(3)—For agent's breach of duty, principal may sue for breach of contract or in tort.

For breaches of duty involved in a contract of agency, the principal may ordinarily sue either for breach of contract for faithfulness or in tort for a breach of duty imposed by contract.

8. Principal and agent §79(1)—Principal's contributory negligence will not defeat action for agent's breach of contract but will be considered on issue of damages.

The principal's contributory negligence will defeat an action in tort for his agent's breach of duty, but not an action for breach of contract, though in such action it will be considered on the issue of damages.

9. Insurance §103—Plaintiff, if contributorily negligent, can recover only nominal damages for broker's failure to procure adequate policy.

In an action against an insurance broker for breach of a contract to procure a policy covering a designated risk, if plaintiff's failure to have an adequate policy was due to his own negligent default in not ascertaining the defect and procuring another policy, he can recover nominal damages only.

Appeal from Superior Court, Forsyth County; Webb, Judge.

Action by I. R. Elam against the Smithdeal Realty & Insurance Company. From a judgment of nonsuit, plaintiff appeals. Reversed.

This action is to recover damages for failure to procure a policy of insurance protecting plaintiff's automobile in case of collision, etc. At the close of plaintiff's evidence on motion there was judgment of nonsuit, and plaintiff excepted and appealed.

Parrish & Deal, of Winston-Salem, for appellant.

Holton & Holton, Swink & Hutchins, and O. O. Eard, all of Winston-Salem, for appellee.

HOKE, J. There was evidence on the part of plaintiff tending to show that on or about March 31, 1919, the plaintiff entered into a contract with defendant company, doing business, among other things, as insurance agents and brokers, to procure a policy of \$5,000 on the car of defendant affording protection against damage by fire or collision or other kind of accident; that shortly thereafter the said agent came to plaintiff, who was at the time presently engaged at his business in a tobacco warehouse and told witness he had obtained the policy desired and had left same for plaintiff at the garage with the proprietor, who had put the policy in the latter's safe; plaintiff, with a view of then paying the premium, asked for the amount and was told by the agent, an officer and one of the owners of the defend-

ant company, that plaintiff had 60 days in which to pay the premium, and it appeared that the premium was paid after the accident and after suit was instituted against defendant; that within a week from this time, or near that, plaintiff's car in a collision sustained damages to the amount of \$1,000, and on application or preparation through the same agent for adjustment with the insurance company which had issued the policy it was ascertained that the policy did not extend to or cover such damages. There was evidence to the effect further that during the time the policy remained in the safe and before the injury, when plaintiff's car had a near accident, but sustained no pecuniary damage, the agent had assured plaintiff that in any event plaintiff was protected, as the policy he had procured covered risks of that kind, and that on another occasion when the owner of another car was about to procure insurance against accident and collision through defendant, plaintiff being present, the agent, referring to plaintiff, said he had a policy of the kind on the car owned by him, and also that, when plaintiff reported the loss and it was found on examination that the risk was not covered, the same agent, Mr. Smithdeal, expressed his regret, saying:

"Mr. Elam I misrepresented this to you, and I am just as sorry as you are. I thought you were insured."

[1] Upon this statement of the facts chiefly pertinent to the inquiry we are of opinion that the judgment of nonsuit should be set aside, and the cause submitted to the jury. It is very generally held that, where an insurance agent or broker undertakes to procure a policy of insurance for another affording protection against a designated risk, the law imposes upon him the duty in the exercise of reasonable care to perform the duty he has assumed, and within the amount of the proposed policy he may be held liable for the loss properly attributable to his negligent default. *Rezac v. Zima et al.*, 96 Kan. 752, 153 Pac. 500, reported also in *Ann. Cas.* 1918B, 1035; *Thomas v. Funkhouser*, 91 Ga. 478, 18 S. E. 312; *Backus v. Ames*, 79 Minn. 145, 81 N. W. 766; *Lindsay v. Pettingrew*, 5 S. D. 500, 59 N. W. 726; *Criswell v. Riley*, 5 Ind. App. 496, 30 N. E. 1101, 32 N. E. 814; *Reed Manufacturing Co. v. Wurt*, 187 Ill. App. 379; *Fellowes v. Gordon*, 47 Ky. (8 B. Mon.) 415; *Mechem on Agency*, § 1258.

[2] In resistance to the application of the principle to the facts of the present record, we are cited to a number of authorities to the effect that a policy of insurance when issued is considered as expressing the contract between the parties and has the effect of shutting off prior or contemporaneous parol inducements and assurances in contravention of the written policy. The position

in proper instances is very generally recognized and has been approved in many cases in this jurisdiction. *Clements v. Ins. Co.*, 155 N. C. 61, 62, 70 S. E. 1076; *Floars v. Ins. Co.*, 144 N. C. 232, 56 S. E. 915. But in the instant case the action is not one against the insurance company in which plaintiff is seeking to hold it liable for an obligation not contained in the written policy, but plaintiff sues the agent and broker for negligent failure to perform a duty he had undertaken and assumed as agent by which plaintiff has suffered the loss complained of, and in our opinion the authorities cited are not apposite to the question presented on the record.

[3] It is further insisted for defendant that no cause of action is disclosed, because there is no consideration given for defendant's promise, but the better considered decisions on the subject are to the effect that, while the agent or broker in question was not obligated to assume the duty of procuring the policy, when he did so the law imposed upon him the duty of performance in the exercise of ordinary care, and as a matter of contract it is said in some of the cases on the subject that the trust and confidence imposed on him as agent afforded a sufficient consideration for the undertaking and carrying out the instructions given. *Criswell v. Riley*, supra. And in *Reed v. Wurt*, supra, Presiding Justice Baume, delivering the opinion, quotes with approval from 1 *Joyce on Insurance*, § 687, as follows:

"If a person voluntarily, without consideration, and without expectation of remuneration or reward, agrees to procure an insurance, and actually takes steps in the matter, he is responsible for misfeasance, and if he proceeds to effect a policy, and is so negligent and unskilled that no benefit is derived therefrom, he is liable, although he was not bound to undertake the performance."

[4, 5] And it would seem that the promise to take the policy would suffice as a consideration. Again it is contended that defendant may not be held liable for this loss because of his own negligent default in not ascertaining the contents of the policy and having taken out a policy which would have afforded him the protection he desired. It is an established principle with us subject to some qualifications not pertinent to this inquiry that, in case of breach of contract which is definite and entire or tort committed, it is incumbent upon the injured party to do what reasonable care and business prudence requires to minimize the loss, and for damages thereafter occurring and incident to his own breach of duty no recovery should be allowed, the same being regarded as too remote (*Yowmans v. Hendersonville*, 175 N. C. 574-579, 96 S. E. 45; *Hocutt v. Telegraph Co.*, 147 N. C. 193, 60 S. E. 980; *Bowen v. King*, 146 N. C. 385, 59 S. E. 1044; *Railroad*

v. Hardware Co., 143 N. C. 54, 55 S. E. 422; 8 R. C. L. 442), and it is also held with us, in accord with principles very generally prevailing, that where a person of mature years of sound mind who can read or write signs or accepts a deed or formal contract affecting his pecuniary interest, it is his duty to read it, and knowledge of the contents will be imputed to him in case he has negligently failed to do so. But this is subject to the qualification that nothing has been said or done to mislead him or to put a man of reasonable business prudence off his guard in the matter. *Clements v. Ins. Co.*, 155 N. C. 61, 62, 70 S. E. 1076; *Floars v. Ins. Co.*, 144 N. C. 233, 58 S. E. 915. The latter citing among the authorities *Bostwick v. Ins. Co.*, 116 Wis. 392, 69 N. W. 538, 92 N. W. 246, 67 L. R. A. 705.

[6] In the present case as it now appears there are facts in evidence tending to show that plaintiff had the policy in his possession for some little time before the collision, and from reading it he could have ascertained that it did not afford any protection in case of collision. There are facts further to the effect that the policy was not delivered to him personally, but at a time when he was busily engaged in a tobacco warehouse, and same was left for him with the proprietor of the garage where his car was kept, and that several times while the policy was so placed and before the collision things were said and done by the agent giving assurance that the policy gave the protection contracted for, and on application of the principles stated we are of opinion that the cause should be submitted to the jury on the question whether the failure to hold an adequate policy is due to plaintiff's own negligence in not reading his policy and taking out one sufficient to protect him.

[7, 8] It is ordinarily true that for breaches of duty involved in the contract of agency the principal may sue either for breach of contract for faithfulness or in tort for a breach of duty imposed by the same. 31 Cyc. 1609. Where in a case of this kind the action is for tort, and there is a negligent default on the part of plaintiff contributing to the injury, this would have the effect of defeating the action. But where the action is brought for breach of contract, and that is established, contributory negligence is not allowed to defeat the action in toto, but the negligence of the claimant contributing to the injury is to be properly considered on the issue as to damages. *Hale on Damages*, p. 68.

[8] In the present case plaintiff has elected to sue for breach of contract of agency causing the damages complained of, and, if this should be established, the cause will be further considered on the question of damages, and, if it is made to appear on the

facts as they may be accepted by the jury that the failure to have an adequate policy affording protection is due to plaintiff's own negligent default in not ascertaining the defect in the policy held by him and procuring another, in that event the damages would be nominal.

This will be certified that the judgment of nonsuit be set aside, and the cause tried by the jury on appropriate issues.

Reversed.

(182 N. C. 574)

CHURCH v. VAUGHN, HEMPHILL & CO.
et al. (No. 511.)

(Supreme Court of North Carolina. Dec. 7, 1921.)

1. Execution \Leftrightarrow 171(1) — Consent judgment held not estoppel to assert lien of judgment not referred to therein.

Where surety on notes to whom makers had executed mortgage to secure him against loss conveyed land to payees by deed which was void, consent judgment in surety's action against payees to set aside conveyance, providing for the sale of the land by commissioner and for payment of proceeds to discharge indebtedness due payees on such notes, did not estop payees from causing execution to issue on judgments representing other indebtedness not referred to in consent judgment, as against purchaser at commissioner's sale under consent judgment who had full notice of lien of other judgments before payment of purchase price to commissioner.

2. Judgment \Leftrightarrow 651 — Consent judgment an estoppel only as to matters litigated.

A consent judgment is an estoppel only as to such matters as are therein litigated or necessarily embraced and determined.

Appeal from Superior Court, Watauga County; Ferguson, Judge.

Action by N. M. Church against Vaughn, Hemphill & Co. and others. Judgment for plaintiff, and defendants appeal. Reversed.

By consent the judge found the facts. This action is for the permanent restraint of the defendants from the sale of land under execution upon two judgments belonging to them, docketed in the superior court of Watauga, one for \$45.30 and interest assigned to them by Hancock Bros. Company and one for \$161.15 and interest, assigned to them by Lynchburg Shoe Company. The plaintiff alleges that the defendants are estopped to sell the land in question under said judgments by reason of a sale of the land under a consent judgment and purchase by plaintiff at a commissioner's sale thereunder.

The defendants denied being estopped by said consent judgment, for that said consent judgment did not in any way refer to or

embrace the judgments purchased from Hancock Bros. Company or the Lynchburg Shoe Company. The defendants caused execution to issue on their above judgments, and had the land advertised for sale, whereupon the plaintiff instituted this action for a perpetual injunction, claiming that the defendants were estopped by the consent judgment to sell the land under said judgments.

The court held as a matter of law that notice to the purchaser, the plaintiff, before the payment of the purchase money, had no effect, and that the defendants are estopped by reason of the consent judgment to sell the land under the judgments herein; that such sale and deed would be a cloud on the plaintiff's title, and rendered judgment perpetually restraining the defendants from selling under said judgment the land described in said consent judgment. The defendants appealed.

R. N. Hackett and Chas. G. Gilreath, both of Wilkesboro, for appellants.

CLARK, C. J. [1] J. C. Cook and wife, on February 16, 1916, executed to the defendants their two notes, aggregating \$1,416.31, on which R. F. Greene was surety, to whom Cook and wife gave a mortgage to secure him against loss. Subsequently said Greene, without having suffered any loss and without foreclosure proceedings, sold the land in question, and executed a deed to these defendants as purchasers. This sale was premature, illegal, and void, and at spring term, 1918, of Watauga a consent judgment was entered of record in an action brought by said Cook against these defendants, wherein said sale by R. F. Greene, mortgagee, was adjudged void and set aside, and, R. F. Greene being made a party, it was decreed that the land should be resold by John H. Bingham, commissioner, who was directed to apply the proceeds of said sale to discharge the indebtedness due on said notes and on payment of purchase money to execute a title in fee to the purchaser. The property after due advertisement was sold by the commissioner on June 3, 1918. The plaintiff, N. M. Church, became the purchaser, and deed was executed to him in fee. Greene had paid the judgments obtained by defendants on the notes to which he was surety, and the resale was to reimburse him.

Before the plaintiff made payment of the purchase money, he was notified by the defendants that they held these two other judgments for \$45.30 and \$161.15, respectively, which had been docketed January 29, 1916, and which had been assigned duly on

the judgment docket to the defendants on June 13, 1917, by the plaintiffs in said judgments.

The question presented, therefore, was whether the consent judgment aforesaid is an estoppel upon the defendants to collect the judgments for an entirely different indebtedness, and which had been assigned to them prior to the foregoing consent judgment. The consent judgment, which is set out in the record, shows that the docketed judgments now sought to be restrained were not considered in or affected by the consent judgment for a resale of the lands theretofore irregularly sold by Greene, whose deed to defendants was set aside as void, to reimburse Greene, who had paid off the defendants' other judgments. The agreement therein that the commissioner should make a conveyance in fee to the purchaser upon payment of the purchase money cannot be reasonably construed as an agreement by the defendants herein to waive the lien of these other judgments taken by other parties for an entirely different consideration, and to which Greene was not a party.

The defendants gave the plaintiff full notice, before he paid over the purchase money, that they held the lien of these judgments on the land, prior in date to and independent of the claim which Greene had asserted by reason of his having paid off the judgments in favor of the defendants on an entirely different indebtedness. It was the plaintiff's misfortune that he ignored this notice, even if it was incumbent on the defendants to go beyond the legal notice given by the docketing of the judgments.

[2] A consent judgment, like all other judgments, is an estoppel only as to such matters as are therein litigated or "necessarily embraced and determined." *Tyler v. Capeheart*, 125 N. C. 64, 34 S. E. 108, and citations thereto in the *Anno. Ed.*

There was nothing in the consent judgment which can be taken as an agreement to cancel the lien of these judgments held by the defendants which were not embraced in, nor connected with, nor referred to in, the consent judgment, nor was there any consideration moving thereto.

This matter was before the court in this same case (*Church v. Vaughn, Hemphill & Co.*, 177 N. C. 432, 99 S. E. 199), in which we affirmed the order continuing the restraining order to the hearing. It did not then appear fully as now, that the judgments sought to be restrained were held by the defendants as assignees, and were in no wise connected with or referred to in the consent judgment, nor within its scope.

Reversed.

[182 N. C. 579]

MANEY v. GREENWOOD et al. (No. 515.)

(Supreme Court of North Carolina. Dec. 7, 1921.)

1. Partnership ⇨55—Evidence sustaining finding of partnership.

In an action to recover the price of timber sold, evidence held to sustain a finding that defendants were partners.

2. Sales ⇨181(1)—Burden held upon plaintiff to show compliance with contract for sale of merchantable timber.

In an action against a partnership for the price of timber sold under a contract covering merchantable timber, the burden of proof was on plaintiff to show compliance with the contract.

3. Trial ⇨123—Defendants' failure to testify proper subject of comment.

Where defendants have failed to prove material facts which they could have shown by their own testimony, their failure to become witnesses is a proper subject of fair comment.

4. Sales ⇨178(4)—Sawing part of lumber held an acceptance thereof.

In an action on a contract for the sale of merchantable timber, that defendants sawed a portion of the logs into timber constituted an acceptance of the portion.

5. Sales ⇨177—Purchaser of logs held not entitled to reject logs coming up to contract.

In an action on a contract for the sale of merchantable timber, held that defendants could not reject all of the logs, but were compelled to take only those coming up to the contract.

6. Trial ⇨295(1)—Instructions construed as a whole.

Instructions are to be construed as a whole.

7. Trial ⇨133(1)—Court may check counsel in commenting on witnesses and parties.

The court has the power and duty to check counsel when abusing his privilege, in commenting on witnesses and their testimony, and on the conduct of parties to the action

Appeal from Superior Court, Yancey County; Shaw, Judge.

Action by T. W. Maney against Robert Greenwood and others, trading under the firm name of Greenwood, Burlison & Blackstocks. Judgment for plaintiff, and defendants appeal. No error.

This action was brought to recover the price of timber, bargained and sold to the defendants, at their request, from plaintiff's land, and also damages for the use of certain lands occupied by them as a sawmill yard for sawing and storing timber cut from other lands. Only one issue was submitted to the jury, as follows:

"Are the defendants, or any one, or more, of them, and if so, which ones, indebted to the plaintiff, and, if so, in what amount? Answer: Yes, all three, to the amount of \$2,212.78."

Judgment upon the verdict, and defendants appealed.

Charles Hutchins, of Burnsville, and A. Hall Johnston, of Asheville, for appellants. Gardner & Hamrick and Watson, Hudgins, Watson & Fouts, all of Burnsville, for appellee.

WALKER, J. (after stating the facts as above). [1] The question in this case turned largely upon whether the defendants were partners in the transaction upon which the plaintiff declares. There was more than ample testimony to show that they were such partners. The defendant Joe M. Burlison signed the contract along with the plaintiff, and agreed to take and pay for the timber or logs which were merchantable, and which would saw out sound lumber. The codefendants, Greenwood and Blackstocks, if they were partners of Burlison, would, of course, be responsible equally with him. The following are some of the facts tending to establish the copartnership between the defendants: The instrument executed by Greenwood and Blackstocks to Burlison some time after the contract was made; the signature of Burlison and Blackstocks to the note; and the statement of Blackstocks that they were partners at the time this contract was made; and the conduct of the partners, especially when plaintiff demanded his money; and, lastly the most significant fact is the admission of the partnership by defendants in paragraph 1 of the answer in this action.

First. There was an abundance of evidence to warrant the jury in finding that Greenwood and Blackstocks were partners with Burlison, and certainly enough to go to the jury, and the jury has so found. Greenwood and Blackstocks did not refuse to pay the plaintiff on the ground that they were not partners with him, but stated that the logs did not come up to the contract, and Blackstocks said that the reason Burlison signed his name to the note was that they were partners "over there" at that time, and this is reinforced by the conveyance from Greenwood and Blackstocks to Burlison and other proof of the partnership, as, for instance, the admission in the answer, as above noted, that the three composed the partnership. There is no substantial merit in this exception.

[2] Second. The court charged the jury that the burden of proof was on the plaintiff to show that he had complied with the terms of the contract in every respect, and there was also evidence by the witness, agreed upon by the plaintiff and defendant to do the measuring of the logs, that he had scaled out all defects and left the logs so that they would saw out sound lumber. Taking the

charge of the court all together, it shows that it was absolutely fair to the defendants.

Third. The court stated the contentions of the plaintiff as to the partnership, and also charged the jury that, if plaintiff had shown by the greater weight of the evidence that, though Blackstocks and Greenwood may not have signed the contract, they were really interested with Burlison, as partners, in the logs conveyed by the contract, that they were going to manufacture them together, and thus engage in the joint enterprise, and that Burlison only represented them, then, and in that event, not only would Burlison be responsible to the plaintiff, but the other two defendants would be liable to him for all merchantable logs plaintiff delivered to the defendant's yards, the designated place of delivery, provided plaintiff complied with his contract.

[3] Fourth. Counsel do not state enough of the charge of the court to show just what the judge meant when he said that the defendants had not gone on the stand; and, when the charge is read as to this point, it will be seen that the court was giving the contentions of the defendants, and that it was not necessary for them to go upon the stand, since they contended that the logs were not up to the contract. But if defendants failed to prove material facts which they could have shown by their own testimony, their failure to become witnesses was the subject of fair comment. *Goodman v. Sapp*, 102 N. C. 477, 9 S. E. 483; *State v. Turner*, 171 N. C. 303, 88 S. E. 523; 16 Cyc. 1062; *Powell v. Strickland*, 163 N. C. 393, 79 S. E. 872, Ann. Cas. 1915B, 709.

[4] Fifth. It was not denied that the defendants sawed a portion of the logs into lumber, and, of course, this was an acceptance of a portion of the logs at least, and the court was warranted in so charging to this effect.

[5] Sixth. The court charged the jury that Burlison could not reject all of the logs, but only such part as came up to the contract he would have to take. This was the correct rule of law applicable to the case.

[6] Seventh. There is nothing in the charge to sustain this exception and the same has been fully answered in the remarks above. When all the charge is taken and construed together, as it should be the rule of law was correctly laid down by the court.

Eighth. We can see no error in this exception. The court charged the jury, at all times, that the burden of proof was on the plaintiff to satisfy them by the greater weight of the evidence that he had complied with the terms of the contract, which had been offered in evidence, before they could answer the issue in favor of him, and if he failed to satisfy the jury by the greater weight of

the evidence, they should answer the issue against the plaintiff.

That part of the charge, as to accepting a part of the timber being equivalent to an acceptance of all, was evidently meant to be confined to the merchantable timber, or such as complied with the description of the contract, and it was not intended to say that an acceptance of the merchantable timber would bind the defendants to take the whole lot, whether of that kind or not. We could not possibly attribute any such meaning to the very learned, and accurate, presiding judge, and, besides, the context discloses the real meaning to be that defendants were bound only to take the timber, which was of the kind they contracted to receive and pay for, and could not reject "any" if some of it was of that description, the word "any" being palpably used for "all," and the jury could not, as intelligent men, have otherwise understood the language of the court, even though the phraseology may not have accorded with the highest and best standard of expression. The charge must be taken and construed as a whole, in the same connected way it was delivered to the jury, and we must not trust to mere conjecture that they may, perhaps, have misunderstood, and thus have been misled, but it should clearly so appear before we can reverse for that reason. It would not be fair to the judge to select only one isolated passage in his instructions, but each clause should be considered in the light of what precedes and follows it, so that we may look at the charge in its entirety. This has always been the rule here and elsewhere, for it is the essence of reason and justice. *State v. Exum*, 138 N. C. 599, 50 S. E. 233; *Kornegay v. Railroad*, 154 N. C. 389, 70 S. E. 731; *In re Hinton's Will*, 180 N. C. 206, 213, 104 S. E. 341.

[7] As to the failure of the defendants to take the stand as witnesses in their own behalf, the case of *Goodman v. Sapp*, 102 N. C. 477, 98 S. E. 483, furnishes a full answer to this objection; but, as this practice does not seem to be well understood, we will refer more particularly to some of the authorities. The power and duty of the court to check counsel when abusing his privilege in commenting on witnesses and their testimony and on the conduct of parties to the action is clearly settled by many decisions. Very soon after the change by statute, allowing parties to actions to testify, it was adjudged that the mere fact that a party, plaintiff or defendant, did not testify in his own behalf, was not the proper subject of comment. In *Devries v. Phillips*, 63 N. C. 52, the court was asked to charge the jury:

"That, inasmuch as the defendant was a competent witness, the fact that he did not offer himself as a witness in his own behalf author-

ized the jury to presume the facts against him. His honor declined to give the instruction, but charged the jury that they might consider the circumstance and give to it what weight they might think proper."

In commenting on this ruling, Reade, J., said:

"It is true as a rule of evidence that, where in the investigation of a case facts are proved against a party which it is apparent he might explain, and he withholds the explanation, the facts are to be taken most strongly against him. * * * We conclude that the fact that a party * * * does not offer himself as a witness, standing alone, allows the jury to presume nothing for or against him, and can only be the subject of comment as to its propriety or necessity in any given case, according to the circumstances, as the introduction or nonintroduction of any other witness might be commented on."

In *Gragg v. Wagner*, 77 N. C. 246, but three persons were present at the bargain and execution of the deed in controversy—the plaintiff, the draftsman, and the defendant. The two former were examined on behalf of the plaintiff. The defendant was not present, but was in the state of Oregon, and it was not alleged that he knew the facts other and different, in connection with the execution of the deed, from those testified to by the witnesses present, and counsel was not permitted to comment upon the fact that he had not offered himself as a witness. The court held that it is the privilege, and not the duty, of a party to an action to offer himself as a witness in his own behalf, and he is not the proper subject for unfriendly criticism because he declines to exercise a privilege conferred upon him for his own benefit merely. The fact is not the subject of comment at all; certainly not, unless under very peculiar circumstances, which must necessarily be passed upon by the judge presiding at the trial as a matter of sound discretion. Only an abuse of that legal discretion is reviewable here. *Peebles v. Horton*, 64 N. C. 374, *State v. Williams*, 65 N. C. 505, *Jenkins v. Ore Co.*, 65 N. C. 563, *State v. Byran*, 89 N. C. 531, *State v. Suggs*, 89 N. C. 527, *Guy v. Manuel*, 89 N. C. 83, *State v. Rogers*, 94 N. C. 860, and *Chambers v. Greenwood*, 68 N. C. 274, and numerous other authorities, settle the general principle that—

The extent to which counsel may comment upon witnesses and parties "must be left, ordinarily, to the sound discretion of the judge who tries the case, and this court will not review his

discretion, unless it is apparent that the impropriety of counsel was gross and calculated to prejudice the jury."

It was said by Reade, J., in *Chambers v. Greenwood*, supra, that—

"The mere manner of conducting the trial below is, and ought to be, so much within the discretion of the presiding judge, that an alleged irregularity must be palpable, and the consequences important, to induce us to interfere."

And this is held in citing and approving *Devries v. Phillips*, supra, where it is stated that his introduction or nonintroduction should be the subject of comment only as the introduction or nonintroduction of other witnesses might be. We think this is the necessary result of the change made by the Code, section 1350. It will be noted that there is a difference between Code, § 1350, which relates to civil actions, and section 1353, which relates to criminal actions. In the latter it is expressly declared that a failure of the defendant to testify "shall not create any presumption against him." The reason for the difference readily suggests itself. The doctrine laid down is not in conflict with *Wilson v. White*, 80 N. C. 280, *Greenlee v. Greenlee*, 93 N. C. 278, *Kerchner v. McRae*, 80 N. C. 219, or *Blackwell v. McElwee*, 96 N. C. 71, 1 S. E. 676, 60 Am. Rep. 404. If the defendant in the present case had had any witness present who was cognizant of, and could have contradicted the damaging facts testified to, and failed to introduce such witness, we think it would have been the subject of proper comment, and the ruling of his honor in this respect does not entitle the defendant to a new trial. See, also, *Yarborough v. Hughes*, 139 N. C. 199, 51 S. E. 904; *Powell v. Strickland*, supra, and *Stone v. Texas Co.*, 180 N. C. 564, 105 S. E. 425.

It seems that *Goodman v. Sapp*, supra, and the later cases approving it, has settled the law in this respect, notwithstanding the varying, and not altogether consistent, expressions used in some of the previous decisions cited above.

We have examined the record with care, and can find no reason to disturb the verdict of the jury or the judgment of the court below. On the contrary, we are of the opinion that the case has been properly, fairly, and correctly tried, and that the jury drew the right conclusion from the evidence.

No error.

(182 N. C. 642)

(109 S.E.)

ALEXANDER et al. v. LOWRANCE et al.
(No. 508.)

(Supreme Court of North Carolina. Dec. 7, 1921.)

1. Officers \Leftrightarrow 80—Schools and school districts \Leftrightarrow 53(3)—Direct proceeding necessary to attack official acts of de facto officer.

Defendants' admission that plaintiffs are acting as the graded school committee of a town, performing the duties of such committee and conducting the public schools of the town, is fatal to their contention that plaintiffs are not lawfully constituted officers, and so without authority to maintain the action as such; as exercise of official duties by an officer de facto can be impeached only by a proceeding properly instituted for that purpose.

2. Statutes \Leftrightarrow 225—Statutes on the same subject to be construed so as to give effect to all provisions of each.

All statutes relating to the same subject are to be compared and so construed in reference to each other that effect may be given to all the provisions of each, if it can be done by any fair and reasonable construction.

3. Schools and school districts \Leftrightarrow 55—Special act creating school district held to confer on school committee control of funds and property.

Laws 1903, c. 395, constituting the town of Forest City a public school district, *held*, in view of sections 3, 5, 6, and 9, to confer on the school committee power and authority to take charge of and control the funds, lands, buildings, property, and general interests of the district.

4. Schools and school districts \Leftrightarrow 46—Control of funds of a town district, given to the school committee by special act creating the district, held not divested by later general act.

C. S. §§ 5684-5690 (being Laws 1915, c. 81) relative to bonds for schoolhouses in cities and towns, by section 5684 providing that whenever the board of aldermen or other authority of a town which is in charge of the finances deems it necessary to erect new school buildings it is authorized to issue town bonds therefor, by section 5688 authorizing the board to cause the bonds to be sold, and by section 5690 providing that this article shall apply to towns having powers under special acts as well as those deriving their powers from general law, but that it shall not be deemed to repeal or abridge any powers, rights, or privileges granted by any special acts to any town, but shall be construed to grant additional or co-ordinate powers, *held* not to deprive the school committee of the school district of the town of Forest City of the exclusive right to control the funds and other property appertaining solely to the graded school district, given by Laws 1903, c. 395, constituting such town a public school district.

5. Mandamus \Leftrightarrow 100—Lies to compel performance of ministerial duty of town treasurer to turn funds over to treasurer of school committee.

Under Laws 1903, c. 395, constituting the town of Forest City a school district, and Laws

1915, c. 81 (C. S. §§ 5684-5690), as to bonds for schoolhouses in towns, when the town treasurer receives the proceeds of such bonds he occupies the position of a passive trustee, holding the money for the benefit of the school committee of the district, with the ministerial duty of immediately transferring the fund to the treasurer of the school committee, so that on his refusal or failure to do so mandamus to compel the transfer will lie.

6. Appeal and error \Leftrightarrow 883—Where cause was by agreement heard without jury, jurisdiction of trial court cannot be renounced on appeal.

The cause having by agreement been heard without intervention of a jury, jurisdiction of the trial court to so hear it cannot be renounced on appeal, and such renunciation invoked as cause for reversal.

Appeal from Superior Court, Rutherford County; Shaw, Judge.

Mandamus by J. F. Alexander and others against L. C. Lowrance and others. Writ granted, and defendants appeal. Affirmed. See, also, 109 S. E. 641.

Peremptory mandamus granted by Shaw, Judge, on September 20, 1921, to compel the defendants to deliver to the treasurer of the graded school committee of Forest City the proceeds of bonds issued to provide a fund for the erection of a school building in the Forest City graded school district.

The defendants admitted that the plaintiffs, Alexander, Reinhardt, Hemphill, Reid, and Biggerstaff, were acting as the graded school committee, performing the duties of such committee, and conducting, the public schools of the town, and that the plaintiff Biggerstaff is the treasurer of the committee. The defendants, however, denied that the plaintiffs were lawfully constituted officers.

By virtue of P. L. 1915, c. 81, now C. S. c. 95, art. 40, the board of aldermen of Forest City ordered an election and submitted to the qualified voters of the town the question of issuing bonds in the sum of \$50,000 for the purpose of erecting a building for the city graded school; and, a majority of the qualified voters having voted for the bonds, the board of aldermen caused bonds to be issued and sold, and, after paying commissions and expenses, turned over to the treasurer of the town \$45,000 arising from the sale. The plaintiffs made demand upon the defendants for this money, and upon the defendants' refusal to deliver it applied to his honor, Ray, Judge, for an alternative mandamus, and afterward to his honor, Shaw, Judge, for a peremptory mandamus. Judge Shaw rendered judgment granting the peremptory mandamus, and from this judgment the defendants appealed.

Solomon Gallert, of Rutherfordton, for appellants.

R. R. Blanton, of Forest City, and Ryburn & Hoey, of Shelby, for appellees.

ADAMS, J. [1] The defendants admit that the graded school committee are conducting the public schools in Forest City, and are otherwise performing the duties and functions of their office. In view of this admission it is unnecessary to enter upon a discussion of the refinements that characterize the difference between an officer de facto and an officer de jure, because it is familiar learning that the exercise of official duties by an officer de facto can be impeached only by a proceeding properly instituted for that purpose. The admission of the defendants is fatal to their contention that the plaintiffs are not lawfully constituted officers, and for this reason are without authority to maintain their action. *Tar River Co. v. Neal*, 10 N. C. 520; *Burke v. Elliott*, 26 N. C. 355, 42 Am. Dec. 142; *Com'rs v. McDaniel*, 52 N. C. 107; *Rogers v. Powell*, 174 N. C. 388, 93 S. E. 917.

[2-4] The principal argument of the defendants was addressed to the proposition that the board of aldermen of Forest City have exclusive control of the fund in question, that the plaintiffs have no legal claim upon it, and that the writ of mandamus was improvidently issued. On the other hand, the committee of the graded school contended that their right to the fund is absolute and unassailable. The arguments advanced require an examination of the laws on which the respective parties base their claims.

The defendants rely chiefly upon the act of 1915, which is now chapter 95, article 40, of Consolidated Statutes. Section 5684 is as follows:

"Whenever the board of aldermen or other duly constituted authority of any incorporated town or city in the state, which is in charge of the finances, shall deem it necessary to purchase lands or buildings or to erect additional buildings for school purposes, the said board of aldermen or other authority is authorized and empowered to issue for said purposes, in the name of the town or city, bonds of such amount as the board of aldermen or other authority shall deem necessary, in such denominations and forms as the board of aldermen or other authority may determine."

Section 5688 authorizes the board of aldermen of each city or town, after ascertaining in the manner provided that a majority of the qualified voters favor the issuance of school bonds, to cause the bonds to be prepared and issued for the approved purpose, and to be sold at public or private sale. Section 5690 is in these words:

"This article shall apply to towns or cities which have powers under special acts or charters as well as to those who derive their powers from the general law. This article shall not be deemed or construed to repeal or abridge any powers, rights, or privileges heretofore or hereafter granted by any special acts to any town or city, but shall be construed to grant additional powers where no such powers have been

granted, or co-ordinate powers where such powers have already been or shall be granted."

If article 40 shall not be construed to repeal or abridge any powers, rights, or privileges granted by special acts, it becomes material to inquire whether such powers, rights, or privileges have been granted to the plaintiffs.

At the session of 1903 the General Assembly passed an act (Laws 1903, c. 395) to establish a graded school for the town of Forest City. This act (section 1) provides that Forest City shall constitute a public school district; (sections 5, 6) that after the graded school committee shall have determined the amount to be levied, the board of aldermen shall levy an annual tax for the support and maintenance of this school; and that the moneys apportioned to the school district shall be turned over by the treasurer of the county to the treasurer of the school committee for the benefit of the school. Section 3 provides that the school committee shall have exclusive control of the public school interests, funds, and property in the graded school district; and section 9, that the committee shall have the right to control site, lands, buildings, and other property belonging to the trustees of the Forest City Academy or High School, title to which is vested in them and their successors.

It is a fundamental rule of statutory construction that for the purpose of learning and giving effect to the legislative intention, all statutes relating to the same subject are to be compared and so construed in reference to each other that effect maybe given to all the provisions of each, if it can be done by any fair and reasonable construction. 25 R. C. L. p. 1061; *State v. Melton*, 44 N. C. 49; *Cecil v. High Point*, 165 N. C. 431, 81 S. E. 616; *Morganton Mfg. & Trading Co. v. Andrews*, 165 N. C. 285, 81 S. E. 418, Ann. Cas. 1916A, 763. Applying this principle to the act of 1903 and to the act of 1915, we regard it clearly the intention of the General Assembly to confer upon the school committee power and authority to take charge of and control the funds, moneys, lands, buildings, property, and general interests of the graded school district. We are convinced also that the act of 1915 was not intended to deprive the committee of the rights and privileges conferred by the act of 1903. The statutes embraced in article 40, supra, were intended to confer upon the board of aldermen of any incorporated city or town, or other governing body in charge of its finances, power and authority, if not otherwise conferred, by conforming to the procedure therein prescribed, to issue and sell bonds for the purchase of lands or buildings, or for the erection of buildings, for school purposes; and if such authority has been conferred on any other body, to grant to the board of aldermen or other duly constituted

authority such co-ordinate powers as may be necessary to effect the contemplated purpose. But evidently these statutes cannot be construed as depriving the school committee of their exclusive right to control the funds and other property appertaining solely to the graded school district.

[5] In the next place, the defendants contend that neither of the acts referred to imposes upon the school committee any specific right or duty, and that they are not entitled to the writ of mandamus. The cases cited by counsel for the defendants sustain the principle that ordinarily the writ will be granted to enforce only a ministerial act or duty which is imposed by law; but we cannot concur with the counsel in his application of the principle. When the bonds were sold and the treasurer of the town received the proceeds, he occupied the position of a passive or simple trustee, who held the money for the benefit of the school committee; for with respect to the fund he had no judicial or discretionary duty to perform. It was incumbent upon him immediately to transfer the fund to the treasurer of the school committee; and upon his refusal or failure to perform a duty which was ministerial, and not judicial or discretionary, the plaintiffs properly applied for, and his honor properly granted, the peremptory writ of mandamus.

[6] It was suggested in the brief of counsel for the defendants that the pleadings raised disputed questions of fact, which should have been submitted to a jury for determination. The pleadings raise, not issues of fact, but questions of fact and of law, which were determinable by the court; but, even if otherwise, the defendants, having agreed that the cause should be heard without the intervention of a jury, cannot now renounce the jurisdiction of his honor and invoke such renunciation as a valid cause for reversing the judgment. Due consideration of the record and of the briefs discloses no error, and accordingly the judgment is affirmed.

Affirmed.

(182 N. C. 646)

ALEXANDER et al. v. LOWRANCE et al.
(No. 509.)

(Supreme Court of North Carolina. Dec. 7, 1921.)

Injunction §—88—Lies to protect from threatened expenditure funds to which plaintiffs are entitled.

Plaintiffs school committee of the school district of the town of Forest City, being entitled to the control of funds from sale of bonds for a schoolhouse, are entitled to protection by injunction against the threatened expenditure thereof by defendants aldermen of the town.

Appeal from Superior Court, Rutherford County; Shaw, Judge.

Action by J. F. Alexander and others against L. C. Lowrance and others for injunction. Judgment for plaintiffs, and defendants appeal. Affirmed.

See, also, 109 S. E. 639.

Appeal by the defendants from a judgment of Shaw, Judge, restraining the defendants from erecting a school building in the town of Forest City. The plaintiffs alleged that the proceeds of the bonds were in the hands of the town treasurer; that the treasurer of the graded school committee was entitled to the fund as the lawful depository; that the defendants had prepared plans and specifications for the erection of the building, and were ready to proceed with its construction; and that the defendants' attempted expenditure of the fund was wrongful and unlawful. The answer of the defendants was practically the same as the answer filed by them, denying the right of the plaintiffs to the mandamus.

Solomon Gallert, of Rutherfordton, for appellants.

R. R. Blanton, of Forest City, and Ryburn & Hoey, of Shelby, for appellees.

ADAMS, J. The disposition of this case is governed by the decision adjudging the plaintiffs entitled to the writ of mandamus. We have held that the plaintiffs are entitled to the proceeds arising from the sale of the bonds, and it follows as a corollary that the plaintiffs are entitled to have the fund protected from expenditure by the defendants. The judgment continuing the restraining order is therefore affirmed.

Affirmed.

(182 N. C. 586)

PERRY v. NORTON et al. (No. 517.)

(Supreme Court of North Carolina. Dec. 7, 1921.)

1. Frauds, statute of §—138(4, 5)—Employé may recover for improvements made and services rendered in reliance on parole promise to convey land.

Where an employé worked under an agreement to pay him a specified amount per month, and in addition deed him the cottage and lot he occupied in lieu of higher wages he could have received in working for others, his employers cannot avoid liability for improvements made by him and for money expended and services rendered by him in reliance on the promise to convey, on the ground that the contract, not being in writing was void under the statute; the employé being entitled thereto, as a matter of equitable relief.

2. Improvements §4(5)—Interest held recoverable in suit for improvements.

Where employers agreed to convey the house and lot occupied by employé when they should sell their plantation, in order to retain employé's services, but on subsequent sale of plantation did not convey such house to the employé, the employé, in action for improvements made upon the land and for money expended and services rendered in reliance upon the promise, was entitled, under C. S. § 2309, to interest on the amount otherwise due him from the time of the sale of the plantation to the time of the trial.

Appeal from Superior Court, Henderson County; Adams, Judge.

Action by John Perry, Jr., against Martha A. Norton and another. Judgment for plaintiff, and defendants appeal. No error.

This action was brought to recover damages for improvements made upon land, which defendants promised by parol to convey, but which they failed to do, and for money expended and services rendered in reliance upon said promise so repudiated.

In the case at bar the plaintiff alleges that he had been in the employ of the defendants since he had been large enough to earn his own living, and, in July, 1913, he was offered very much higher wages than the defendants were paying, and he went to defendants and told them that he wanted to serve notice of his leaving their employ. Defendants were so anxious to keep plaintiff that they made him a proposition that, if he would not leave and go to the better paying job, they would continue to pay him \$40 per month, charge no house rent, and when their large plantation was sold, or they dispensed with his services, they would deed him the cottage and lot he was occupying in lieu of the higher wage he would receive at the other place. He took the offer under consideration, and, on the day following, he went to defendants and told them he had decided to accept the same. He thereafter exercised a sole, and even despotic, dominion over the house and lot, as his own, building a fence around it and erecting a barn on it, at his own cost and expense, and continued to serve the defendants at the same wage of \$40 per month for four years, three of them years of world war, uncertainty, and unprecedentedly inflated prices for living commodities, and labor wages never before heard of—a period in which skilled workmen such as he (a landscape gardener, plumber, and general utility man) were in great demand, and earning anywhere from \$150 to \$300 per month the country over. For all this period the defendants got this man's services on the same basis—never any change—allowed him to build the barn, and expend his own money in improving the place, believing it to be his, as soon as the plantation could be sold,

and, when his services to defendants were no longer needed, assured for themselves a permanent supply of skilled labor from him through all the chances and vicissitudes of the war, and then, when the plantation is sold, included the lot and house they had contracted to convey to him with the whole estate, and made no other compensation for the sacrifice of his opportunities and the benefits that they had received from his hard toll, freely given and induced by the false promise. The jury returned the following verdict:

"1. Did the defendants contract with the plaintiff to pay him for his services more than \$40 a month and for the use of the house and lot, as alleged in the complaint? Ans. Yes.

"2. If so, in what amount are the defendants indebted to the plaintiffs? Ans. \$1,700."

Judgment on the verdict, and defendants appealed.

Martin, Rollins & Wright, of Asheville, for appellants.

Ewbank & Whitmire, of Hendersonville, for appellee.

WALKER, J. (after stating the facts as above). First. The defendants' first ground of exception is the court's instruction to the jury that the burden was upon the plaintiff to satisfy them by the greater weight of the evidence, that the alleged contract was made, and if, upon consideration of all the evidence, the plaintiff has satisfied them that the defendants made the contract upon which he relies, that is, a contract to convey to him the house and lot, to pay him money, and give him the use and occupation of the house and lot, they will answer the first issue Yes, and, further, that it has long been settled by our court that where the labor or money of a person has been expended in the permanent improvement and enrichment of the property of another by parol contract or agreement, which cannot be enforced because, and only because, it is not in writing, the party repudiating the contract, as he may do, will not be allowed to take and hold the property thus improved and enriched without compensation for the additional value which his improvements have conferred upon the property, and this equity rests upon the broad principle that it is against conscience for one man to be enriched to the injury and cost of another, which was induced by his own acts. *Luton v. Badham*, 127 N. C. 96, 37 S. E. 143, 53 L. R. A. 337, 80 Am. St. Rep. 783; *Ford v. Stroud*, 150 N. C. 365, 64 S. E. 1; *Ballard v. Boyette*, 171 N. C. 26, 86 S. E. 175.

[1] The jury found the facts to be as proven by the plaintiff, and the law has been settled by this court, in a number of well-considered cases, that the defendants cannot take advantage of the plaintiff's labor and

services under such an agreement as that set up and proved in this case and defeat his claim for compensation for the same by pleading the statute of frauds. *Luton v. Badham* and other cases, *supra*. In *Albea v. Griffin*, 22 N. C. 9, the bill was for specific performance of the contract. The defendants relied upon the statute of frauds, the contract being in parol, and Judge Gaston said that the court admitted this objection to be well founded, and held as a consequence from it that, the contract being void, not only its specific performance cannot be enforced, but that no action will lie, in law or equity, for damages because of nonperformance. But we are nevertheless of the opinion that plaintiff has an equity which entitles him to relief, and that parol evidence is admissible for the purpose of showing that equity. The plaintiff's labor and money have been expended on improving property which the ancestor of the defendants encouraged him to expect should become his own, and by the act of God or the caprice of the defendants this expectation has been frustrated. The consequence is a loss to him and a gain to them. It is against conscience that they should be enriched, by gains thus acquired, to his injury. *Baker v. Carson*, 21 N. C. 381. In *Dunn v. Moore*, 38 N. C. 364, relief was denied because the contract set up in the bill was denied. *Nash, J.*, said that if defendant had admitted the contract, the court would not have permitted him to put plaintiff out "without returning the money he had received and compensating him for his improvements." Of this *Connor, J.*, said in *Ford v. Stroud*, 150 N. C. at page 365, 64 S. E. 1, that, while in the case at bar the contract is not denied, if it had been, we should not hesitate to follow the decision in *Luton v. Badham*, *supra*, in which Mr. Justice Furches reviews this and all of the other cases, and shows conclusively that the right to relief cannot be defeated by a mere denial of the contract. See the very able and, the writer thinks, conclusive opinion of *Smith, C. J.*, in *McCracken v. McCracken*, 88 N. C. 272. Certainly this cannot be done where the action is for the recovery of the purchase money, as upon an implied assumpsit for money had and received or for money paid for a consideration which has failed.

In *Daniel v. Crumpler*, 75 N. C. 184, *Rodman, J.*, says that the right to recover the purchase money and compensation for improvements against one who had repudiated his parol contract to convey land "stands on general principles of equity." As said by Judge Furches, in *Luton v. Badham*, *supra*, all of the cases are based upon this theory. It is doubtful whether, prior to the abolition of the distinction between actions at law and suits in equity, an action could have been maintained at law for compensation for improvements put upon land by the

vendee. The court of equity had granted relief by enjoining the eviction of the vendee by the vendor, who had repudiated his contract, until he had made compensation for improvements. Whatever difficulty was encountered because of technical rules of pleading disappear when forms of action are abolished and a plaintiff recovers upon the facts stated in his complaint and proven upon the trial.

[2] Second. As to the defendant's second exception, which is that the court erred in rendering the judgment in favor of the plaintiff and against the defendants for the interest on \$1,700 from October, 1917, until paid. Under the contract between the parties, plaintiff's right to compensation for the loss of the house and lot accrued when the defendants sold their plantation in October, 1917, and at the same time sold the house and lot that the plaintiff had labored to acquire for four years. The defendants had received the services for which compensation was due, and the plaintiff had, in addition to these services, expended his money in building fences and a barn on the defendants' lot, which they had contracted to convey to him prior to October, 1917, and the jury "ascertained from the terms and relevant evidence" the amount of the plaintiff's claim and, under decisions of this court, the trial judge rendered judgment for interest from the time the plaintiff's right to compensation accrued, to wit, from October, 1917. In this the trial judge simply followed the law as established by the decisions of this court. *Chatham v. Realty Co.*, 174 N. C. 671, 94 S. E. 447. In the case before the court, there has been more than an adequate default on the part of the defendants in withholding the money belonging to the plaintiff for the value of his services—they have tried to defeat his claim altogether for a period of four years, and still, in the prosecution of this appeal, endeavor to prevent him from reaping the reward of his toil. The statute says that all sums of money due by contract of any kind, excepting money due on penal bonds, shall bear interest, etc. *Consol. Statutes*, § 2309. From this it would seem to follow in this state that whenever a recovery is had for a breach of contract and "the amount is ascertained from the terms of the contract itself or for evidence relevant to the inquiry," that interest should be added. *Kester v. Miller*, 119 N. C. 475, 26 S. E. 115; *Bond v. Cotton Mills*, 166 N. C. 20, 31 S. E. 936.

But this question of interest has been settled, by this court at the present term, in *Croom v. Lumber Co.*, 108 S. E. 735, opinion by Justice Adams, where the authorities are collected, which decision also bears somewhat upon the equitable principle we have applied to another branch of this case. It was argued by the defendants that, as the court did not instruct as to giving interest

in the verdict, the jury may have done so, and defendants would thereby pay double interest, but we think this cannot be assumed, but that the presumption is the other way, that the jury did not allow interest, nothing having been said by counsel or the court with respect to it. In adding interest, the court was merely complying with the statute and following the precedents in this court.

It will be noted that in this case the defendants got the benefit of both the labor and money of the plaintiff—his labor in the service of the defendants for four years and his money in the improvement of the house and lot that they agreed should be deeded to him, but which they conveyed to another in the wholesale conveyance of their large estate.

The defendants' counsel argued strenuously and at some length that the contract alleged and proved was unreasonable and improbable, when as a matter of fact the contention of the plaintiff is much more reasonable than to suppose that he would stay with the defendants in 1913, after being offered much higher wages, and then continue to stay on during the three years following, when labor of the commonest sort increased very much in value, and yet with all this change in opportunities he remained "on the job" until the end, at the same old pay, unless there was some other compelling motive keeping him there, which was his desire honestly to perform the contract for the breach of which by defendants and as compensation for his services the jury found that he was entitled to \$1,700, and for this sum the court gave judgment, with interest from October, 1917.

We are of the opinion that the learned judge, who presided at the trial, was right on both points. The first ground upon which rests the verdict and his judgment has been settled and established for many years without much question, and the second is equally as clear, and, moreover, has for its support the authority of a statute, the construction of which cannot now be questioned.

No error.

ADAMS, J., not sitting.

(182 N. C. 899)

STATE v. BLACKWELDER. (No. 467.)

(Supreme Court of North Carolina. Dec. 7, 1921.)

1. Homicide ⚡172—Evidence held admissible.

In a prosecution for homicide, defendant having killed deceased when latter was attempting to arrest him, where state's theory of the case was that defendant and another had broken into deceased's garage a few minutes before the attempted arrest, at some distance

from the garage, and were guilty of felony, and defendant's theory was that they had not gone to the garage of the deceased, and that deceased had no authority to make the arrest under C. S. §§ 4235, 4543, and that he shot deceased in self-defense, evidence of what occurred at the garage held admissible, though defendant was not identified at the garage.

2. Criminal law ⚡338(2)—"Direct" and "circumstantial evidence" distinguished; circumstantial evidence admissible.

"Direct evidence" is that which is immediately applied to the fact to be proved, while "circumstantial evidence" is that which is indirectly applied by means of circumstances from which the existence of the principal fact may reasonably be deduced or inferred; that is, circumstantial evidence is merely direct evidence indirectly applied, and is competent in the absence of direct evidence.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Circumstantial Evidence; Direct Evidence.]

3. Arrest ⚡64—Private person may arrest without warrant for commission of felony within his "presence."

Where one heard hinge of his garage door creak, and, on going out, found the door open, he was warranted in arresting one in the vicinity for an attempt to steal a car therein, and that without a warrant; the crime being committed in his "presence" within the meaning of C. S. §§ 4235, 4543.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Presence.]

4. Criminal law ⚡761(6)—Instruction not erroneous as assuming that deceased properly attempted to arrest accused.

An instruction in a homicide case, wherein it appeared that accused shot and killed deceased, who attempted to arrest him after some one had broken into his garage, held not subject to the objection that it assumed that deceased was acting in compliance with the law in attempting to arrest accused.

* Appeal from Superior Court, Cabarrus County; Bryson, Judge.

Frank Blackwelder was convicted of murder in the second degree, and appeals. No error.

Criminal action tried before Bryson, Judge, and a jury at the April term, 1921, of Cabarrus county. Frank Blackwelder and Sid McDaniel were indicted for the murder of M. W. Allman, but Blackwelder only was tried. When the case was called for trial, the solicitor announced that he would not request a verdict for murder in the first degree, but only for murder in the second degree, or for manslaughter, as the evidence might warrant. The jury returned a verdict against Blackwelder for murder in the second degree. The judgment of the court was pronounced, and the defendant, having en-

tered exceptions of record, appealed to the Supreme Court.

There was evidence for the state tending to show the facts to be as follows: M. W. Allman resided in Cabarrus county, some distance from Concord, the county seat, and about a quarter of a mile from the cross roads. On the occasion hereinafter referred to, he, his wife, and his son were at his home. Between 1 and 2 o'clock on the morning of January 4, 1921, the defendant arrived at Concord on a train which had come from Charlotte, and at the station met McDaniel and a man named Jones. The defendant, after a conversation with the other two, went to the Hartsell mill, and took a pistol and some cartridges from a traveling bag which he had left at the home of McDaniel's mother. About 2 o'clock these three men left Concord in a Ford car, and went in the direction of the place at which the deceased lived, and about 4 o'clock in the morning a car passed the residence of the deceased, and stopped in front of his garage, which was about 50 yards from the residence; the wife of the deceased about this time heard the door of the car close, and raised the curtain, looked through the window, and saw the car go on down the road. In about three minutes the car returned, and again passed the residence of the deceased, and stopped at a distance of about 40 or 50 yards from the house in the road leading to Concord. The deceased, his son, and his wife had been disturbed by the noise, and the deceased, going out to make an investigation, called out, "What are you doing there?" Just prior to this time, or about this time, the son of the deceased heard the door of the garage open, and, taking the shotgun, went to the piazza and fired the gun twice. The car which had stopped beyond the house thereupon moved on in the direction of Concord, and the deceased and his son a few minutes thereafter took the car of the deceased from the garage and went in pursuit of the other car a distance of about two miles, when, failing to overtake it, they returned in the direction of their home.

When about a mile from home, the deceased and his son met the defendant and McDaniel in the road coming from the direction of their residence, and apparently going toward Concord. Upon their meeting, the deceased had the car stopped, and entered into a conversation with the defendant and McDaniel. The deceased inquired where Blackwelder and McDaniel were going, and they said they were going to Concord. The deceased asked where they were from, and they said from Georgeville. The deceased asked their names, and Blackwelder said his name was Smith. The deceased inquired whether the car had run off and left them, to which Blackwelder answered, "No." The son of the deceased then got out of the car, walked

in front of it, and the deceased thereupon told Blackwelder and McDaniel to come in front of the car so that he might see them in the light. They came in front of the car, and Blackwelder inquired whether the deceased knew them. The deceased said he did not, got out of his car, took a position near his son, and said to Blackwelder and McDaniel: "Why do you hold your hand so closely in our pockets? You have a gun, haven't you?" Blackwelder and McDaniel had their hands in their overcoat pockets, and Blackwelder said, "Yes." The deceased took the shotgun which his son had. He had previously asked Blackwelder and McDaniel if they had been in his garage, and each of them said "No." The deceased said: "I have reason to believe you are the two fellows I ran out of my garage a few minutes ago." He asked them to take their hands out of their pockets, and Blackwelder remarked: "There is no use of that." The deceased then said: "If you were not in my garage at the time mentioned, why do you refuse to take your hands out of your pockets?" Blackwelder and McDaniel then began shooting with pistols, and the defendant fell at the first shooting. The shotgun which he held was fired as he fell, and again after he had fallen to the ground. The son was shot in each shoulder. McDaniel shot him and Blackwelder shot the deceased. They fired four or five times before the shotgun was fired. Blackwelder was shot in the hand, and, as he and McDaniel ran away, the son of the deceased fired two shots at them. The shotgun was the only weapon in the possession of the deceased and his son. The deceased was shot on the morning of January 4th, and died at 3 o'clock on the morning of the 7th.

The defendant, Blackwelder, was a mechanic, and worked in one of the mills at Concord, and had mechanic's tools which he kept in his suit case. On the morning following the homicide, defendant's glove and a pair of bolt nippers were found on the ground near the scene of the shooting. The defendant had previously pleaded guilty of carrying a concealed weapon and of larceny in Mecklenburg county, and had been sentenced to the roads for a term of 2 years. He had served about 13 months when he was pardoned. He had been charged with breaking into a store at Mooresville, and had been arrested on another occasion and, it seems, had been released after trial. There was evidence tending to show that the general reputation of the defendant was bad. It had been raining for some time before the shooting took place, and the deceased in his dying declaration said that he noticed when he met Blackwelder and McDaniel that they had very little mud on their shoes, though the road from his house to the scene of the shooting was very muddy.

The state contended that Blackwelder, McDaniel, and Jones had gone in a car from Concord to the residence of the deceased for the purpose of committing larceny of the car which the deceased had locked in his garage; that Jones drove the car and that Blackwelder and McDaniel got out of the car when it stopped in front of the garage, broke the door, and were in the act of taking the car away when they were frightened by the deceased and by the firing of the gun; that the night was dark, and, after their car had left them, they secreted themselves and made their way cautiously in the direction of Concord, traveling as little as possible in the road. The state contended that Blackwelder and McDaniel at the time of the shooting had committed a felony, and that they were affected with notice of the statute which gave the deceased a right to arrest them without warrant.

The defendant contended that he, McDaniel, and Jones had gone from Concord in search of liquor, and that they left their car near the place of the shooting, while Jones went alone for the purpose of getting the liquor, and bringing it to the defendants in the car; that it was their purpose after getting it to return to Concord; that Blackwelder and McDaniel were secreted within a short distance of the road when the two cars referred to passed in the direction of Concord; that neither Blackwelder nor McDaniel knew anything about the other car, had not been in it, had not gone to the residence of the deceased, knew nothing of the attempted larceny of the car owned by the deceased, and that the deceased did not have any reasonable ground for believing that they had broken the garage and attempted to take his car. The defendant further contended that, when the four met in the road, the deceased required Blackwelder and McDaniel to walk in front of the car and to hold up their hands; that the defendant thereupon said, "Please don't shoot me; give me a living chance"; that the deceased immediately thereupon fired his gun, and shot Blackwelder's hand out of his pocket; that Blackwelder then began shooting his pistol with the other hand; that he shot once or twice, started to leave the road, stepped into a ditch, and fell; that the gun was fired directly over him, and as soon as he recovered himself he began shooting again. The defendant contended that he and the deceased were at arms' length; that the deceased had no right to arrest him; and that he shot the deceased, if at all, upon the principle of self-preservation and insisted upon the law of self-defense in his exoneration.

The court admitted evidence tending to show all the occurrences at the residence of the deceased and at the garage, to which the defendants excepted, and the defendant

thereafter moved to strike the evidence from the record, and, upon the court's declining the motion, again excepted. The first five exceptions relate to the admission of evidence as to what took place at the residence and at the garage.

The defendant excepted to the court's charge to the jury as set out in the opinion of the court. This is the defendant's sixth exception.

L. T. Hartsell and J. L. Crowell, both of Concord, for appellant.

James M. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

ADAMS, J. The state's theory of the case is diametrically opposed to that of the defendant. At the trial the state contended that Blackwelder and McDaniel, in the presence of the deceased, had broken and entered into his garage with intent to steal his car, and were therefore guilty of a felony, for the commission of which the deceased had a legal right to arrest them without a warrant. C. S. §§ 4235, 4543.

The defendant contended that neither he nor McDaniel had gone to the garage of the deceased, and that the deceased, having no authority to make the arrest, fired the first shot, and the defendant acted in self-defense.

The two sections referred to are as follows:

"If any person, with intent to commit a felony or other infamous crime therein, shall break or enter either the dwelling house of another otherwise than by a burglarious breaking; or any storehouse, shop, warehouse, banking house, counting house or other building where any merchandise, chattel, money, valuable security or other personal property shall be; or any uninhabited house, he shall be guilty of a felony, and shall be imprisoned in the state's prison or county jail not less than four months nor more than ten years." C. S. § 4235.

"Every person in whose presence a felony has been committed may arrest the person whom he knows or has reasonable ground to believe to be guilty of such offense, and it shall be the duty of every sheriff, coroner, constable or officer of police, upon information, to assist in such arrest." C. S. § 4543.

[1] When we consider the conflicting theories we cannot escape the conviction that evidence of what occurred at the garage was material, if not absolutely necessary, to a determination of the question whether the defendant had committed a felony under such circumstances as would justify his arrest by the deceased without a warrant. Neither the deceased nor his wife nor his son identified either the defendant or McDaniel at the garage, wherefore, the immediate inquiry is whether the evidence as to what took place there, taken in connection

with other evidence, was of such probative force as required its submission to the jury, or whether it was so indefinite and remote as to preclude its consideration.

The defendant's objection to this evidence rests upon the contention that there was not a particle of testimony tending to show that the defendant had gone to the garage, or that he had been seen near the home of the deceased, and that the deceased therefore could not have had any reasonable ground for believing that the defendant had attempted to steal the car.

[2] True, the evidence as to the attempted larceny of the car was circumstantial, but not for that reason incompetent; for, says Starkie, "circumstantial evidence is essential to the well-being at least, if not to the very existence, of civil society." Starkie on Evidence, p. 839. All evidence is direct or indirect. Direct evidence is that which is immediately applied to the fact to be proved, while circumstantial evidence is that which is indirectly applied, by means of circumstances from which the existence of the principal fact may reasonably be deduced or inferred. In other words, as has been said, circumstantial evidence is merely direct evidence indirectly applied.

"In a legal sense, presumptive evidence is not regarded as inferior to direct evidence. The two are parts of one system of means, intended to aid, and not to thwart, each other. Circumstantial evidence is often used as an aid to, and frequently as a test of, direct evidence. It is admissible in both civil and criminal cases in the absence of direct evidence, and is often the only means by which a fact can be proved. This is particularly the case in criminal trials where the act to be proved has been done in secrecy." 1 Jones, Com. on Ev. § 6b(5).

Professor Greenleaf, in drawing the line of distinction between competent and satisfactory evidence, says:

"By competent evidence is meant that which the very nature of the thing to be proved requires, as the fit and appropriate proof in the particular case, such as the production of a writing, where its contents are the subject of inquiry. By satisfactory evidence, which is sometimes called sufficient evidence, is intended that amount of proof which ordinarily satisfies an unprejudiced mind beyond reasonable doubt. The circumstances which will amount to this degree of proof can never be previously defined; the only legal test of which they are susceptible is their sufficiency to satisfy the mind and conscience of a common man, and so to convince him that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest. Questions respecting the competency and admissibility of evidence are entirely distinct from those which respect its sufficiency of effect; the former being exclusively within the province of the court, the latter belonging exclusively to the jury." Greenleaf's Ev. § 2.

In State v. White, 89 N. C. 465, it is said:

"It is well-settled law that the court must decide what is evidence, and whether there is any evidence to be submitted to the jury, pertinent to an issue submitted to them. It is as well settled that, if there is evidence to be submitted, the jury must determine its weight and effect. This, however, does not imply that the court must submit a scintilla—very slight evidence; on the contrary, it must be such as, in the judgment of the court, would reasonably warrant the jury in finding a verdict upon the issue submitted, affirmatively or negatively, accordingly as they might view it in one light or another, and give it more or less weight, or none at all. In a case like the present one, the evidence ought to be such as, if the whole were taken together and substantially as true, the jury might reasonably find the defendant guilty.

"A single isolated fact or circumstance might be no evidence, not even a scintilla; two, three, or more, taken together, might not make evidence in the eye of the law; but a multitude of slight facts and circumstances, taken together as true, might become (make) evidence that would warrant a jury in finding a verdict of guilty in cases of the most serious moment. The court must be the judge as to when such a combination of facts and circumstances reveal the dignity of evidence, and it must judge of the pertinency and relevancy of the facts and circumstances going to make up such evidence. The court cannot, however, decide that they are true or false; this is for the jury; but it must decide that, all together, they make some evidence, to be submitted to the jury; and they must be such, in a case like the present, as would, if the jury believed the same, reasonably warrant them in finding a verdict of guilty. Cobb v. Fogalman, 23 N. C. 440; State v. Vinson, 63 N. C. 335; Wittkowsky v. Wasson, 71 N. C. 451; State v. Massey, 86 N. C. 658; Imp. Co. v. Munson, 14 Wall. 442; Pleasants v. Fonts, 22 Wall. 120."

There was evidence tending to support each of the theories above referred to. For the prosecution there was evidence tending to show that the defendant left Charlotte and arrived at Concord after 1 o'clock in the morning, and met McDaniel and Jones at the station; that the defendant went to the Hartsell mill, and, after procuring a pistol and cartridges, started about 2 o'clock with McDaniel and Jones in a Ford car toward the residence of the deceased; that about 2 hours later a car passed by the residence and stopped in the road in front of the garage, when the car door was heard to close; that in about three minutes the car returned, passed the house, and stopped 40 or 50 yards beyond; that the garage door was opened, and the deceased, who had gone out to make investigation, called out, "What are you doing there?" and about this time or soon thereafter his son fired a shotgun, which moved the chauffeur to "crank up" and to proceed in the direction of Concord. The evidence tends to show that in a few

minutes the deceased and his son took the car from the garage and went in pursuit, but when 2 miles from home desisted, and on their return met the defendant and McDaniel within a mile of the garage; that deceased told the defendant and his companion that he had reason to believe they had broken into the garage; that they claimed to have come from Georgeville, and the defendant gave his name as Smith. There was evidence tending to show that the defendant, who is a mechanic, kept his tools in the house from which he had taken his pistol, and that some time during the next day the defendant's glove and a pair of bolt nippers were found near the scene of the shooting. The defendant admitted that he had previously pleaded guilty of carrying a concealed weapon and of larceny, and, having been sentenced for a term of 2 years, had been pardoned, after serving for a period of 13 months.

Applying to the testimony the law which has been stated, we are of opinion that the evidence relating to the occurrences at the residence and at the garage is not so indefinite or remote as to make it incompetent, and that, the trial judge properly left to the jury the weight of these and other circumstances pertinent to the questions under investigation.

The sixth exception is directed to the following excerpt from the charge of the court:

"The state says and insists that the deceased was acting in compliance with law in attempting or declaring his intention to arrest the defendant and his companion and to take them before the proper officers in the town of Concord or elsewhere where such officers might be found. The state says and insists that you should be satisfied beyond a reasonable doubt that a felony had been committed; that an attempt had been made to break and enter the garage of the deceased; that not only had the attempt been made, but the breaking had actually been effected and the door opened; and it was the intent of those committing such act to commit the crime of larceny and feloniously take and carry away the car, the property of the deceased; and the state says and insists that this act was committed in the presence of the deceased; that the garage was situated but a short distance from his dwelling; that, hearing the noise, he repaired to the front porch and opened the door, and that there he was enabled to see the bulk of the car, and that the darkness of the night only prevented his distinguishing the forms of those at the door of the garage or retreating therefrom; and the state says that this was in the presence of the deceased, and under such circumstances as the law declares it to be in his

presence, and that he was only prevented from actually identifying those at the door and retreating therefrom on account of the darkness of the night; and the court instructs you as a question of law that, if the deceased was only prevented from seeing and distinguishing them and observing their acts by reason of the darkness, if he was in such a place as he could have otherwise seen and distinguished them, and seen their acts, then such acts as were committed in law were committed in the presence of the deceased."

To the foregoing instruction the defendant interposed these objections: (1) The deceased at the time the shooting occurred did not know that a felony had been committed at the garage; (2) if he knew a felony had been committed, he did not know the felony; (3) the felony, if any, was not committed in the presence of the deceased; (4) the court in effect instructed the jury that the deceased was acting in compliance with the law in attempting to arrest the defendant.

[3, 4] As to the first two grounds of exception, the answer is this: The deceased and his son, after the hinge had creaked in turning, went to the garage and found the door open, and afterward met the defendant and McDaniel within a mile of the garage under circumstances found by the jury to be sufficient to create reasonable ground for believing that the defendant and McDaniel had attempted to take the car. The third objection is met by the decision of this court in *State v. McAfee*, 107 N. C. 812, 12 S. E. 435, 10 L. R. A. 607, in which Justice Avery said:

"We concur with the judge below in the view expressed in his charge, that, if the defendant struck his wife with the stick described by the witness at a point so near to the officer that he could distinctly hear what was said, and the sound made by the blow, it would be considered in law a breach of the peace in his presence, though he could not at the time actually see the former, because it was too dark."

Considering the fourth objection, we cannot concur in the defendant's interpretation of the instruction. A perusal of the charge will show that his honor, in referring to "the defendant and his companion," was stating the contentions of the state, and that in his explanation of the law he applied the word "them" to "those at the door," and not as a necessary legal inference to the defendant and his companion. Finding no error in the record, we hold that all the exceptions must be overruled.

No error.

(117 S. C. 409)

(109 S.E.)

PEETS v. WRIGHT. (No. 10726.)

(Supreme Court of South Carolina. Oct. 10, 1921.)

1. Wills \S 837—Person succeeding to interest of tenant in common takes interest subject to accounting for rents.

Where tenant in common in possession of property died devising his interest to his wife, she took such interest subject to an accounting due by her deceased husband to the cotenants for rents, taxes, etc., on sale of the premises in partition proceeding.

2. Partition \S 83—Accounting between tenants for rents incident to partition.

Accounting for waste, betterments, and rents among cotenants is an incident to the right of partition.

3. Homestead \S 84 — Partition \S 12(3) — Tenant in common not allowed homestead as against claims of cotenants and their right to partition.

A tenant in common will be allowed his homestead in the common property as against the claims of his creditors, but not as against the claims of his cotenants, so as to defeat their right to partition and an accounting for rents and profits.

4. Limitation of actions \S 53(2)—Statute has no place in accounting between cotenants.

In action between cotenants for an account for rents, the statute of limitations has no place.

Appeal from Common Pleas County Court of Richland County; M. S. Whaley, Judge.

Action by Rosina Sterlita Peets by F. J. Chavis, guardian ad litem, against Anna Wright. From the judgment, both parties appeal. Modified and remanded.

The report of the master was as follows:

I, the undersigned master, have to report:

(1) Pursuant to an order of reference heretofore granted by Hon. M. S. Whaley, presiding judge of the county court, dated July 11, 1919, referring the above-entitled cause to J. C. Townsend, master in equity for Richland county, "to take the testimony and report the same with all convenient speed to this court, together with his findings of law and fact thereon, and that he have leave to report any special matter. I held several references herein attended by counsel of record, took the testimony offered which is herewith reported, and therefrom I find and conclude as follows:

(2) I find that Rosina Wright was seized and possessed of certain lots of land described in the complaint, holding the same under deed from Caroline Waters dated February 28, 1887, recorded March 26, 1887, in Deed Book R, at page 202; that some time since and a long time prior to this date said Rosina Wright departed this life intestate, leaving as her only heirs and distributees at law her husband, Sterling Wright, and a daughter by a previous marriage, Julia F. Peets.

(3) That the said Julia F. Peets departed

this life on or about July 4, 1909, leaving as her only heirs and distributees at law her husband, A. E. Peets, and one daughter, Rosina Sterlita Peets, the plaintiff herein.

(4) That the said A. E. Peets, husband of Julia F. Peets, departed this life on or about July 5, 1917, leaving as his only heirs at law and distributees his daughter Rosina Sterlita Peets, the plaintiff herein.

(5) That the said Sterling Wright departed this life on or about August 30, 1918, intestate in so far as the testimony shows, leaving as his known heirs at law his wife, Anna Wright, one of the defendants herein.

(6) I find, therefore, that the parties entitled to the distribution of said property as described in the complaint, is the plaintiff, Rosina Sterlita Peets, entitled to two-thirds thereof, and Anna Wright, wife of Sterling Wright, and the other heirs of Sterling Wright, if any, are entitled to the other one-third thereof.

(7) I find that said premises have been in possession of Anna Wright and her predecessors from whom she inherited for and during the term since the death of the said Rosina Wright, to the exclusion of Rosina Sterlita Peets and those from whom she inherited, and that the same is still in the possession of the defendant, Anna Wright.

(8) In this case there was voluminous testimony taken as to an accounting between the parties in interest from the death of Rosina Wright when the property was in the possession of the heirs at law of Rosina Wright, to wit: Sterling Wright and Julia F. Peets, and after the death of Julia F. Peets when the same was in the possession of the said Sterling Wright and Anna Wright and during which time improvements were made on the property by those in possession and for which an accounting should have been had between the administrator, if any, of Julia F. Peets and Sterling Wright, but it appears that none were ever had, and the attempt is now made to set up such an accounting in this action against Anna Wright on behalf and for the interest of Rosina Sterlita Peets, heir at law of Julia Peets, and her father, A. E. Peets. I have therefore eliminated an accounting between these parties in the property from the death of Rosina Wright to the time of the death of Julia Peets, and from whom Rosina Sterlita Peets inherited the same, and from which time only this plaintiff, Rosina Sterlita Peets, has had an interest in said premises and since which time said premises have been occupied, and in the possession of Sterling Wright and his wife, Anna Wright, the defendant herein.

(9) That any and all of such improvements made by Sterling Wright during his occupation and possession of the premises could not now inure to the benefit of Rosina Sterlita Peets, and that an accounting for rents and improvements as between the parties then entitled to the possession of the premises should be deemed and declared to be a balance of accounts.

(10) I herewith submit a statement of the accounts proven between the plaintiff and defendant in this action, to wit, Rosina Sterlita Peets, plaintiff, and Anna Wright, defendant:

(11) I find that the defendant, Anna Wright, is entitled to a credit for the taxes, repairs, and insurance paid on said premises, and that

the plaintiff, Rosina Sterlita Peets, is entitled to the repayment of taxes paid by her and for two-thirds of the value of a reasonable rent for said premises from the time of the death of her mother, Julia F. Peets, to wit, July 4, 1909, to the date of this report, to wit, September 10, 1920.

(12) The following is a statement of the account between the parties plaintiff and defendant herein as best same can be determined from the evidence produced: The following is a statement of accounts Anna Wright is entitled to credit:

Taxes, city:	1909	\$ 5 10
	1910	6 10
	1911	6 40
	1912	6 40
	1913	6 80
	1914	6 60
	1915	7 20
	1916	8 83
	1918	12 00
		<hr/> \$ 65 42
Taxes, county:	1915, February	\$ 7 20
	1915, December	7 20
	1917, January	13 88
	1917, December	7 92
	1918, December	7 20
	1919, March	8 24
		<hr/> \$ 51 62
Repairs, 1916:	Toilet	\$ 9 00
	Wire fence	14 25
	Wire	4 50
	Labor on toilet	9 20
	Labor on wire fence	2 40
		<hr/> \$ 39 40
Insurance:	1917, Miller	\$ 8 00
	1916, Miller	8 00
	1920, Bollin	12 00
	1918, Bollin	17 60
		<hr/> \$ 45 60
		<hr/> \$202 05

The following is a statement of accounts to which Rosina Sterlita Peets is entitled to credit:

Taxes, city, 1917	\$ 10 30
Rents, July 4, 1909, to September 10, 1920, 134.2 months, at \$15 per month, \$2,003, two- thirds to Rosina Sterlita Peets	1,335 23
	<hr/> \$1,345 63
Less credits Anna Wright	202 05
Balance due plaintiff	<hr/> \$1,142 58

(13) Testimony was introduced giving various amounts as to the rental value of the premises from the year 1909 to the present date, ranging from a valuation of twelve (\$12.00) dollars per month to twenty-two (\$22.00) dollars per month. I have therefore struck an average, and am allowing a rental of \$15 a month which I find to be a fair average, taking into consideration that the smaller valuation was made for a longer length of time than the larger valuation as shown by the testimony, and have given credit to Rosina Sterlita Peets for two-thirds of said amount, which I find to be reasonable to be allowed in adjusting the accounts between the parties to this action.

(14) That after giving credit for the amount of expenditures by the defendant, Anna Wright, and allowing credits to Rosina Sterlita Peets, I find that there is a balance due the plaintiff in this action of \$1,142.58.

(15) I further find that the plaintiff, Rosina

Sterlita Peets, is entitled to judgment against the defendant, Anna Wright, in the sum of \$1,142.58, same being the balance due according to the foregoing statement on account of the tenancy and occupancy by the defendant, Anna Wright, in and to said premises for and during the time covered by the foregoing statement.

(16) The property being impracticable of division in case of settlement, I would recommend that the premises be ordered sold, and the proceeds arising from the sale of said premises, after the payment of the costs and disbursements of this action, be distributed to those thereunto entitled to the interest of the parties as set forth in the foregoing report.

All of which is respectfully submitted.

The decree of the trial judge was as follows:

This matter comes before me on exceptions by both parties to the report of J. C. Townsend, master. The facts will be found in said report.

Exception No. 1 of the defendant pertains to what was evidently an oversight on the part of the master as to a finding of fact, which fact can have no particular bearing on the issues.

Exception 3, subdivision (a), (b), and (c) of the defendant, is the only one meriting serious consideration. If rent accrued prior to Sterling Wright's death in 1918, the respective representatives of the several decedents would be liable and not the defendant, Anna Wright. Huff v. Latimer, 33 S. C. 259, 11 S. E. 758.

But the defendant is bound by the order of this court wherein I refused to make the personal representative of Sterling Wright a party, and allowed the defendant to set up a claim for any improvements made by Sterling Wright during his exclusive use of the premises. Under that order, from which there was no appeal, rents and improvements were to be considered by the master during the period of Sterling Wright's exclusive possession, from July 4, 1909, to August 30, 1918. However, as to any rent prior to that under Huff v. Latimer, supra, there could be no accounting; and, even if there were, a balance, as the master found, would have to be struck between the improvements and such rent for that period. The testimony is very vague as to when the house was remodeled, but it was safe to conclude that same was done prior to 1909.

The master's report, considering the uncertainties arising from the testimony, and except for the error of fact noted in exception 1, correctly finds on all of the issues.

Another matter which was heard before me at the same time as the above appeal came up on the petition of the defendant to have a homestead set aside out of the proceeds of the sale before any part of such proceeds are applied to the payment of the rents due by her to the plaintiff.

In their verbal return in open court the plaintiff's attorneys stated that they did not contest this right to homestead, but that such right was prematurely asserted, in that defendant was only entitled to claim a homestead in the amount found to be her distributive share after an accounting. So much is true. Small v. Usher, 77 S. C. 115, 57 S. E. 623. But the court can ascertain whether she is en-

titled to \$1,000 homestead exemption, not in the undivided interest, but in the proceeds of her interest after division, and to the extent of such interest, not over \$1,000, allow her to retain so much of the rent money as will offset the value of her one-third interest, which value will be determined at the sale.

It is therefore ordered: First, that the master's report be, and the same is hereby, confirmed; second, that the defendant, Anna Wright, be allowed to retain as homestead out of the rent money due by her to plaintiff so much as her one-third interest may bring at the sale, not exceeding the sum of \$1,000.

Plaintiff's exceptions were as follows:

Exception 1: "Because the one-third interest in the premises owned by the heirs of Sterling Wright is chargeable with one-third of the cost of taxes, insurance, and repairs upon the property, and his honor erred in crediting the said interest with the full amount thereof." This proposition is too obvious to admit of argument. We therefore merely invite the court's attention to the master's report (Case, pages 17 and 18, folios 67-71), where it will appear that the full amount paid out for these purposes by Anna Wright or Sterling Wright is \$202.05, for which she is given credit, instead of for \$134.70, the two-thirds thereof chargeable to the other interest. That this was an oversight on the part of the master may be inferred from the fact that he credited plaintiff with the two-thirds of the rent only to which she is entitled.

Exception 2: "Because his honor erred in holding that the defendants are entitled to receive one-third of the proceeds from the sale of the premises, whereas he should have held that the defendants are entitled to receive only so much of the one-third of the proceeds as remains after adjustment of the equities in accordance with the findings upon the accounting." In the view that we take of this matter, a partition suit is a quasi proceeding in rem, in which the ultimate interest of each of the several parties in the common property is established; the parties being required to account that the court may determine from such accounting, if, and to what extent, the interests of any party or parties is increased by his or their additions to the value of the property, or by payments for the necessary expenses of maintaining it, or diminished by depredations to the property, by failure to share in the common burdens, or by use, or rents or profits received, in excess of his share. This being ascertained, the province of equity is to conform the original interest of the cotenant to the ultimate interest remaining to him as revealed by the accounting.

This view seems in harmony with the decisions of this court in *Nance v. Hill*, 26 S. C. 227, 1 S. E. 897, as expounded by this court in the recent case of *Tedder v. Tedder*, 104 S. E. 318, where the court say: "The right of partition, which includes the right to such accounting, is paramount to the occupying cotenant's claim of homestead in the common property, because, as between cotenants, the ultimate interest and right of each in and to the common property depends upon an adjustment of the equities between him and his cotenants." (*Italics ours.*) It seems also to harmonize with the decisions in *Small v. Usher*, 77 S. C. 112,

57 S. E. 623, and *Vaughan v. Langford*, 81 S. C. 282, 62 S. E. 316, 128 Am. St. Rep. 912, 16 Ann. Cas. 91. However, whatever the theory upon which the court has moved in reaching its conclusions, it is manifest, from the decisions of this court, that, when the rights of third parties are not involved, a cotenant ought not to be allowed to have his share of the proceeds of sale, without first accounting for * * * the rents and profits derived by him therefrom." *Vaughan v. Langford*, 81 S. C. 288, 62 S. E. 318, 128 Am. St. Rep. 912, 16 Ann. Cas. 91. To the same effect is *Small v. Usher*, where the court say: "The defendant was not entitled to a distributive share until she accounted for that part of the estate which she has converted to her own use." *Small v. Usher*, 77 S. C. 115, 57 S. E. 625. And to the same effect is *Wilson v. Kelly*, 16 S. C. 218.

Exception 3: "Because his honor erred in holding that a claim of homestead by a cotenant arrests the court of equity in the adjustment of the equities among the cotenants in the common property and compels it to pay over the proceeds of the legal interest of such cotenant in the property, whereas he should have held that the homestead exemption reaches only such portion as remains to the cotenant after adjustment of the equities." It seems to us from this order that the county judge falls into error in not regarding the accounting as an essential part of the partition suit, which must take place before partition—or, what is the same thing, division of the proceeds—may be made, and that the partition or division must be made in accordance with the findings upon the accounting. The relief sought is not merely a partition of the property, but also payment of what is due.

The master's report found that the plaintiff is entitled to collect \$1,142.58 from the other interest and so recommended. (Case, page 19, folios 74-75.) This, then, the county judge, in confirming the master's report, has himself decreed, and the payment of the \$1,142.58 is as much a part of the relief granted by the decree as the order of sale. The only difference that I can discover in the question at issue in this case and the case of *Edwards v. Edwards*, 14 S. C. 18, is that in that case the decree was made by another judge, and in this case that the judge who decreed the relief undertakes to take it away. "An assertion of homestead right on the part of the defendant would tend to defeat in part the relief intended by the decree of Judge Orr, and cannot be allowed." *Edwards v. Edwards*, 14 S. C. 20. Most certainly the effect would be the same in this case, and should not be allowed.

This court say: "But, as among the parties themselves, the court in decreeing partition has the power, in doing full justice in the premises, to adjust all demands for rent, and require the amount found due to be settled from the share of the proceeds of the sale of the property coming to the cotenant owing the rent. This rule is just and in accord with the principle that, when all the parties and the property are before the court of equity, it will do full justice to all before releasing its hold." *Vaughan v. Langford*, 81 S. C. 289, 62 S. E. 316, 128 Am. St. Rep. 912, 16 Ann. Cas. 91. The partition suit is not ended by the decree that declares the rights of the several parties but by the carrying into effect of its provisions, and until that

is done the entire fund is in the custody of the court and free from all other claims or demands against it. "She could only claim a homestead in the amount found to be her distributive share after the accounting." *Small v. Usher*, 77 S. C. 115, 57 S. E. 623.

If, however, there could be room for any question of the rule—and this court is of the opinion that there is not—all question is now removed by a decision of the precise point at issue in this case; the court saying: "A tenant in common will be allowed his homestead in the common property as against the claims of his creditors, but *not as against the claims of his cotenants*, so as to defeat their right to partition, or an accounting for rents and profits received by him." *Tedder v. Tedder*, 104 S. E. 320. We therefore submit that the decree should be reversed upon each of the grounds hereinabove set forth.

Defendant's exceptions were as follows:

(1) The defendant, Anna Wright, excepting to the order of his honor, the county judge, alleges that he erred in holding and finding as follows: "Exception No. 1 of the defendant pertains to what was evidently an oversight as to a finding of fact, which fact can have no particular bearing on the issues." Whereas he should have held, as pointed out by the defendant's first exception to the master's report, that inasmuch as Sterling Wright left of full force and effect his last will and testament, by which the testator devised his interest in the premises in question to the defendant, Anna Wright, one-third of the premises in question were vested in the defendant, Anna Wright, to the exclusion of other heirs at law of Sterling Wright.

(2) Because his honor erred in holding as follows: "But the defendant is bound by the order of this court wherein I refused to make the personal representative of Sterling Wright a party and allowed the defendant to set up a claim for any improvements made by Sterling Wright during his exclusive use of the premises. Under that order, from which there was no appeal, rents and improvements were to be considered by the master during the period of Sterling Wright's exclusive possession, from July 4, 1909, to August 30, 1918. However, as to any rent prior to that under *Huff v. Latimer*, supra, there could be no accounting, and even if there were, the balance, as the master found, would have to be struck between the improvements and such rent for that period. The testimony is very vague as to when the house was remodeled, but it was safe to conclude the same was done prior to 1909"—the error in the foregoing extract being in his honor's holding that because the court had, by a previous order, refused to make the personal representative of Sterling Wright a party defendant to the action, and had allowed the defendant to set up a claim for any improvements made by Sterling Wright during his exclusive use of the premises, the defendant was precluded from denying liability for two-thirds of the rental value of the premises since the death of Julia Peets, mother of the plaintiff.

(3) Because his honor erred in construing his order of July 29, 1919, as holding the defendant, Anna Wright, liable for two-thirds of the rental value of the premises in question, and

in holding said order as res adjudicata of the question raised by the defendant's third exception to the master's report, when he should have held that the order of July 29, 1919, merely adjudicated that it was not necessary to have Sterling Wright's personal representative made a party to the action, and, in this connection, his honor should have held that the plaintiff's failure to appeal from the said order of July 29, 1919, precluded her from obtaining judgment for said rents and profits against the personal representative of Sterling Wright, and also against the defendant, Anna Wright, individually.

(4) Because his honor erred in overruling the defendant's third exception to the master's report, which was as follows: "(3) Because the master erred in rendering judgment in favor of the plaintiff for the sum of \$1,142.58, when said judgment should have been for only \$518, on the accounting between the parties, if for anything"—and in sustaining the master's report, when he should have held that the defendant, Anna Wright, was liable only for the rental value of the premises since the death of her husband, Sterling Wright, which took place on the 30th of August, 1918, as shown by the master's report.

T. St. Mark Sasportas, of Charleston, and Butler W. Nance, of Columbia, for plaintiff.
James S. Verner, of Columbia, for defendant.

COTHRAN, J. Action for partition of a lot in the city of Columbia, involving questions of accountability for rents, betterments, taxes, and homestead. The lot belonged to Rosina Wright, who died at an unstated time prior to 1903, intestate. Her heirs at law were a husband, Sterling Wright, and a daughter, Julia Peets. The daughter died in 1909, intestate. Her heirs were her husband, A. E. Peets, and a daughter, the plaintiff, Rosina Peets. A. E. Peets died in 1917, leaving a will naming his daughter, Rosina, his sole devisee.

Upon the death of Rosina Wright, her title descended, one-third to her husband, Sterling Wright, and two-thirds to her daughter, Julia Peets. Upon the death of Julia Peets, her two-thirds interest vested in her husband, A. E. Peets, one-third of said two-thirds, two-ninths, and in her daughter, Rosina Peets, two-thirds of said two-thirds, four-ninths. Upon the death of A. E. Peets, his two-ninths interest vested under his will in his daughter, Rosina Peets, so that she became seized of the original two-thirds interest of her mother, Julia Peets. Sterling Wright, husband of Rosina Wright, who inherited one-third interest in the lot, went into exclusive possession of it in 1903, and married the defendant, Anna Wright. He died in 1918, leaving a will by which he devised his one-third interest to Anna Wright, his second wife. At that time the plaintiff, Rosina Peets, and the defendant, Anna Wright, became tenants in common, owning respectively two-thirds and one-third interests,

The rental value of the premises has been fixed by the master and by the trial judge at \$15 per month. The master adopted as the initial date of the accounting July 4, 1909, that being the date of the death of Julia Peets, mother of the plaintiff, deciding that the claim for rent prior to that date against Sterling Wright should be offset against improvements, betterments, and taxes paid out by him. To this action all parties appear to have consented.

The rental value for which Sterling Wright was accountable, from July 4, 1909, to the date of his death, August 30, 1918, is two-thirds of \$1,648, \$1,098.66; Anna Wright, from August 30, 1918, to September 10, 1920 (date of master's report) two-thirds of \$365, \$243.34—total, \$1,342. (Error of \$6.67 in the master's calculation.)

Anna Wright was allowed credit for city taxes, state and county taxes, repairs and insurance paid by both Sterling Wright and herself, between July 4, 1909, and September 10, 1920, amounting to \$202.05 and Rosina Peets for \$10.30 taxes. In stating the account, the master allowed Anna Wright credit for the whole sum of \$205.05, whereas he should have allowed her credit for only two-thirds of that sum, \$136.70. A proper statement of the account upon the basis adopted by the master would therefore be:

Rents accountable by—	
Sterling Wright	\$1,098 66
Anna Wright	243 34
	<hr/> \$1,342 00
Less two-thirds of taxes, repairs, etc.	\$136 70
Less one-third of taxes paid by Rosina Peets	3 43
	<hr/> \$1,208 73

The defendant Anna Wright objects to being held accountable for this item of \$1,098.66, for which Sterling Wright was accountable.

[1, 2] If Sterling Wright were alive and a party to this suit, and it appeared that he was personally accountable to his cotenant for \$1,098.66, his proportion of the rental value of the premises while he had been in possession, it would unquestionably be held that in the division of the proceeds of sale he must account therefor. As it is, Sterling Wright is dead, and Anna Wright has succeeded to his interest. If the devolution of his interest upon her cannot confer a greater interest than he had, and if his interest would have been subject to this accounting, it is difficult to see why her interest would not be also.

"Accounting for waste, for betterments, and for rents among cotenants is now recognized as an incident to the right of partition, and the universal practice for the court of equity is to adjust all these matters in the suit for partition." *Vaughan v. Langford*, 81 S. C. 282, 288, 62 S. E. 316, 318 (128 Am. St. Rep. 912, 16 Ann. Cas. 91).

[3] The defendant's claim to a homestead is concluded by the decision of this court in the case of *Tedder v. Tedder*, 115 S. C. 145, 104 S. E. 318, where it is said:

"A tenant in common will be allowed his homestead in the common property as against the claims of his creditors, but not as against the claims of his cotenants, so as to defeat their right to partition, or an accounting for rents and profits received by him."

[4] Some suggestion is made in the argument of defendant's counsel in reference to the statute of limitations against the accountability for rental value. No such question was raised before either the master or trial judge, and will not be considered here, other than to say that the case of *Vaughan v. Langford*, 81 S. C. 282, 286, 62 S. E. 316, 128 Am. St. Rep. 912, 16 Ann. Cas. 91, declares that the statute has no place in such an accounting.

Let the report of the master, the decree of the trial judge, and the exceptions be reported.

The case will be remanded to the county court of Richland county, with directions to formulate a decree of partition and sale providing: (1) That from the proceeds of sale there shall be first paid the costs and expenses of this action in the lower court and on the sale; (2) that two-thirds of the remaining net proceeds of sale be paid to the plaintiff or her attorneys; (3) that out of the one-third remaining the plaintiff's costs and disbursements of the Supreme Court be first paid; (4) that from the remainder of said one-third, there shall be paid to the plaintiff or her attorneys the sum of \$1,208.73, with interest at 7 per cent. from September 10, 1920, together with \$10 per month, two-thirds of the rental value of the premises, from September 10, 1920, to day of sale; (5) that the remainder of said one-third be paid to the defendant or her attorney.

The judgment of this court is that the judgment of the county court be modified as herein indicated, and that the case be remanded to that court for such further orders as may be necessary to carry into effect the conclusions herein announced.

GARY, C. J., and WATTS and FRASER, JJ., concur.

(152 Ga. 286)

JETT v. HART. (No. 2449.)

(Supreme Court of Georgia. Nov. 17, 1921.)

(Syllabus by the Court.)

1. Evidence \S 341, 345(1)—Certified copies of tax returns admissible; not inadmissible because certified by tax receiver instead of collector.

Material portions of certified copies of tax returns of the defendant in ejectment, as to the number of acres of land given in by him, and the value thereof for certain years, were allowed in evidence over objection that the copies were certified to by the tax receiver, and not by the tax collector; that the original returns were of file in the office of the collector, and not in the office of the receiver; and that the original returns themselves, and not certified copies of the returns, would be admissible. It was not error, as against these objections, to allow the certified copies of the returns in evidence. Civil Code 1910, §§ 5798, 1194, 4882; *Ponder v. Shumans*, 80 Ga. 505(2), 5 S. E. 502.

(a) Under Civil Code 1910, §§ 1093, 1094, 1096, 1197, relative to the duties of the receiver of tax returns, the tax receiver of each county is required to receive all returns and make three digests of the tax returns as provided therein; one copy of the digest is to be forwarded to the comptroller general, one filed in the office of the ordinary of the county, and one delivered to the tax collector; but the certified copy offered in evidence in the present case is the copy of the return of the taxpayer, and not a copy of the digest which is required to be filed in the office of the tax collector.

2. Pleading \S 291(4)—Deed admissible without preliminary proof when affidavit of forgery not filed.

Where, on the trial of an ejectment suit, a deed from the defendant to the plaintiff to the land in controversy, duly recorded, was offered in evidence by the plaintiff, and no affidavit of forgery was filed, it was prima facie admissible in evidence, and the burden of disproving the genuineness of the deed rested upon the party against whom the deed was admitted. Civil Code 1910, § 4210; *Haithcock v. Sargent*, 145 Ga. 84(2), 88 S. E. 550; *Powell's Actions for Land*, 254, § 205. Consequently, in such circumstances, it was not error for the judge to charge the jury: "The defendant in this case contends that he never made any deed to this land to Dr. Hart. I charge you that a deed has been introduced from the defendant, Titus Jett, to Dr. C. C. Hart, and that the burden rests upon the defendant of proving that he did not execute the deed."

3. Appeal and error \S 1078(6)—Point not argued deemed abandoned.

The third ground of the motion for new trial is not argued, and will be considered as abandoned.

4. Sufficiency of evidence.

The evidence authorized the verdict, including the amount found as mesne profits.

Error from Superior Court, De Kalb County; John B. Hutcheson, Judge.

Action by R. H. Hart against Titus Jett. Judgment for plaintiff, and defendant brings error. Affirmed.

Carl T. Hudgins, of Decatur, for plaintiff in error.

Napier, Wright & Wood and J. N. Johnson, all of Atlanta, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent because of sickness.

(152 Ga. 251)

MONROE v. ANDERSON, County Treasurer.**ANDERSON, County Treasurer, v. MONROE.**

(Nos. 2578, 2579.)

(Supreme Court of Georgia. Nov. 16, 1921.)

(Syllabus by the Court.)

Witnesses \S 11, 24—Nonresident not entitled to fee unless subpoena signed by both clerk and solicitor.

Unless at the time a subpoena for a non-resident witness for the state in a criminal case is issued it is signed both by the clerk of the superior court and the solicitor general of the circuit, it is void; and, though such witness may attend thereon, he is not entitled to compensation under the provisions of section 1143 of the Penal Code of 1910.

Error from Superior Court, Houston County; Malcolm D. Jones, Judge.

Mandamus by J. R. Monroe against A. M. Anderson, Treasurer. Judgment for defendant, and plaintiff brings error, and defendant brings cross-bill of exceptions. Affirmed on the main bill, and cross-bill dismissed.

Duncan & Nunn, of Perry, for plaintiff in error.

C. E. Brunson, of Perry, for defendant in error.

BECK, P. J. This was a petition for mandamus against a county treasurer to compel the latter to pay the witness fees of nonresident witnesses for the state. A mandamus nisi was issued; but upon the hearing the judge refused to make the rule absolute, upon the ground that the subpoenas had not been signed by the solicitor general of the circuit before the issuance of the same.

The ruling stated in the headnote is taken from the decision in the case of *Harris v. Early County*, 96 Ga. 186, 22 S. E. 704, and controls the case here adversely to the contentions of the plaintiff in error. We have been asked to review and reverse that decision.

but we decline to do so. It seems to have made a proper application of the statute upon which it was based. And, moreover, the decision has been the rule upon questions like that presented here for more than 25 years. The Legislature has power to change the rule, but has permitted it to stand, thereby fixing the policy of the state upon the question here involved.

Judgment affirmed on the main bill of exceptions. Cross-bill dismissed.

All the Justices concur, except FISH, C. J., absent because of sickness.

(152 Ga. 280)

AVERA et al. v. CLYATT et al., Com'rs.
(No. 2635.)

(Supreme Court of Georgia. Nov. 17, 1921.)

(Syllabus by the Court.)

1. Injunction \Leftrightarrow 137(1)—Against payment of salary of farm demonstrator properly refused, where county board had not employed and did not intend to employ demonstrator.

Under the pleadings and the evidence the judge did not err in refusing an interlocutory injunction.

(Additional Syllabus by Editorial Staff.)

2. Counties \Leftrightarrow 160—Balance of specific fund after payment of all claims becomes general, and may be used to pay any legitimate liability.

While public funds of the county raised by taxation for specific purposes cannot be used for other purposes, when there remains a surplus after all proper demands and indebtedness have been paid or deducted, it becomes a general fund, and may be lawfully applied to any legitimate liability of the county.

3. Counties \Leftrightarrow 192—Act authorizing use of funds for tick eradication not invalid under constitutional prohibition of levy of taxes except for specified purposes, including "necessary sanitation."

Acts 1909, p. 131, as amended by Acts 1918, p. 256, authorizing the use of county funds to aid in the work of eradication of cattle ticks and the suppression of contagious and infectious diseases of live stock, does not violate Const. art. 7, § 6, par. 2, prohibiting the levying of taxes by counties except for the purposes therein specified, including "necessary sanitation."

4. Counties \Leftrightarrow 192—Provision of Constitution authorizing tax for purposes of sanitation not eliminated by amendment.

The provision of Const. art. 7, § 6, par. 2, permitting the levying of taxes by counties for "necessary sanitation," was not eliminated by the amendment proposed by Act Aug. 4, 1910 (Laws 1910, p. 45), amending the provision relative to education.

Error from Superior Court, Berrien County; R. G. Dickerson, Judge.

Suit by B. F. Avera and others against W. H. Clyatt and others, Commissioners. An interlocutory injunction was refused, and plaintiffs bring error. Affirmed.

Jno. P. & Dewey Knight, of Nashville, for plaintiffs in error.

W. D. Buie, of Nashville, R. A. Denny, Atty. Gen., and Graham Wright, Asst. Atty. Gen., for defendants in error.

GEORGE, J. On March 16, 1921, B. F. Avera and others, citizens and taxpayers of Berrien county, filed a petition in equity against the members of the board of commissioners of roads and revenues of the county of Berrien, alleging that the defendants were proceeding to expend public funds of the county, raised by taxation for the purposes provided by law, in putting into effect in the county of Berrien the law embodied in an act approved August 16, 1909 (Acts 1909, p. 131), known as "An act to protect the live stock of Georgia from all contagious or infectious diseases," and the amendatory act of 1918 (Acts 1918, p. 256), making it mandatory upon the county authorities to institute and carry on cattle dipping in the counties of this state; that the defendants have expended and propose to expend large sums of money in constructing vats, employing inspectors, and in putting into operation other means to carrying into effect the provisions of the acts referred to; that the expenditures contemplated are without authority in law; and that so much of the act of August 16, 1909, as attempts to authorize the application of public funds to the purposes stated is unconstitutional and void, in that it allows the application of public funds raised by taxation to a purpose not within the purview of that portion of the Constitution contained in article 7, § 6, par. 2, of the Constitution, enumerating the purposes for which taxation by a county may be authorized. Incidentally the plaintiffs alleged that the defendants had employed a farm demonstrator for Berrien county, and proposed to pay the salary of such demonstrator out of the public funds of the county. The plaintiffs prayed that the defendants be enjoined from applying the public funds of the county to the work of tick eradication in the county, especially funds raised during the previous years for specific county purposes and not used for such purposes; and that the defendants be also enjoined from paying out of the county funds the salary of the farm demonstrator.

In the answer to the petition, filed by the defendants, it was admitted that the commissioners were expending the money of the county in the work of tick eradication; and upon this phase of the case in the pleadings and in the evidence submitted at the interlocutory hearing there is no issue of fact.

It was averred, however, that the work of tick eradication had been begun by the commissioners of roads and revenues in office in the year 1920, and that the defendants were merely carrying on the work begun by their predecessors in office. The employment by the defendants of a farm demonstrator was denied. It was admitted that one month's salary of the farm demonstrator employed by the defendants' predecessors in office had been paid by the defendants after they assumed control of the county's affairs, but that the payment had been made before the filing of the petition. The defendants averred that they did not intend to employ a farm demonstrator for the year 1921. The evidence submitted at the interlocutory hearing disclosed that the defendants had not employed a farm demonstrator for the year 1921, and did not intend to employ such agent. No evidence to the contrary was submitted on behalf of the plaintiffs. Upon the interlocutory hearing the court refused the injunction, and the plaintiffs excepted.

[1] The court found that the defendants had not employed a farm demonstrator for the year 1921, and did not intend to employ such demonstrator. He further found that the defendants had paid one month's salary to the county demonstrator employed by the defendants' predecessors in office for the year 1920, but that this month's salary had been paid before the petition for injunction was filed, as alleged by the defendants. Upon this phase of the case the court denied the injunction, for the specific reasons stated. The judgment refusing the injunction is clearly in accord with the decisions of this court. See *Thornton v. Skelton*, 149 Ga. 93, 99 S. E. 299.

[2] While it is true that public funds of the county raised by taxation for specific purposes cannot be used for other purposes, in *Butts County v. Jackson Banking Co.*, 136 Ga. 719 (4), 71 S. E. 1065, it was ruled:

"When, out of a fund raised by taxation for a specific purpose, all demands and indebtedness properly chargeable against that particular fund have been paid or deducted, and there remains a surplus from such fund in the hands of the treasurer, the same then becomes a general fund which may be lawfully applied to the payment of balances due on warrants drawn against other specific funds not sufficient for their payment, or to any other legitimate liability against the county"—citing *Tate v. City of Elberton*, 136 Ga. 301, 71 S. E. 420; *Field v. Stroube*, 103 Ky. 114, 44 S. W. 363, 19 Ky. Law Rep. 1751; 11 Cyc. 510.

[3, 4] In *Townsend v. Smith*, 144 Ga. 792, 87 S. E. 1039, this court had under consideration the identical constitutional objection raised in the present case. It was there held:

"The provision of the Constitution of Georgia inhibiting the delegation by the Legislature

to any county of the right to levy a tax for any purpose except for those specified in article 7, § 6, par. 2, among which purposes is that of providing for sanitation, is not offended by any act authorizing the appropriation of funds for carrying on and aiding in the work of the eradication of cattle ticks and the suppression of contagious and infectious diseases of live stock. The expression 'provide for necessary sanitation' is sufficiently comprehensive to authorize the raising and the expenditure of money for the purposes within the purview of the statute referred to."

Also:

"The words 'to pay the county police, and to provide for necessary sanitation,' were not stricken from article 7, § 6, par. 2, of the Constitution (Civ. Code, § 6562), by the amendment proposed by the act of August 4, 1910 (Acts 1910, p. 45). The only change made in this paragraph of the Constitution was the elimination of the words 'in instructing children in the elementary branches of an English education only.'"

It follows therefore that the judge did not err in refusing the injunction.

Judgment affirmed.

All the Justices concur, except FISH, C. J., absent because of sickness.

(152 Ga. 223)

McDONALD v. STATE. (No. 2377.)

(Supreme Court of Georgia. Nov. 16, 1921.)

(Syllabus by the Court.)

1. Highways 166—Indictment and Information 108—Statutes 5—Provisions of act passed at extra session relative to motor vehicles held void as not within Governor's proclamation; indictment good, though act on which passed invalid when supported by another statute; statute not repealed by similar unconstitutional provision of later law.

Sections 9 and 15 of the act of 1915 (Acts Ex. Sess. 1915, p. 107), and certain portions of section 10 of the same act, all copied in the first division of this opinion, are violative of article 5, § 1, par. 13, of the Constitution of this state, which provides that "no law shall be enacted at a called session of the General Assembly except such as shall relate to the object stated in his [the Governor's] proclamation convening them," because the act above referred to was passed at an extraordinary session of the Legislature, and the proclamation issued by the Governor convoking the Legislature into extraordinary session did not comprehend the matter to which the above-mentioned provisions of the act of 1915 related; and consequently the Legislature at such extraordinary session was without authority to pass any law dealing with such matters.

(a) The judge erred in overruling the demurrers to certain counts in the indictment, which were based in part on violation of the above provisions of the act of 1915.

(b) The seventh count was sufficient, notwithstanding unconstitutionality of the act above referred to, because it conformed to the provision of section 9 of the act of 1910 (Acts 1910, p. 90), referring to the same subject-matter, which was not repealed by the unconstitutional provisions of the act of 1915, *supra*.

2. Criminal law §824(3)—Evidence held to require instruction as to manslaughter in commission of lawful act without due caution.

Applying the evidence to the allegations of other counts in the indictment, it was erroneous for the judge to omit to charge the jury, without request, the law relating to the crime of involuntary manslaughter in the commission of a lawful act without due caution and circumspection.

(Additional Syllabus by Editorial Staff.)

3. Indictment and Information §142—Further proceedings nugatory when demurrers to counts erroneously overruled.

Error in overruling a demurrer to insufficient counts of an indictment rendered all further action by the court under such counts nugatory.

4. Criminal law §304(12)—Judicial notice not taken of municipal ordinances.

The court will not take judicial cognizance of a municipal ordinance.

George, J., dissenting in part.

Error from Superior Court, Fulton County; John D. Humphries, Judge.

Frank McDonald was convicted of involuntary manslaughter, and he brings error. Reversed.

J. O. Ewing, John Y. Smith, and Branch & Howard, all of Atlanta, for plaintiff in error.

John A. Boykin, Sol. Gen., and E. A. Stephens, both of Atlanta, for the State.

ATKINSON, J. Frank McDonald was charged under seven counts in an indictment for the murder of Mrs. Carabel Smith, by driving an automobile against her, inflicting certain wounds from which she died. A demurrer to counts 3, 5, 6, and 7 having been overruled, the defendant excepted *pendente lite*. At the trial count 2 was withdrawn, and a verdict was rendered finding "the defendant guilty on counts 1, 3, 4, and 6 of involuntary manslaughter." The defendant made a motion for new trial, which was overruled, and he excepted. The bill of exceptions also assigned error on the exceptions *pendente lite*.

[1] 1. In each of the counts 3, 5, 6, and 7 it was charged that the crime of murder was committed while the defendant was engaged in an unlawful act. The unlawful act alleged in count 3 was a violation of the first paragraph of section 10 of the act of 1915

(Acts Ex. Sess. 1915, pp. 107, 112), which provides that—

"No person shall operate a motor vehicle or motorcycle upon any public street or highway at a speed greater than is reasonable and safe, not to exceed a speed of 30 miles per hour, having due regard for the width, grade, character, traffic and common use of such street or highway; or so as to endanger life, limb or property in any respect whatever."

The unlawful act alleged in count 5 was a violation of section 9 of the act of 1915 (Acts Ex. Sess. 1915, p. 111), which provides:

"Every motor vehicle and motorcycle, while in use or operation upon the streets or highways of this state, shall at all times be provided and equipped with efficient and serviceable brakes, and with a signaling device, consisting of a horn, bell, or some other suitable device. It shall likewise be equipped with at least two front lamps, throwing strong, white lights to a reasonable distance in the direction in which such vehicle is proceeding, a rear lamp showing a red light plainly visible in the reverse direction to which said vehicle is proceeding, and such other light so reflected as to clearly reveal the figures on the number plate; provided, that a motorcycle shall be required to be equipped with one front light only. All of such lamps or lights shall at all times be kept burning while such vehicle is in use or operation or standing in a public street or highway during the period from one hour after sunset until one hour before sunrise."

The unlawful act alleged in count 6 was a violation of the last paragraph of section 10 of the act of 1915 (Acts Ex. Sess. 1915, p. 113), which provides that—

"No person operating a motor vehicle or motorcycle upon a public street or highway in this state shall drive the same past any street car, interurban or other passenger train, in said street or highway, while the same is standing still for the purpose of taking on or letting off passengers to or from such car or train."

The unlawful act alleged in count 7 was a violation of section 15 of the act of 1915 (Acts Ex. Sess. 1915, p. 115), which provides that—

"No person shall operate a motor vehicle or motorcycle upon any public street or highway, whether as owner or operator of such vehicle, if under sixteen years of age, or while under the influence of intoxicating liquors or drugs; and no person shall take, use or operate any motor vehicle or motorcycle upon the public streets and highways, without the permission of the owner thereof."

In the demurrers to the several counts above mentioned, each of the above provisions of the act of 1915 was attacked as violative of article 5, § 1, par. 13, of the Constitution of the state (Civil Code, § 6482), which provides that "no law shall be enacted at a called session of the General Assem-

bly except such as shall relate to the object stated in his [the Governor's] proclamation convening them," on the ground that the act of 1915 was passed at an extraordinary session of the Legislature, and the proclamation issued by the Governor convoking the Legislature into extraordinary session did not comprehend legislation on the subjects to which the above-mentioned provisions of the act relate. After the decision by the trial court overruling the demurrer, this court, in the case of *Jones v. State*, 151 Ga. 502, 107 S. E. 765, rendered the following decision:

"The accused was indicted for involuntary manslaughter in the killing of a named person without any intention to do so, but in the commission of an unlawful act which, in its consequences, naturally tended to destroy the life of a human being. There were two counts in the indictment. In the first, the unlawful act charged as being committed by the accused when the homicide occurred was the driving of an automobile by him over a public highway at a speed exceeding 30 miles an hour; and, in the second, that he was under the influence of intoxicating liquors while driving the automobile at the time of the homicide. Held:

"1. So much of the act of the General Assembly passed at the called session of 1915 (Laws 1915, Ex. Sess., p. 107) as (in section 10) declares it to be unlawful for any person to operate a motor vehicle upon any public street or highway at a speed exceeding 30 miles per hour, and as (in section 15) declares it to be unlawful for any person to operate a motor vehicle upon any public street or highway while under the influence of intoxicating liquors or drugs, is unconstitutional and void, for the reason that the Constitution (article 5, § 1, par. 13 [Civ. Code 1910, § 6482]), declares that 'no law shall be enacted at a called session of the General Assembly, except such as shall relate to the object stated in his [the Governor's] proclamation convening them,' and such designated portions of the act above referred to do not relate to any object stated in his proclamation calling the special session, the only reference to motor vehicles in the proclamation being as to amending the automobile license tax laws of the state, so as to secure the collection and disposition of the same.

"(a) The approval of the act by the Governor did not make it valid.

"(b) The ruling here made is not in conflict with anything decided in *Dorsey v. Wright*, 150 Ga. 821, 103 S. E. 591, and *Atlantic Coast Line R. Co. v. State*, 135 Ga. 545, 69 S. E. 725, 32 L. R. A. (N. S.) 20.

"(c) The first count in the indictment being based solely on that part of section 10 of the act of 1915 held to be void, the demurrer to it should have been sustained.

"2. The second count of the indictment may stand upon section 9 of the act of 1910 (Acts 1910, p. 90), making it a misdemeanor for one to operate an automobile over the public streets or roads while intoxicated, which act was not repealed by the unconstitutional provision of section 15 of the act of 1915. However, as the state introduced no evidence tending to

support this count, the court should have granted a new trial as to it, for that reason."

This decision is applicable to the several provisions of the act of 1915 above set forth, upon which counts 3, 5, 6, and 7 were based. Those provisions of the act being unconstitutional, it was erroneous to overrule the demurrer to counts 3, 5, and 6. Count 7 was sufficient under section 9 of the act of 1910 (Acts 1910, p. 90), which provides:

"It shall be unlawful for any person who is intoxicated or under the age of sixteen years at the time, unless such minor shall have previously had twelve months' experience in the operation of automobiles and is accompanied by the owner of the machine at the time, to propel or operate a machine on any of the highways described in this act, of this state. No person shall operate an automobile without the consent and by authority of the owner, and any person so doing shall be guilty of a misdemeanor and punishable therefor"

—and was not repealed by the unconstitutional provision in section 15 of the act of 1915, supra.

[3] The error in overruling the demurrer to counts 3, 5, and 6 rendered all further action by the court under those counts nugatory. The jury did not render a verdict against the defendant on count seven; and count two was withdrawn.

[2, 4] 2. The jury convicted the defendant of "involuntary manslaughter" under counts 1, 3, 4, and 6. The ruling in the first division of this opinion disposes of the case on counts 3 and 6. It is necessary to consider the motion for new trial only in so far as it relates to counts 1 and 4. In the amended motion for new trial complaint is made that the judge omitted to charge the jury, without request, the law on the subject of involuntary manslaughter in the commission of a lawful act without due caution and circumspection (the charge which it was contended should have been given being set forth), on the ground that under the evidence such offense was involved. In dealing with this question both counts may be considered together. It was alleged in count 4 that at the time of the homicide the defendant was driving in violation of an ordinance of the city of Atlanta, but no ordinance was introduced in evidence; and, as the court will not take judicial cognizance of a municipal ordinance (*Funk v. Browne & Leacy Co.*, 145 Ga. 825 [2], 90 S. E. 64; *Shurman v. Atlanta*, 148 Ga. 1 [3], 95 S. E. 698), the case made under that count does not differ from that made under count 1, which charged the unlawful killing of the deceased by driving an automobile against her.

The testimony introduced by the state tended to show the following case: The homicide occurred late in an afternoon at the intersection of Ivy and Harris streets, in the

city of Atlanta. The deceased had just alighted on the east side and from the front end of a north-bound trolley car, which had stopped on approaching the intersection of the streets to let off passengers. Almost instantly the automobile driven by the defendant, going north, passed the trolley car at a rate of speed estimated to be 35 or 40 miles per hour, striking the deceased and dragging her body entirely across Harris street and killing her. The streets were paved, and the driving space between the street car and sidewalk was about 11 feet wide. The automobile bore towards the sidewalk, and, after dropping the body, ran partly on the sidewalk and overturned an ice wagon standing at the edge of the sidewalk near the northeast corner of the streets, and was stopped by jamming a telephone pole at the edge of the sidewalk, about 15 feet north of the wagon. Approaching Harris street from the south, Ivy street contained a long and considerably steep downgrade which the defendant traversed before reaching the scene of this disaster. There were two ladies riding on the front seat of the automobile with him. The driver of a truck going also north along Ivy street had noticed defendant several blocks away, having trouble with his car, and passed him while he was apparently trying to "change his gear." The truck driver did not see him again until his car passed at the alarming speed where the truck driver had stopped at the rear of the street car standing at the intersection of the streets. Defendant's car was equipped with an "emergency brake" manipulated by a hand rod, and with a "service brake" manipulated by pressure of the foot on a pedal inserted through the floor. It was also equipped with an accelerator, manipulated by pressure of the foot on a small pedal inserted through the floor about three inches from the pedal that applied the service brake. The office of the accelerator is to feed gas to the engine, and, secondarily, to produce speed in the car. After the tragedy, the automobile was taken in charge and examined by a mechanic, who testified that the emergency brake was in "fairly good" condition, and that "the service brake, known as the foot brake, wouldn't hold at all; you could push it over flat, and it didn't have any effect on the car at all."

The circumstances above stated are sufficient to authorize a finding that the homicide was not intentional, but that it was committed by the defendant while engaged in the lawful act of operating an automobile but without exercising due care and circumspection, so that it might be kept under his control, and not injure others who should chance to be on the street on which he was driving. The facts bring the case within the

principle of *Flannigan v. State*, 136 Ga. 132, 70 S. E. 1107, in which it was held:

"Where a homicide occurs in the performance or commission of an act not in itself wrongful, and the attendant circumstances, while showing no intention to kill, authorize an inference that the homicide resulted from the negligent doing of an act under circumstances endangering life, the homicide is 'involuntary manslaughter' in the commission of a lawful act without observing necessary discretion and caution."

It was erroneous to omit to charge this principle as applicable under the allegations of the indictment and the evidence submitted by the state.

Judgment reversed.

All the Justices concur, except GEORGE, J., dissenting from the ruling in the second headnote, and FISH, C. J., absent because of sickness.

(152 Ga. 332)

JOHNSON v. TULLIS. (No. 2430.)

(Supreme Court of Georgia. Nov. 16, 1921.)

(Syllabus by the Court.)

1. Cancellation of Instruments \S 37(8)—Deeds \S 144(2), 153—Petition for cancellation for nonperformance of conditions as to support, etc., held sufficient; conveyance in consideration of services with provision rendering it void for nonperformance is conveyance on condition subsequent; provision in deed that "agreement" should be void for nonperformance by grantee construed.

Where the allegations of an equitable petition brought by the grantor, for the cancellation of a deed which contained a condition subsequent, showed a failure upon the part of the grantee to fulfill the condition, the petition stated a cause of action, and a general demurrer was properly overruled.

(a) A conveyance of property, wherein it is recited that the conveyance is made upon consideration that the grantee shall render certain services and perform certain acts beneficial to the grantor, and which contains the further stipulation that upon failure of the grantee to comply with such condition the deed shall be void, is a conveyance upon a condition subsequent, and the grantor may treat the failure upon the part of the grantee to perform the covenant for service as a forfeiture of the estate conveyed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Agreement.]

2. Cancellation of Instruments \S 46—Evidence tending to show breach of condition subsequent properly admitted.

The evidence objected to in the case tending to establish the allegations of the petition showing a breach of the condition subsequent, and the court properly overruled the objection thereto.

3. Cancellation of Instruments ¶51—Charges submitting issue of breach of condition subsequent held proper.

In view of the construction of the deed given above, the court's charges to the jury, submitting to them the issue as to whether or not there had been a breach of the condition, were proper and not open to the objection that the deed showed on its face that it was absolute, and the court was unauthorized to submit the issue as to whether there had been a breach of the condition.

4. Sufficiency of evidence.

There was evidence to support the verdict in favor of the plaintiff.

Error from Superior Court, Gwinnett County; Andrew J. Cobb, Judge.

Suit by M. S. Tullis against J. E. Johnson. Judgment for plaintiff, and defendant brings error. Affirmed.

O. A. Nix, of Lawrenceville, for plaintiff in error.

Kelley & Kelley, of Lawrenceville, for defendant in error.

BECK, P. J. M. S. Tullis brought an equitable petition seeking a decree for the cancellation of a deed which he had made to the plaintiff in error, to a tract of land and certain personal property. It is alleged in the petition that the consideration of the deed was an agreement upon the part of the defendant, John E. Johnson, "to take charge of your petitioner and his wife whom he was to support, maintain, clothe, and board during their lives, and to treat petitioner and his wife kindly and gently during their lives and see after them in sickness." The failure to perform this agreement upon the part of the defendant, Johnson, is charged; and conduct that was the reverse of that stipulated in the agreement was also alleged. Petitioner prayed that the conveyance be canceled, and for other equitable relief. The defendant filed a general demurrer to the petition. The demurrer was overruled. He also filed a plea and an answer; and upon the issue thus made the case was tried, and the jury returned a verdict in favor of the plaintiff. The defendant made a motion for a new trial, which was overruled, and he excepted.

[1] 1. The court did not err in overruling the demurrer to the petition. The deed which the plaintiff sought to have canceled recited that for the consideration stated the property described in the conveyance was conveyed to the grantee. Following the description of the property is the recital in the deed of an agreement or covenant upon the part of the grantee, in the following language:

"The said John E. Johnson does by these presents agree to take charge of the said M.

S. Tullis and his wife and support them and maintain and pay all their doctors' bills, and see after them financially, clothe and board and sleep them; and the said Johnson binds himself, his heirs and assigns, upon the consideration of the above-described property, to support, maintain, board, clothe, and sleep the said M. S. Tullis and his wife for and during their natural lives, * * * and does hereby agree to treat the said Tullis and his wife kindly and gently during their lives and see after them in sickness and treat them likewise. In the event the said Johnson, his heirs and assigns, fail to fill and perform and comply with the above stipulation in the agreement, then this agreement becomes null and void."

This is followed by a warranty clause. The attestation clause is as follows:

"In witness whereof we, the said Tullis and the said John E. Johnson, have hereunto set our hands and seals the day and year above written."

This was signed by the parties and duly attested.

While this instrument, a part of which is quoted above, is in form an agreement between the two parties, it is also a deed of conveyance upon the part of the grantor, Tullis. But it is a conveyance containing a condition subsequent. The recital that if Johnson fails to perform the covenant as to support, etc., "this agreement becomes null and void," introduces a condition subsequent. The deed is inartificially drawn. The word "agreement," as here used, we construe to mean the conveyance as well as the expressed undertaking upon the part of Johnson. And the stipulation that upon the failure of the grantee to comply with the covenant and to perform his undertaking, the deed shall become null and void, created a condition subsequent. In the case of Wilkes v. Groover, 138 Ga. 407, 75 S. E. 353, it was said:

"An owner of land conveyed it by warranty deed to his grandson, upon the expressed consideration of natural love and affection 'and in consideration of support and maintenance of the said [grantor] and his wife.' The deed contained this clause: 'It is further provided herein that should the said [grantee] voluntarily refuse and fail to care for and maintain the said [grantor] and his wife, that that fact will cancel, annul, and void this deed.' Held, that the provision as to avoidance created a condition subsequent."

And in the case of Jones v. Williams, 132 Ga. 782, 64 S. E. 1081, it was said:

"A deed from a grandfather to his granddaughter, which recites that the grantor, 'for and in consideration of work and labor done and to be done, consisting of taking care and caring for the [grantor] for and during his natural life, upon the faithful performance of said duty upon her part this obligation is to be of full force and virtue, otherwise this deed to be and the above and foregoing to be null

and void, the receipt whereof is hereby acknowledged, does hereby sell and convey unto the [granddaughter], her heirs and assigns, a certain tract of land in fee simple, conveys an estate in fee on a condition subsequent."

The court held, in the last case referred to, that the language quoted could only mean that the estate was granted on the condition that the grantee was to care for her grandfather during his life, and upon failure to perform this condition the estate was to become forfeited. See *Mayor, etc., v. Brennan College*, 150 Ga. 156, 103 S. E. 164. Inasmuch as the deed in the instant case was one containing a condition subsequent and this was shown by the petition, the allegations of the failure upon the part of the grantee in the deed to comply with the covenant imposing certain obligations upon him completed the cause of action; and the court did not err in overruling the general demurrer to the petition.

[2-4] 2-4. The rulings made in headnotes, 2, 3, and 4 require no elaboration.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent because of sickness.

(152 Ga. 243)

HINSON v. STATE. (No. 2550.)

(Supreme Court of Georgia. Nov. 16, 1921.)

(Syllabus by the Court.)

1. Criminal law § 741(5)—Sufficiency of corroboration of confession is question for jury.

A confession alone, uncorroborated by other evidence, will not justify a conviction. Pen. Code 1910, § 1031.

(a) The sufficiency of the corroboration is a question for the jury. *Coley v. State*, 110 Ga. 271, 34 S. E. 845.

(b) The evidence was sufficient to authorize the jury to find that the confession of the defendant was corroborated, and was sufficient to prove the corpus delicti.

2. Criminal law § 525—Homicide § 151(2)—Presumption in favor of defendant's sanity; burden on defendant to show insanity rendering confession inadmissible.

Where, on the trial of one charged with murder, a plea of insanity is set up, the presumption is in favor of the sanity of the defendant. *Carter v. State*, 56 Ga. 463(8); *Danforth v. State*, 75 Ga. 614 (4 a), 58 Am. Rep. 480. Confessions freely and voluntarily made are prima facie admissible; and the burden of proof is upon the defendant, pleading insanity, to prove his legal incapacity to commit the crime, and consequently his legal incapacity to confess the crime. This burden was not carried by the defendant.

(a) It appearing that the confession was freely and voluntarily made, it was not error to admit it over the objection that it was not freely and voluntarily made, and that the defendant did not have mental capacity to make the confession.

3. Criminal law § 48, 773(2), 829(6)—Homicide § 179, 294(1)—Ability to distinguish between right and wrong is test of criminal responsibility; witness properly permitted to testify that defendant had sufficient mind to know difference between right and wrong; instruction as to criminal responsibility properly given; charges properly refused when argumentative and covered so far as correct.

The general rule in this state is that, "If a man has reason sufficient to distinguish between right and wrong in relation to a particular act about to be committed, he is criminally responsible." *Roberts v. State*, 3 Ga. 310 (3); *Carr v. State*, 96 Ga. 285(2), 22 S. E. 570; *Flanagan v. State*, 103 Ga. 619, 625, 30 S. E. 550; *Taylor v. State*, 105 Ga. 746, 775, 31 S. E. 764; *Strickland v. State*, 137 Ga. 115 (5), 72 S. E. 922; *Bowden v. State*, 151 Ga. 336 (4), 339, 106 S. E. 575.

(a) Accordingly it was not error for the court to permit the solicitor general to propound to certain witnesses, and receive answers thereto, and allow the jury to consider the question and answers, as follows: "Has the defendant sufficient mind to know the difference between right and wrong? A. He had" as against the objection that the true rule is, "Is the defendant a person of sound and disposing mind and memory; is his memory sufficient to form the intent to commit a crime?"

(b) Nor was it error for the court to charge the jury substantially the rule which was first laid down in the *Roberts Case*, supra, and which has been followed since; nor was it error to refuse the requests to charge on the law of insanity, the requests being argumentative. In so far as they state sound principles of law, they were covered by the charge as given by the court.

4. Other assignments without merit.

Other assignments of error are without merit.

5. Criminal law § 935(1)—New trial properly denied when evidence sufficient.

The evidence authorized the verdict, and the court did not err in refusing a new trial.

Error from Superior Court, Cook County; R. G. Dickerson, Judge.

Milton Hinson, alias Milton Moon, was convicted of murder, and he brings error. Affirmed.

Milton Hinson, alias Milton Moon, was indicted for the homicide of his mother; and at the same term of court he filed his plea of not guilty, and also a plea of insanity. On the trial of the case the jury returned a verdict of guilty of murder, with a recommendation to life imprisonment, and he was accordingly sentenced by the court. The defendant made a motion for new trial, which was overruled, and he excepted.

T. N. Hendricks, of Valdosta, and R. A. Hendricks, of Nashville, for plaintiff in error.

J. D. Lovett, Sol. Gen., of Nashville, Jack-

son & Jackson, of Adel, R. A. Denny, Atty. Gen., and Graham Wright, Asst. Atty. Gen., for the State.

HILL, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent because of sickness.

(152 Ga. 271)

JOHNSON v. STATE. (No. 2526.)

(Supreme Court of Georgia. Nov. 17, 1921.)

(Syllabus by the Court.)

1. Constitutional law \S 206(1), 312—Searches and seizures \S 7—Federal constitutional amendment without application in the state courts; exemption from unreasonable searches and seizures not privilege and immunity of United States citizens; not element of due process.

The Fourth Amendment to the Constitution of the United States applies only to proceedings in the courts of the United States; it does not in any manner govern or regulate trials in criminal cases in state courts.

(a) The exemption from unreasonable searches and seizures contained in the Fourth Amendment to the federal Constitution is not one of the privileges and immunities of the citizens of the United States which the Fourteenth Amendment to that Constitution forbids the state to abridge, nor is it an element of due process of law guaranteed by the Fourteenth Amendment against state action.

2. Criminal law \S 395—Evidence taken from defendant's person while under illegal arrest not inadmissible.

On the trial of a criminal case, incriminatory evidence which was taken from the person of the accused by one who had illegally arrested him and who discovered it by search of his person while he was under illegal arrest, if relevant, is not inadmissible as contravening paragraph 16 of section 1 of article 1 of the Constitution of this state (Civil Code of 1910, \S 6372), prohibiting unreasonable searches and seizures.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

James Johnson was convicted of carrying concealed weapons, and petition for certiorari was refused by the judge of the superior court, and he brings error. Affirmed.

S. C. Crane, of Atlanta, for plaintiff in error.

Roy Dorsey, Sol., and Jno. A. Boykin, Sol. Gen., both of Atlanta, for the State.

GEORGE, J. The facts in this case are brief. James Johnson was tried and convicted in the criminal court of Atlanta for the offense of carrying concealed weapons. Upon the trial a detective of the city of Atlanta testified as follows:

"In the performance of my duty [as city detective] I arrested the defendant * * * in the city of Atlanta, Fulton county, upon suspicion of burglary. I had information that he had a pistol concealed on his person. Upon arresting him I searched his person, and while searching his person a pistol slipped out of his shirt and it was picked up. I had no warrant for his arrest, and this defendant was never prosecuted for any offense except the charge of carrying concealed weapons. * * * The pistol was concealed from view at the time of the search."

Counsel for the defendant moved to exclude the testimony of the witness, because the evidence was obtained by violating the right secured to the defendant by the Fourth Amendment to the Constitution of the United States and by paragraph 16 of section 1 of article 1 of the Constitution of this state (Civil Code of 1910, \S 6372). The court overruled the objection, and adjudged the defendant guilty, whereupon he presented his petition for certiorari to the judge of the superior court. Sanction of the writ was refused, and the defendant excepted. The single assignment of error here insisted upon is that the court erred in overruling the motion to exclude the evidence of the witness, upon the grounds urged; the contention being that the prohibition against unreasonable searches and seizures contained in the Fourth Amendment to the Constitution of the United States is, by virtue of the provision of the Fourteenth Amendment to that Constitution, one of the privileges and immunities of the citizens of the United States which may not be abridged by the states, and that the right of the citizen to be secure in his person against unreasonable searches and seizures is a right included in the conception of due process of law guaranteed by the Fourteenth Amendment.

[1] The first ten amendments to the Constitution of the United States—including, of course, the Fourth—refer to powers exercised by the government of the United States, and not to those of the individual states. In other words, the Fourth Amendment is not concerned with state action, and deals only with federal action. Almost from the beginning this principle has been consistently recognized by the Supreme Court of the United States. *Barron v. Baltimore*, 7 Pet. 243, 8 L. Ed. 672, *Fox v. Ohio*, 5 How. 410, 434, 12 L. Ed. 213, *Twitcheil v. Pennsylvania*, 7 Wall. 321, 19 L. Ed. 223, *Brown v. New Jersey*, 175 U. S. 172, 20 Sup. Ct. 77, 44 L. Ed. 119, *Twinning v. New Jersey*, 211 U. S. 78, 93, 29 Sup. Ct. 14, 53 L. Ed. 97, and *Minn., etc., R. Co. v. Bombolis*, 241 U. S. 211, 217, 36 Sup. Ct. 595, 60 L. Ed. 981, L. R. A. 1917A, 86, Ann. Cas. 1916E, 505, are among the leading cases in point. See *Loeb v. Jennings*, 133 Ga. 796, 67 S. E. 101, 18 Ann. Cas. 376.

With respect to the further contentions of plaintiff in error, kindred questions were raised in *Adams v. New York*, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575, and *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 28 Sup. Ct. 178, 52 L. Ed. 327, 12 Ann. Cas. 658; but the questions were left undecided, as those cases were disposed of on other grounds. In the leading case of *Twining v. New Jersey*, 211 U. S. 78, 29 Sup. Ct. 14, 53 L. Ed. 97, it was decided that "the first eight amendments are restrictive only of national action and, while the Fourteenth Amendment restrained and limited state action, it did not take up and protect citizens of the states from action by the states as to all matters enumerated in the first eight amendments," and that exemption from compulsory self-incrimination in the state courts is not secured by the fifth amendment to the federal Constitution, nor is it one of the fundamental rights, immunities, and privileges of citizens of the United States, or an element of due process of law within the meaning of the federal Constitution or the Fourteenth Amendment thereto. This case is in principle controlling. See, also, *Minn., etc., R. Co. v. Bombolis*, supra. It is insisted, however, that the decision in *Twining v. New Jersey*, supra, is modified and in effect overruled by the recent decisions of the Supreme Court of the United States in *Gould v. U. S.*, 255 U. S. 298, 41 Sup. Ct. 261, 65 L. Ed. —, and *Amos v. U. S.*, 255 U. S. 313, 41 Sup. Ct. 266, 65 L. Ed. —. In *Gould's Case* it was ruled:

"The prohibition of Const. Amend. 4, against unreasonable searches and seizures is violated when a representative of any branch or subdivision of the government gains entrance to the home or office of a person suspected of crime by stealth, through social acquaintance, or in the guise of a business call, and subsequently makes a secret search, in the absence of the suspected person, and seizes papers to be used in evidence against him. The admission in evidence against a defendant of a paper secretly seized from his possession by a representative of the United States government, in violation of Const. Amend. 4, is contrary to Const. Amend. 5, providing that no person shall in any criminal case be compelled to be a witness against himself. * * * The use in evidence of papers seized in a search unconstitutional under Const. Amend. 4, is in effect to compel defendant to become a witness against himself contrary to Amendment 5."

It was further decided that the rule of practice (in force in the courts of the United States) that an objection first made at the trial to the introduction in evidence of a paper seized from the defendant is too late to be considered does not apply where the paper was seized from the defendant by stealth and he did not know of its seizure until it was of-

fered in evidence against him; that the rule of practice must not be allowed to prevail over a constitutional right; and that, where a motion by defendant for return of papers as unlawfully seized has been denied before trial, it is the duty of the judge presiding at the trial to re-examine the question on the objection of the defendant to the introduction in evidence of the papers against him. In *Amos' case* it was held that a motion for the return of property unlawfully seized, made after the jury was sworn, but before any evidence was offered, was not presented too late, and that the motion should have been granted. The rulings in *Gould's Case* were in answer to questions certified by the Circuit Court of Appeals for the Second Circuit. *Amos* was convicted in the District Court of the United States for the Eastern District of South Carolina. We are not called upon to decide whether previous rulings of the Supreme Court of the United States are modified, and, if at all, to what extent, by the rulings in the cases last above considered. The principle that the first ten amendments to the Constitution of the United States are not concerned with state action and deal only with federal action is not affected. However, the recent cases seem to be consistent with *Weeks v. U. S.*, 232 U. S. 883, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, and *Silverstone Lumber Co. v. U. S.*, 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319; at least the principle applied is but a logical extension of the doctrine laid down in these cases.

[2] The almost unvarying rule in state courts is that upon the trial of criminal cases the court, largely to avoid a collateral issue, will receive any competent evidence without inquiring into the means by which it has been procured. In answer to questions certified by the Court of Appeals, the rule was definitely accepted by this court in *Calhoun v. State*, 144 Ga. 679, 87 S. E. 893. An examination of the cases there reviewed will show that the general rule had been long in force in this state. The decision in *Calhoun v. State* was by a full bench of six justices. The ruling there made is supported by *Adams v. New York*, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575, and by other cases decided by the Supreme Court of the United States. Whether the rule tends to reduce the constitutional prohibition against unreasonable searches and seizures and compulsory self-incrimination of one accused of crime to mere forms of words it is in fact well established and is binding upon us until reviewed and overruled.

Judgment affirmed.

All the Justices concur, except FISH, C. J., absent because of sickness.

(152 Ga. 229)

LUMPKIN v. STATE. (No. 2410.)

(Supreme Court of Georgia. Nov. 16, 1921.)

(Syllabus by the Court.)

1. Homicide \S 290—Evidence held to authorize charge as to shooting with shotgun as alleged.

On the trial of a defendant indicted for murder by shooting the victim with "a shotgun," producing wounds which caused the death of the person alleged to have been slain, a witness testified that he was seated on one end of a swing suspended in the front porch of his residence, in the evening after dark, and the person alleged to have been slain (wife of the defendant) came up and took a seat at the other end of the swing. In a few minutes witness saw defendant approaching. After approaching closely from behind the swing, defendant put "the gun about 2½ feet of" deceased and "shot immediately." The shot struck the deceased, who fell on the floor and died without speaking a word. Witness told defendant, "Will, you have killed her," and defendant walked away without saying a word. The witness further testified: "It seemed the kind of a gun he had was a little single-barrel, breechloader shotgun." *Held*, that the evidence was sufficient to authorize a charge submitting to the jury the question of whether the defendant killed the deceased by shooting her with a shotgun.

2. Criminal law \S 762(3), 789(2)—Instruction as to reasonable doubt held not to express opinion that there was no reasonable doubt of defendant's guilt; definition of "reasonable doubt" held not confusing and misleading.

A charge, "The reasonable doubt which the law recognizes and gives the defendant the benefit of, where it exists, is not a vague, indefinite, or capricious doubt; but it is such a doubt as arises from the evidence or want of evidence, and causes your mind to be halting, hesitating, and unsatisfied, and refusing to reach a conclusion that is satisfactory to you," is not erroneous on the ground that, on account of the use of the words "where it exists," the charge amounted to an expression of opinion by the court that a reasonable doubt did not exist as to the guilt of the accused on trial, or on the ground that the charge was confusing and calculated to mislead the jury.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Reasonable Doubt.]

3. Criminal law \S 805(1)—Failure to give some other appropriate instruction not ground of objection to instruction correct in itself.

It is not a good assignment of error on a portion of the judge's charge which states a correct principle of law applicable to the case that some other correct and appropriate instruction was not given. Under application of this principle, the criticism of the charge, made in the third ground of the amended motion for new trial, shows no cause for reversal.

4. Criminal law \S 789(5)—Instruction omitting qualifying word in defining reasonable doubt not error against defendant.

A charge, "If you have resting on your minds, after receiving the law from the court and applying it to the facts and circumstances of the case, a doubt, and this doubt grows out of the case from the want, weakness, insufficiency, or conflict in the testimony of the defendant's statement, and leaves an honest juror's mind unsettled as to what the truth is, the benefit of such a doubt should be given to the defendant and he should be acquitted," was not erroneous, as against the defendant, on the ground that the judge did not use the qualifying word "reasonable," immediately preceding and referring to the word "doubt" as employed in the charge.

5. Criminal law \S 781(2)—Defendant's statement held to warrant instruction as to defendant's admission of killing and contention as to self-defense.

The state introduced evidence to the effect that the defendant killed the deceased by shooting her with a shotgun. The defendant did not introduce any evidence, but made a statement before the jury in which he said: "I want to talk with her and reason with her, and she raised the knife in her hand, and at that time I shot to save myself. I wouldn't have killed her for nothing in the world, but I shot her to save myself. * * * I am sorry I done that, but I had to do it to save myself." *Held*, that this was sufficient basis for the charge. "He [referring to the defendant upon trial] admits the killing, but contends that the deceased was after him with a knife, and that he shot her to save himself—to save his own life," and the charge was not erroneous for any of the reasons assigned.

6. Criminal law \S 822(4)—Instruction concerning minimum and maximum sentences and paroles held not erroneous when language criticized considered in its context.

In the course of his instructions the judge charged the jury: "If you find the defendant guilty of the crime of voluntary manslaughter, it is your duty to fix the sentence. In fixing this sentence, gentlemen, you must fix a minimum and a maximum sentence; that is, in the event you find the defendant guilty of voluntary manslaughter. This sentence must not be less than the time named by law for the punishment of the crime, nor more than the time named by law. You should, in fixing the sentence, fix somewhere in between one and 20 years, and you should say in your verdict that 'We, the jury, find the defendant guilty of the crime of voluntary manslaughter, and fix his sentence' at not less than so much time nor more than so much time, 'at labor in the penitentiary,' specifying in each instance the length of time you so fix, remembering that the short term so fixed by you shall not be less than one, and that the longer term so fixed by you shall not be more than 20 years." Immediately following the above instruction the court charged: "When a convict is sentenced to such minimum and maximum term as I have defined to you, the law makes it the duty of the prison commission to fix rules by which said convict,

after serving the minimum sentence, may be allowed to complete the sentence without the confines of the penitentiary, upon complying with said rules." One of the grounds of the motion for new trial assigned error upon the last part of the charge above quoted, upon the ground that it led the jury to look upon the defendant as a convict before he was found guilty. Held that, when the language of the charge excepted to is considered with its context, it is not susceptible of the construction given to it by the plaintiff in error, and furnishes no ground for a reversal.

7. Criminal law §914—Defects in proceedings to revise jury list and disqualification of grand jurors held not open on motion for new trial.

Irregularity in the appointment of a jury commissioner to revise the list of jurors; omission of jury commissioners to take and subscribe the oath as provided in Penal Code 1910, § 815, before entering upon the discharge of their duties as commissioners; failure of the clerk of the superior court to certify the revised lists of jurors, as provided in Penal Code 1910, § 821; exclusion by the jury commissioners of certain classes of persons (such as all persons over 60 years of age, all ministers of the gospel, all practicing physicians, all justices of the peace and notaries public and ex officio justices of the peace and constables, policemen, and other arresting officers) from the jury box; failure of the clerk to take and subscribe the oath as prescribed in Penal Code 1910, § 817; and disqualification of grand jurors to return a bill of indictment, on account of having served as jurors at preceding terms of the city court and the superior court of the county—are matters of objection in their nature proper defectum; and, when relied on as grounds for showing illegality of the grand jury returning an indictment, all such objections should be made by a proper challenge to the array of grand jurors before the indictment is found, where the illegality was known or, if not known by the defendant or his attorney at law before indictment, by plea in abatement to the indictment. *Turner v. State*, 78 Ga. 174; *Folds v. State*, 123 Ga. 167, 51 S. E. 305; *Tucker v. State*, 135 Ga. 79, 68 S. E. 786. Where there is no such challenge or plea in abatement, such questions cannot be raised for the first time after verdict, by motion for a new trial. *Jordan v. State*, 119 Ga. 443, 46 S. E. 679.

8. Criminal law §923(9)—Objection that jurors had served at preceding terms not ground for new trial when not raised by challenge.

The objection that certain jurors put upon defendant as trial jurors had served at imme-

diately preceding terms of the city court and superior court of the county, being proper defectum, might have been raised by challenge to the juror when put upon the prisoner; but, where no objection was raised, it cannot be made for the first time after verdict by motion for new trial. *Brown v. State*, 105 Ga. 640 (1), 31 S. E. 557; *Jordan v. State*, 119 Ga. 443 (6), 46 S. E. 679; *Parris v. State*, 125 Ga. 777 (1), 54 S. E. 751; *Embry v. State*, 138 Ga. 464 (1), 78 S. E. 604.

9. Criminal law §914—Failure to challenge array of grand jurors not ground for new trial, though defendant ignorant, in jail, etc.

Where a defendant fails to challenge the array of grand jurors before indictment for any of the several reasons mentioned above, and is subsequently convicted, the verdict finding the defendant guilty will not be set aside on a motion for new trial, on the ground that the conviction was violative of the Constitution of the state of Georgia, or of the Constitution of the United States; and the fact that the defendant may have been ignorant and incarcerated in the jail prior to his indictment, and unable to employ counsel, and that immediately after the return of the indictment he was put on his trial, and the attorney at law then appointed for him by the court did not have any opportunity to make any investigation, would not render his conviction illegal on the account of a disqualification of the grand jurors.

10. Criminal law §945(1)—New trial not granted when new evidence would not likely cause different result.

The alleged newly discovered evidence was not of such materiality as would likely cause a different result on another trial.

11. Criminal law §935(1)—New trial properly denied when evidence sufficient.

The evidence was sufficient to support the verdict, and there was no error in refusing a new trial.

Error from Superior Court, Berrien County; J. I. Summerall, Judge.

Will Lumpkin was convicted of homicide, and he brings error. Affirmed.

R. A. Hendricks, of Nashville, for plaintiff in error.

J. D. Lovett, of Nashville, and R. A. Denny, Atty. Gen., and Graham Wright, Asst. Atty. Gen., for the State.

ATKINSON, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent because of sickness.

(152 Ga. 283)

BROWN v. CITY OF ATLANTA. CITY OF ATLANTA v. BROWN. STATE v. SAME. (Nos. 2681, 2682, 2688.)

(Supreme Court of Georgia. Nov. 17, 1921.)

(Syllabus by the Court.)

1. Constitutional law \S 33—Municipal corporations \S 75, 907—Amendment as to incurring of bonded debts by municipalities not self-executing; enabling act held inoperative until ratified by voters of municipality; constitutional amendment authorizing issuance of bonds held cumulative, and not exclusive, method.

The amendment to the Constitution of 1877, proposed by the Legislature in 1918 (Acts 1918, p. 915), and ratified by the people in November of the same year, authorizing any municipal corporation within the state, having a population of 150,000 or more, to incur a bonded debt or debts for the public purposes of such corporation as provided in the amendment, is not self-executing, but by its terms an enabling act must be passed by the Legislature, and such act shall not become operative until it shall have been affirmed at a general election held for the election of a mayor and general council in such municipality falling within the class described in the amendment, by two-thirds of the qualified voters thereof who may vote at the election. While the enabling act has been passed by the Legislature, it has not been affirmed as provided in the constitutional amendment, and therefore is not operative.

(a) The above amendment to the Constitution is not exclusive, but is cumulative of the authority to vote upon and issue bonds as provided in article 7, \S 7, par. 1, of the Constitution.

(b) The city of Atlanta falls within the class designated in the foregoing amendment to the Constitution.

2. Municipal corporations \S 918(1)—Registration of voters preceding bond election held "general registration," and not "special registration" forbidden by Constitution; "general registration" and "special registration" defined; vote sufficient to authorize incurring of debt defined.

Under a proposed amendment to article 7, \S 7, par. 1, of the state Constitution (Acts 1918, p. 99), which proposed amendment was subsequently ratified by the people, all laws, charter provisions, and ordinances theretofore passed or enacted, providing for special registrations of voters in municipal corporations and other political divisions of the state, such special registrations to be used in elections to vote on the issuance of bonds by such municipal corporations, etc., are null and void. And the General Assembly, under such amendment, has no power to pass or enact any law providing for such special registration.

(a) The pleadings and evidence in this case examined: *Held*, that the registration of voters preceding the bond election of March 8, 1921, in the city of Atlanta, is a general, and not a special, registration of voters.

(b) Under the above amendment, two-thirds of the qualified voters voting at an election to

incur a debt by the municipal corporation by the issuance of bonds, as prescribed by law, shall be sufficient for that purpose, provided that two-thirds so voting shall be a majority of the registered voters.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Special Registration.]

3. Constitutional law \S 33—Municipal corporations \S 918(1, 4)—Suffrage amendment is self-executing; burden on one attacking bond election to show irregularities disqualifying voters; disqualification of voters does not avoid election where bonds were authorized without their votes; calling voters' attention to registration oath and signing by them held sufficient administration of oath.

The Nineteenth Amendment to the Constitution of the United States, providing that the right to vote shall not be denied or abridged on account of sex, is self-executing, and removes the electoral disqualification on account of sex.

(a) Under the general registration of voters, as made by the city of Atlanta, for the purpose of determining whether bonds should be issued or not, at an election held March 8, 1921, the female voters were prima facie qualified to vote, and the burden was on the intervener to show irregularities, if any, disqualifying them. If the female voters were not qualified to vote, it does not appear that their voting would have changed the result of the election; and in such circumstances this furnished no cause for declaring the election void.

(b) Where the attention of the voters was called by the city registrar to the contents of the registration oath prescribed by the City Code, and the voters subscribed their names thereto, this was a substantial compliance with the requirement of the City Code as to administering such oath.

4. Municipal corporations \S 918(5)—Consolidation of returns of election held prima facie correct, and burden on one attacking election.

Where the duly elected managers of a municipal election, held in the city of Atlanta, for the purpose of determining whether or not bonds should be issued for municipal purposes, submitted the consolidated returns to the mayor and general council of such city, "and consolidated and the result declared," showing that the election resulted in favor of bonds, such consolidation was prima facie correct, and the burden would be on the intervener to show that the result was inaccurate and different from that submitted by the mayor and general council of the city; and the intervener failed to carry that burden.

(Additional Syllabus by Editorial Staff.)

5. Municipal corporations \S 918(1)—Bond issue election need not be held at general election.

Under Const. art. 7, \S 7, par. 1, a municipal election on the question of issuing bonds was not invalid because not held at a general election for the election of mayor and general council of the city if all other legal requirements, under Civ. Code 1910, \S 440, were complied with.

6. Municipal corporations \Leftrightarrow 918(1)—General registration list must be used at bond elections.

Const. art. 7, § 7, par. 1, as amended in 1918, prohibiting special registration of voters for municipal bond elections, requires the use of the general registration list in all such elections.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Suit by the State against the City of Atlanta for the validation of municipal bonds, in which W. R. Brown intervened. Order validating the bonds, and the intervenor brings error, and the State and City bring separate cross-bills of exception. Affirmed on the main bill, and cross-bills dismissed.

An election was held in the city of Atlanta on March 8, 1921, for a proposed issue of bonds for municipal purposes, amounting to \$8,850,000. The result of the election was declared to be in favor of the issuance of the bonds; notice was served upon the solicitor general of the Atlanta circuit, and suit was filed by him in behalf of the state for the validation of the bonds. A time was set for a hearing, advertisement was made, and the city of Atlanta appeared at such time and made answer, admitting generally the facts alleged by the solicitor general. No objection to the validation of the bonds having been filed, the court passed an order validating them. Subsequently, and on the same day, Walter R. Brown moved to set aside the order of validation, and to be allowed to intervene. The court set aside the order validating the bonds, and permitted the intervention to be filed. To this order both the city of Atlanta and the state of Georgia excepted, and these exceptions are the subject-matter of the cross-bills of exception filed by the city of Atlanta and the state of Georgia respectively. On the hearing the presiding judge made an order validating all of the bonds.

The case, as made by the solicitor general, for the validation of the bonds was in substance the following:

The petition recited service of notice by the city of Atlanta that the election on the question as to whether the bonds should be issued or not had been held, and that the election resulted in favor of the issuance of the bonds, the amount to be issued, the purposes for which the bonds were to be issued, the rate of interest to be paid, and how paid, and prayed an order requiring the city of Atlanta to show cause why the bonds should not be validated. The city of Atlanta appeared and filed an answer to the petition, admitting that proper notice was served on the solicitor general of the Atlanta circuit, and setting out in detail the various issues of the bonds. The answer also recited the

fact that an election was held for the purpose above stated, on March 8, 1921, and also the description in the notice of the various issues of bonds, the amount and purpose of each issue, and the denomination of each, the rate of interest and the time of payment of principal and interest; and also admitted that the provisions for a tax levy and sinking fund were true. It was further alleged that the total number of qualified voters who were entitled to vote in this election was 27,070; that the election resulted in favor of the issuance of the bonds voted for, by a requisite two-thirds vote of those voting in the election of March 8, 1921; and that such two-thirds vote was a majority of the total vote registered. It was also admitted by the city that the resolution was adopted by the mayor and general council, directing the service of the notice upon the solicitor general of the Atlanta circuit, and that the copy of the advertisement inserted in the notice was correct, and that it was published 30 days before the election in the newspaper in which the sheriff's advertisements for the county in which Atlanta is located were published.

It was further answered by the city that it had proceeded, with reference to the advertisement, and the holding of the election, and declaring the result thereof, in accordance with the law. It was further answered that under article 7, § 7, pars. 1 and 2, of the Constitution of the state of Georgia, the requirements of that provision of the Constitution with reference to holding the election were set out and that the city had complied therewith. Copies of the ordinances passed by the mayor and general council of Atlanta, calling for the election, were attached to the petition. It was further averred that under article 2, § 4, of the Constitution of Georgia, the General Assembly was authorized to provide for the registration of voters, and that, under an act of the General Assembly of 1893 (Acts 1893, p. 174), the charter of the city of Atlanta was amended, and under such amendment the mayor and general council had authority to provide for the registration of voters prior to any municipal election, and no person, under such amendment, would be permitted to vote unless registered. The tax collector of Fulton county was appointed the official registrar. It was averred that, under the above-recited act, the city of Atlanta had passed an ordinance under which a system of general registration was provided, whereby a person who paid his taxes and made oath to that effect was registered by the county tax collector for the city. It was further averred that the registrar made up a list of the voters from all who had registered prior to any bond or municipal election; that after the passage of the above act the city had no spe-

cial registration system, and the county tax collector, as registrar for the city, put every one who had registered prior to any municipal election on the registration list; that prior to this act the city had by ordinance a system of special registration, and under this ordinance a time for beginning and ending of the registration was provided prior to any election.

It was averred that, when the bond election of March 8, 1921, was held, all persons who had registered with the county tax collector, acting as city registrar, were registered and permitted to vote. A registration list of the voters was thus made out, and, when any one registered after the list was made out, a supplemental list, or certificate, was given if desired, and those holding such certificates were permitted to vote. There was no ordinance of the city providing for special registration in this bond election, and there was no special registration therefor. The registrar registered those who made the required affidavit, and the names were put upon the registration list and supplemental list, and were permitted to vote if they so desired. The ordinance providing for this system of general registration was set out. The county tax collector, as city registrar, made two reports to the mayor and general council, which were accepted by the city and placed upon the minutes. It was averred that the consolidated returns of the managers of the bond election was made to the mayor and general council on March 21, 1921, and were consolidated and the result declared. The notice given to the public of the proposed validation was set out, and it was affirmed that all the facts set out in the resolution, notice, and ordinances concerning the proposed issue of bonds were true.

It was averred that the voters participating in the last general election held in the city of Atlanta on the first Wednesday in December, 1920, as shown by the tally sheets of that election, amounted to 2,360; and this was referred to as an additional reason why the election held was valid, because more than two-thirds of the above number participated in and voted for the bonds in the election of March 8, 1921. It was averred that the total number of voters registered and qualified to participate in the last general election on the first Wednesday in December, 1920, amounted to 18,587, and that more than two-thirds of the voters so registered voted in the bond election of March 8, 1921, and that two-thirds so voting was a majority of the total number of voters so registered. It was also averred that two-thirds of those voting at the bond election constituted a majority of the total registered voters of the city of Atlanta, qualified to vote in said election, and that the city had complied in all respects with the law governing bond issues. The petition prayed the judgment of

the court validating the issue of bonds, which was set out in detail, etc.

The city introduced certified copies of the resolutions and ordinances referred to in its answer; also the notice served on the solicitor general, together with his acknowledgment thereof; also certified copies of the various ordinances of the mayor and general council, which were referred to in the answer. The tax collector of the county, who, it was alleged, was the registrar for the municipality, testified orally to the number of votes registered, and that he registered all those who applied for registration, including females, giving the approximate number of each class in accordance with the facts set out above. On the date set for the hearing, March 28, 1921, an order was made validating the bonds, and exception was taken by the intervener to this order. Further facts will sufficiently appear in the opinion.

Case No. 2681:

Little, Powell, Smith & Goldstein and R. B. Blackburn, all of Atlanta, for plaintiff in error.

J. L. Mayson, J. M. Wood, John A. Boykin, and W. H. Terrell, all of Atlanta, for defendant in error.

Case No. 2682:

J. L. Mayson, and J. M. Wood, both of Atlanta, for plaintiff in error.

Little, Powell, Smith & Goldstein and R. B. Blackburn, all of Atlanta, for defendant in error.

Case No. 2688:

W. H. Terrell, of Atlanta, for plaintiff in error.

Little, Powell, Smith & Goldstein and R. B. Blackburn, all of Atlanta, for defendant in error.

HILL, J. (after stating the facts as above). [1] 1. On August 19, 1918, the Legislature passed an act (Acts 1918, p. 915) proposing an amendment to the Constitution of the State of Georgia, as follows:

"Reserving to the municipal corporations the benefit of all provisions of the Constitution of force in this state, the General Assembly is hereby empowered to authorize any municipal corporation within this state having a population on one hundred and fifty thousand or more, according to the census of the United States government taken next preceding the approval of any act passed in pursuance hereof, to incur a bonded debt or debts for the public purposes of such municipality, the said debt or debts so to be incurred to be for such sums and to be secured after such manner, and to be paid, principal and interest at such times and such places and by such means and upon such terms as the General Assembly may prescribe.

"Provided, however, that no act conferring the powers aforesaid or any of them, shall become operative until the same shall have been affirmed at a general election held for the elec-

tion of a mayor and general council in such municipality by two-thirds of the qualified voters thereof who may vote at said election. Such two-thirds to constitute at least a majority of the qualified voters of said municipality."

This proposed amendment to the Constitution of the state was subsequently ratified by the people at a general election held in November thereafter, and is known as the Atkinson amendment, so called because it was introduced and pressed to passage by the late lamented Judge Spencer R. Atkinson, a former member of this court. The bond election held on March 8, 1921, as set out in the foregoing statement of facts, was evidently held with reference to the time of its holding under the constitutional provision as it existed prior to the amendment above set out. This provision is as follows:

"The debt hereafter incurred by any county, municipal corporation, or political division of this state, except as in this Constitution provided for, shall not exceed seven per centum of the assessed value of all the taxable property therein, and no such county, municipality, or division shall incur any new debt, except for a temporary loan or loans to supply casual deficiencies of revenue, not to exceed one-fifth of one per centum of the assessed value of taxable property therein, without the assent of two-thirds of the qualified voters thereof at an election for that purpose, to be held as may be prescribed by law; but any city, the debt of which does not exceed seven per centum of the assessed value of the taxable property at the time of the adoption of this Constitution, may be authorized by law to increase, at any time, the amount of said debt, three per centum upon such assessed valuation," etc.

The intervener in the present case contends that the constitutional amendment referred to above is exclusive so far as the city of Atlanta is concerned, inasmuch as the city of Atlanta has a population of 150,000 and more, and therefore that it falls within the class to which the amendment exclusively applies; and that the city of Atlanta, after the adoption of the Atkinson Amendment to the Constitution, must vote bonds, if at all, as provided in the constitutional amendment, and that it could not vote for bonds under any other provision of the Constitution. With reference to this phase of the case, therefore, the question is whether the constitutional amendment of 1918, known as the Atkinson Amendment, is exclusive, or whether it is merely cumulative of the power to issue bonds under that provision of the Constitution last above quoted. We are of the opinion that the amendment is not exclusive, but is merely cumulative. It will be observed that the first sentence of the amendment begins with:

"Reserving to municipal corporations the benefit of all provisions of the Constitution in force in this state, the General Assembly is hereby empowered," etc.

This language is broad enough to cover all the municipal corporations of the state, including Atlanta, with her population of more than 150,000. This amendment was evidently passed and adopted with the view to authorizing cities of the class indicated to incur a bonded debt or debts for the public purposes of such municipality, without reference to the amount of such bonded indebtedness, etc., because the amendment provides that the debts so to be incurred may be "for such sums and to be secured after such manner, and to be paid principal and interest at such times and places and by such means and upon such terms as the General Assembly may prescribe." It will be seen, therefore, that there is no limit as to the amount of the debt to be incurred or the time when such principal and interest may become due under the amendment to the Constitution. But, in order to safeguard the taxpayers of the municipality against an unreasonable and unlimited amount of bonds being issued, no doubt, it is provided that no act conferring the powers above mentioned shall become operative until the same shall have been affirmed at a general election held for the election of a mayor and general council in such municipality by two-thirds of the qualified voters thereof who may vote at such election, etc. The amendment is not, therefore, self-executing. It requires an enabling act to carry it into effect; and while such enabling act was passed (Acts 1919, p. 260), it has never been ratified or adopted by the city of Atlanta as required by the amendment to the Constitution, so far as the record discloses, and it is inoperative until it has been so ratified. Therefore the city of Atlanta, while coming within the class designated in the Atkinson Amendment, still has the power and authority to issue municipal bonds under article 7, § 7, par. 1, of the Constitution of the State of Georgia (Civil Code of 1910, § 6563), as quoted above; and this election was evidently held under this provision of the Constitution. We are of the opinion that neither the Legislature nor the people meant by the Atkinson Amendment to take away from municipalities of the class designated in that amendment the right to issue bonds; and if the Atkinson Amendment is held to be exclusive, it would have that effect, inasmuch as the enabling act has never been, and may never be, ratified or affirmed. The enabling act of 1919, supra, passed in pursuance of the constitutional amendment, provides that municipal corporations of this state having a population of 150,000 or more are empowered and authorized to incur a bonded debt or debts for the public purposes of such municipality, provided that the issuance of such bonds "is voted affirmatively at a general election held at the same time that the election of the mayor and general council of such municipalities is held, by

two-thirds of the qualified voters thereof who may vote at said election, said two-thirds to constitute at least a majority of the qualified voters of such municipality."

[5] It is contended by the intervener that the present bond election is invalid, because it was not held at a general election held at the same time that the election of mayor and general council of the city of Atlanta was held. As said above, the Atkinson Amendment not being exclusive nor self-executing, but only cumulative, "an election for that purpose, to be held as may be prescribed by laws," and in conformity with article 7, § 7, par. 1, of the Constitution of the state (Civil Code, § 6563), would be valid, though not held at a general election, provided, of course, all other legal requirements were complied with. Civil Code, § 440.

[2] 2. Another objection offered by the intervener against the validation of the bonds voted at the election of March 8, 1921, is that it contravenes what is known as the Brown Amendment to the Constitution (Laws 1918, p. 99). That amendment was proposed by the Legislature at the same session which proposed the Atkinson Amendment, supra, viz. in August, 1918, and was subsequently ratified by the people at the general election held in November, 1918. The Brown Amendment provides:

"That paragraph 1, section 7, article 7, of the Constitution of this state be * * * amended by inserting between the word 'thereof' and the word 'at,' as they occur in the tenth line of said paragraph, the following, 'voting, provided said two-thirds so voting shall be a majority of the registered voters; and provided further that all laws, charter provisions and ordinances heretofore passed or enacted providing special registration of the voters of counties, municipal corporations, and other political divisions of this state, to pass upon the issuance of bonds by such counties, municipal corporations and other political divisions are hereby declared to be null and void, and the General Assembly shall hereafter have no power to pass or enact any law providing for such special registration, but the validity of any and all bond issues by such counties, municipal corporations, or other political divisions made prior to January 1, 1918, shall not be affected hereby.'"

It will be seen that the Brown Amendment provides that all laws, charter provisions and ordinances heretofore passed or enacted, providing special registration of the voters of municipal corporations, to pass upon the issuance of bonds, are declared to be null and void. The question raised, therefore, is whether the registration preceding the bond election of March 8, 1921, is a special registration, or whether it is a general registration. It must be conceded that, if it is a special registration, the Brown Amendment being self-executing and not requiring an enabling act to carry it into effect, as is

the case in the Atkinson Amendment, the registration would, by the terms of the amendment, be null and void, and consequently an election held under it would likewise be invalid. But we do not think that the registration of the voters for the bond election in the instant case is a special registration, but on the contrary that it is a general registration, as we shall endeavor to show.

[6] The Brown Amendment changed the provision of the Constitution as to the method of ascertaining the registered vote, and as to the method of registration. It prohibits special registrations, and requires that, in all elections on the question of the issuance of bonds, the political subdivisions of the state, including municipalities, should use the general registration list. The evidence in the record shows that the registrar, who was the tax collector of the county of Fulton, of which Atlanta is the county site, was created the registrar, not only for the state and county, but also for the city of Atlanta. He testified:

"All persons were registered who made oath that they had paid all taxes except those for the current year, and answered the questions which qualified them to vote. I put those on the registration list. * * * Every one that came around there to register, that was qualified, was registered. I had no complaint from any person that they were qualified to register and had not been allowed to register; and if there had been trouble on this line, they would naturally have come to me as registrar. * * * We used certificates as a supplemental list. Books of registration were open at the city hall and at the tax collector's office. There were two windows; one for white and one for colored. * * * People whom I registered were not registered separately for the state and county. There was only one registration as to those voters, both city and county at the same time. * * * I have only one list of registration—city, state, and county; and the list I made up for the city in the election was from that list, and those people took the oath that they had paid all taxes. If another election was called this year, say in December or October, I will use the same registration list as was made up for the city election, plus any additions that might come in between now and then. A party is not required to register but one time, and I would add to it any party who registered for another election, city, state, and county. They do not register any more."

It appears also that females, as well as males, who qualified were permitted to register and vote. It appears that any person who registered between January 1 and March 8, 1921, and others who had previously been registered prior thereto, and who made the oath that they had paid the taxes required of them the year previous to registration, were put on the list and permitted to vote, and any person so registering was put upon the permanent registration list. The charter of

the city of Atlanta was amended in 1893 (Acts 1893, p. 172), so that section 154 of the charter as amended reads as follows:

"That the mayor and general council of said city shall have full power and authority to provide for the registration of voters prior to any municipal election in said city; to make all needful rules and regulations for the same, and require that no person be permitted to vote unless registered as aforesaid; to constitute and appoint the tax collector of Fulton county to the office of registrar of said city; to fix his compensation as such registrar, and when so appointed to require him to perform the duties of said office."

Section 2 of the act provided:

"That the registration intended under this act shall take effect at such time as the said mayor and general council shall fix by ordinance, and until then the present mode of registration for said city shall exist."

In pursuance of this amendment to the city charter, ordinances were adopted by the city carrying this legislation into effect. These ordinances were attached to and made a part of the answer of the city in this case, and they designated the tax collector of Fulton county or his assistants as authorized to register qualified voters of the city as they paid their taxes annually. Section 2131 of the City Code of Atlanta provides:

"It shall be the duty of the tax collector of Fulton county or his assistants to register the qualified voters of said city as they pay their taxes annually. For this purpose he shall have prepared printed blanks, containing the oath required of the voters proposing to register, in the form prescribed in this ordinance, and it shall be his duty to administer to such taxpayer wishing to register the required oath; and the voter shall subscribe to said oath in the presence of such collector or his assistants, who shall preserve all of said affidavits, and from them shall compile a book for each ward showing the names and residences of the qualified voters for each ward, giving streets and numbers, or, if no number, then giving the street each side or nearest to the numbers on street in front."

Section 2133:

"The collector, or his assistant, shall also register qualified voters taking the prescribed oath, even if they do not pay or offer to pay the taxes for the current year, and place their names on the books of their respective wards, as provided in the preceding sections," etc.

And then follows the oath to be required of all voters registering their names. It seems, therefore, that the charter amendment of the city of Atlanta and the ordinances passed in pursuance thereof provided for a general, and not for a special, registration. A special registration, as distinguished from a general registration, is one designed for a particular election, and which becomes functio officio when the election under which it

was held has been had; that is to say, when the registration cannot be used for any other purpose. A general registration is one made up under general rules. In view of the foregoing and the evidence adduced on the trial, we hold that the registration for the election held on March 8, 1921, was a general, and not a special, registration. See Pol. Code 1910, §§ 41, 43, 46. And in so far as the two foregoing exceptions to the judgment of validation are concerned, the bonds which were validated by the trial judge were authorized by the election as provided in article 7, § 7, par. 1, of the Constitution, as amended by the Brown Amendment. Under the Brown Amendment to the Constitution two-thirds of the qualified voters voting at an election to incur a debt by the municipal corporation by the issuance of bonds, as prescribed by law, shall be sufficient for that purpose, provided, that two-thirds of the voters so voting shall be a majority of the registered voters, etc.

[3] 3. Exception is also taken to the judgment validating the bonds; and it is insisted that the same was void, because it did not affirmatively appear that the persons who voted in favor of the bonds constituted a majority of the registered voters of the city. It is insisted that article 2, § 1, par. 1, of the Constitution (Civil Code [1910], § 6395), provides one of the qualifications of voters in this state. This constitutional provision is as follows:

"After the year 1908, elections by the people shall be by ballot, and only those persons shall be allowed to vote who have been first registered in accordance with the requirements of law."

Intervener insists, under this constitutional requirement, that the registrar did not require voters to comply with this provision as to registration, in that a large number of voters, including 10,000 women, had not qualified as registered voters of this state under the Constitution and statutes passed in pursuance thereof, and that this so invalidated the list that was made up that it is impossible for the court to determine from the evidence what was the number of registered voters legally voting; and the plaintiff in error contends that the burden of furnishing the proof by which the court could ascertain the number of legally registered voters in the city of Atlanta on the date of the election, in order to determine whether the bonds in question have been authorized by a majority of the legally registered voters of the city, was upon the plaintiff, and that this burden was not carried. It appears from the record that the oath to be required of all voters registering their names shall be in the following form:

"Georgia, Fulton County. I do swear, or affirm, that I am a citizen of the United States;

that I am twenty-one years of age, or will be on the _____ day of _____ of this calendar year; that I have resided in this state for one year, and in this county for six months, immediately preceding the date of this oath, or will have so resided on the _____ day of this calendar year; that I have paid all the taxes which, since the adoption of the Constitution of 1877, have been required of me, except taxes for this year; that I possess the qualifications of an elector required by the constitutional amendment adopted in 1908; and that I am not disfranchised from voting by reason of any offense committed against the laws of the state. I further swear, or affirm, that I am a citizen of Atlanta, and reside in the _____ ward of the city of Atlanta, at No. _____ on _____ street, or in the _____ district G. M. My age is _____, my occupation is _____. (Sign here.)

"Sworn to and subscribed before me, this _____, 1921 _____, Registrar."

The city registrar testified that all those whose names were placed upon the general registration list for the city subscribed the oath. As to the registration of women voters, the plaintiff in error contends that—

"If enabling legislation be necessary to carry the last amendment of the federal Constitution into effect, that legislation has not been enacted."

The Nineteenth Amendment to the Constitution of the United States provides that the right of suffrage shall not be denied on account of sex. The Constitution of the United States is the supreme law of operation in this state. Civil Code 1910, § 1. The Nineteenth Amendment became automatically operative on August 26, 1920. *Graves v. Eubank*, 205 Ala. 174, 87 South. 587. We are of the opinion that that amendment is self-executing, and that under it females are not now disqualified on account of their sex to register and to vote, but on the contrary they are qualified. *Graves v. Eubank*, supra. In *Neal v. Delaware*, 103 U. S. 370, 26 L. Ed. 567, the question was what effect the Fifteenth Amendment to the Constitution of the United States had upon the laws of Delaware, which were to the effect that all jurors should be "white male electors." It was held that the Fifteenth Amendment had the effect, *ex proprio vigore*, of striking from the laws of Delaware the word "white," and left the remainder of the law intact. So we think in the present case, where the Nineteenth Amendment strikes the word "male," as used in defining who may become qualified voters. The evidence in the case discloses that all of the females who registered swore that they had paid all taxes due by them, etc. And when they subscribed to the oath prescribed by the city, they were entitled to be registered and to vote in the municipal election. Civil Code 1910, § 41 et seq. We are also of the opinion that, where the attention of the voters was called to the con-

tents of the oath by the city registrar, and they subscribed their names thereto, as testified by the city registrar, although they were not formally sworn, this was a substantial compliance with the requirement of the provision of the City Code as to administering the oath to such person qualifying for registration. Civil Code 1910, §§ 41-46, as to this being sufficient. And see *Brumby v. Marietta*, 132 Ga. 408 (2), 64 S. E. 321. See Civil Code 1910, §§ 42, 43. And when the plaintiff has thus made a *prima facie* case as to who constitute legal voters in said election, and that is denied by the intervener, the burden of proof is shifted from the plaintiff to the intervener to overcome the evidence offered by the plaintiff. The intervener offered no evidence. In the case of *Harrell v. Whigham*, 141 Ga. 322, 325, 80 S. E. 1010, 1012, it was said:

"If the petition of the solicitor general has alleged the facts required by the statute, and citizens are made parties for the purpose of contesting the validation of the bonds, necessarily they stand as quasi defendants. When they deny the substantial allegations of the petition of the solicitor general, this places upon him the burden of proving such allegations. In certain cases, where citizens who have become parties raise objections which do not appear in the pleadings between the solicitor general and the municipality, but which depend for their support upon aliunde evidence, the burden of sustaining such allegation is upon the citizens alleging them. *Spencer v. City of Clarksville*, 129 Ga. 627, 59 S. E. 274. This may be analogized to the affirmative pleading of a defendant in an ordinary action at law. In ordinary lawsuits, an allegation by the plaintiff and a denial by the defendant puts the burden upon the plaintiff. If the defendant sets up an additional affirmative plea as to it the burden is upon him."

As said above, we think the plaintiff made out a *prima facie* case. In the *Spencer Case*, 129 Ga. 627, 59 S. E. 274, the third headnote is as follows:

"When an intervener in a proceeding for the validation of bonds interposes objections based upon facts which do not appear in the pleadings of the parties, but which depend for the proof of their existence upon aliunde evidence, the burden is upon him to prove the alleged facts thus set up."

The intervener offered no evidence at all. He does not show by evidence, or otherwise, how many, if any, of the females who were registered and voted did so illegally. But, assuming that all of the 10,000 registered females who voted as shown by the record were registered and voted illegally, still, if all of these were deducted from the total number of registered voters, as shown by the record, viz. 27,070, this would leave 17,070 male registered voters. It appears from the record that the highest number of votes cast in favor of

any issue of bonds was for public schools, viz. 21,633, and the smallest number cast for any issue of bonds was 1,034, and that the smallest vote cast against any issue was 513. So the vote cast for each of the issues of bonds was above 21,000 votes. Assuming, therefore, that all of the 10,000 females were disqualified, and that all voted for the bonds, deducting this number from the 21,000 votes cast for the various issues of bonds, this would leave 11,000 as voting for bonds out of the 17,070 registered male voters. Adding to the highest number of votes cast against any issue of bonds, viz. 1,034, to the number of votes for that issue, we have a total of 12,034 votes cast. The number of affirmative votes is therefore obviously more than two-thirds of the qualified voters who voted at said election, as well as a majority of the qualified voters of such municipality. Therefore, even if the 10,000 female registered voters should be excluded, the result of the election is the same, the bonds having received the requisite constitutional majority. See, in this connection, Civil Code 1910, § 126; Epping v. Columbus, 117 Ga. 263 (16), 43 S. E. 803; Brumby v. Marietta, 132 Ga. 408 (2), 64 S. E. 321.

[4] 4. It is insisted that a reversal of the judgment of the court below validating the bonds should be had, because the plaintiff did not carry the burden of proof in making out the case for validation. It is argued that the only proof as to the vote on the bonds was the introduction of the copy from the minutes of the city council, certified by the clerk, purporting to show a consolidation of the vote by the council, not jointly with the managers of the election, as required by the statute, but upon the returns previously made to them by the managers. We have already referred to the question of the burden of proof in such cases, in a preceding division of this opinion; and, with reference to the argument just referred to, it appears from the resolution consolidating the returns that "the consolidated returns of the duly elected election commissioners or managers, as made to the mayor and general council of this city, on this date, and consolidated and the result declared, shows that" the results were "In favor of each issue submitted to the voters in said election, and that the bonds were carried by the required number of votes; and the result is hereby accordingly declared and ordered spread upon the minutes." This consolidation was prima facie correct, and the burden would then be on the intervener to show that the result of the election was inaccurate and different from that submitted by the mayor and general council. Sewell v. Tallapoosa, 145 Ga. 19 (2), 88 S. E. 577. The intervener failed to carry this burden. Prop-

erly construed, we think the resolution means that the consolidated returns were made by the managers of the election and the mayor and general council of the city of Atlanta.

5. Other grounds of exception are without merit.

Judgment affirmed on the main bill of exceptions; cross-bills dismissed.

All the Justices concur, except FISH, C. J., absent because of sickness.

(152 Ga. 270)

JOHNSON v. STATE. (No. 2471.)

(Supreme Court of Georgia. Nov. 17, 1921.)

(Syllabus by the Court.)

1. Intoxicating liquors — 219—Accusation for allowing distilling apparatus on premises not demurrable.

An accusation in a city court charging a named person with the offense of a misdemeanor, "for that the defendant did [on a given date] * * * allow some person whose identity is unknown * * * to have and possess and locate on defendant's premises, in an outhouse within the curtilage of defendant's residence, a complete distilling apparatus for the distilling of intoxicating liquors," is not demurrable on the ground that the same is "insufficient because of its failure to designate 'what is meant by some person'"; nor is it demurrable on the ground that the name of the person allowed to possess and locate the distilling apparatus on the defendant's premises is not given.

2. Intoxicating liquors — 207—Accusation held to sufficiently describe premises on which defendant permitted distilling apparatus.

The premises upon which it is charged that the distilling apparatus was located are sufficiently described.

3. Intoxicating liquors — 209—Accusation held to sufficiently describe apparatus which defendant permitted on his premises.

Another ground of the demurrer challenges the accusation upon the ground that the expression "a complete distilling apparatus," the location of which is charged in the accusation, is insufficient because it does not disclose what is contemplated by the terms used. This ground is without merit, the accusation alleging that the complete distilling apparatus was for the distilling of intoxicating liquors, "consisting of a lard can, a galvanized pipe, coil, * * * there being a hole in the top of the can wherein the coil was inserted." This description was sufficient.

4. Intoxicating liquors — 143½, New, vol. 2A Key-No. Series—Permitting distilling apparatus on premises constitutes offense.

The demurrer on the ground that the accusation under consideration charges no offense under the law is without merit, when the provision of section 22 is read in connection with other sections of the act providing penalties for the violation of any of the provisions of the act,

5. Statutes §114(7)—Provision relative to permitting on premises distilling apparatus held within title of act to amend and supplement prohibition laws.

Section 22 of the act of the General Assembly of Georgia, entitled "An act to amend and supplement the prohibition laws of this state," approved March 28, 1917 (Georgia Laws Ex. Sess. 1917, p. 1), which makes it unlawful for any corporation, firm, or individual to knowingly permit or allow any one to have or possess or locate on his premises any apparatus for the distilling or manufacturing of the liquors specified in the act, is not unconstitutional on the ground that it contains matter different from what is expressed in the title of the act. One of the purposes for which the law was enacted, as expressed in the title, is to make it unlawful to distill or manufacture any intoxicating liquors in the state; and the provision of section 22 falls within the general scope and purpose of the act as indicated in the part of the caption recited, and makes the scheme of prohibition, so far as it relates to the manufacture of alcoholic liquors, more complete.

6. Criminal law §13—Statute against permitting distilling apparatus not too vague and uncertain for enforcement.

The section of the act upon which this accusation is based is not void upon the ground that it is too vague and uncertain for enforcement under the penal laws.

Error from City Court of Dawson; M. C. Edwards, Judge.

Thornton Johnson was convicted of an offense, and he brings error. Affirmed.

Yeomans & Wilkinson, of Dawson, for plaintiff in error.

W. H. Gurr, Sol., of Dawson, for the State.

BECK, P. J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent because of sickness.

(27 Ga. App. 720)

DORTCH v. BISHOP et al. (No. 12462.)

(Court of Appeals of Georgia, Division No. 2. Nov. 29, 1921.)

(Syllabus by the Court.)

1. Sales §92—Agreement for rescission of contract for sale of mule not without consideration.

In January, 1919, defendants bought from plaintiff a mule, paying a part of the purchase price and giving a retention of title note for the remainder. Some weeks later one of the vendees, according to his evidence, complained to the vendor of the animal's inability to do farm work, and a new contract was orally made, by which the vendee was to keep the mule until fall and then return the animal to the vendor, whereupon the vendor would relieve him of further obligation. When reminded by the vendee of such alleged agreement, the

vendor denied the same, and refused to take the animal back and cancel the debt, but filed an attachment for the purchase money, under which the mule was sold. On the trial of the issues raised by the declaration in attachment and the defendants' plea setting up the alleged rescission, the evidence was in conflict as to the alleged agreement of rescission. The jury found for the vendor the amount of proceeds realized from the sale of the mule, but for the vendee under his plea as to the balance claimed on the note. The plaintiff excepted to the refusal to grant a new trial. *Held:*

The alleged novation or contract of rescission, although executory, was not void as a nudum pactum, since it was supported not only by the vendee's promise to restore to the vendor the property in part paid for, but also to care for the animal until the following fall.

2. Appeal and error §173(6)—Statute of frauds not available when not raised below.

Even if the alleged contract of rescission or novation could be taken as such an agreement as is required by the statute of frauds to be in writing, and, if so, even if it was not taken out of such provisions by the equivalent of performance on the part of the vendee, since the record fails to disclose that such point was made in the court below, it cannot be raised in this court in the brief of counsel.

Error from Superior Court, Pulaski County; Eschol Graham, Judge.

Action by A. F. Dortch against Henry Bishop and others. Judgment for plaintiff for an insufficient amount, and he brings error. Affirmed.

H. F. Lawson, of Hawkinsville, for plaintiff in error.

H. E. Coates, of Hawkinsville, for defendants in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(27 Ga. App. 557)

DAVIS v. STATE. (No. 12337.)

(Court of Appeals of Georgia, Division No. 1. Nov. 16, 1921.)

(Syllabus by the Court.)

Licenses §40—Evidence held to support conviction for operating automobile without required number plate.

The evidence in this case authorized the conviction of the defendant. It was not error to overrule the motion for a new trial.

Luke, J., dissenting.

Error from City Court of Tifton; Jas. H. Price, Judge.

J. T. Davis was convicted of operating an automobile without a number plate on the rear thereof, and he brings error. Affirmed.

Fulwood & Hargrett, of Tifton, for plaintiff in error.

R. E. Dinmore, Sol., of Tifton, for the State.

PER CURIAM. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

LUKE, J. (dissenting). I cannot concur in the judgment of affirmance in this case. The defendant was accused and convicted of having operated an automobile over the highways of Tift county without having placed on the rear of the automobile a tag number plate. The evidence, both for the state and the defendant, was uncontradicted, and was in substance as follows: The defendant had paid the license tax, as required by law, to operate the automobile over the highways of the state. He had been furnished with two tags, one a small disk and the other a large tag to be displayed on the rear of his car, each of the tags carrying his license number and indicating his payment of the license tax. On the night before his arrest the tag displayed on the rear of his car was lost. He lived in the country, and he drove his car from his home in the country to the city of Tifton, and went at once to the sheriff and told him that he had lost the tag from his automobile, and inquired how he could procure a duplicate. The sheriff gave him instructions about how to get the duplicate tag for his car. The defendant inquired of the sheriff if it was all right to operate the car until the duplicate tag could be sent to him from the Secretary of State's office. The sheriff told him that it would be all right. He met a county policeman and stated to him the situation, and stated what he was doing and what the sheriff had advised him to do. The county policeman asked him if he had driven the truck from his farm to town on that morning without the tag being displayed on the rear of the truck. He stated to the policeman that he had. The policeman then stated to him that he would have to swear out a warrant for him and have him tried for violating the automobile law. He was arrested, and upon this evidence was convicted.

I do not concur in the judgment of affirmance, for the reason that there was no criminal intention upon the part of this defendant to violate a public law. He had paid his tax and by accident had lost the number off the rear of the car, and was doing everything in his power and moving immediately to procure the duplicate for which the law provides in the event of the loss of the original.

(27 Ga. App. 556)

RASKIN v. MAYOR AND ALDERMEN OF SAVANNAH. (No. 12264.)

(Court of Appeals of Georgia, Division No. 1. Nov. 16, 1921.)

(Syllabus by the Court.)

1. Answer of Supreme Court to certified question.

In answer to a question certified by this court in this case, the Supreme Court held: "An ordinance of the city of Savannah providing that 'any person who shall, in the night or day, disturb the peace and quiet of the city in any manner whatsoever, or shall be guilty of any riotous, disorderly, or improper conduct, or keep a disorderly house within the limits of the city of Savannah, * * * shall, on conviction before the police court, be fined * * * or imprisoned' (as therein provided), does not authorize the recorder of the city of Savannah to try and punish for acts committed beyond the corporate limits of the city, but within three miles thereof. This is true notwithstanding the provision of the act of the General Assembly approved August 11, 1906 (Ga. L. 1906, p. 1033), extending the jurisdiction of the police court of the city of Savannah 'to try all offenses against the laws and ordinances of the municipal government of the city of Savannah committed within the corporate limits of said city and within three miles thereof, and extending into the county of Chatham.' Under proper construction of the ordinance only acts committed within the corporate limits of the city of Savannah are declared to be unlawful." *Raskin v. Mayor, etc., of Savannah*, 108 S. E. 778, decided October 14, 1921.

2. Municipal corporations \S 642(1)—When ordinance did not apply to acts outside corporate limits, refusal to sanction certiorari held error.

Upon the trial of the case in the recorder's court of the city of Savannah, the evidence failed to show that the alleged offenses were committed within the limits of the city, and this point was specifically raised in the petition for certiorari. The judge of the superior court refused to sanction the petition, holding that as the act of the General Assembly of Georgia, approved August 11, 1906 (Ga. L. 1906, p. 1033), had extended the jurisdiction of the recorder's court of the city of Savannah to within three miles of the corporate limits of the city, and, as the petition for certiorari, in raising the question that the venue of the offenses charged had not been shown, alleged merely that it had not been proved that the offenses were committed within the limits of the city, the failure to prove the venue was not sufficiently averred in the petition. Under the ruling in the preceding paragraph, the refusal to sanction the petition was error.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Abe Raskin was convicted of violating an ordinance of the city of Savannah, and his petition for certiorari was denied by the judge of the superior court, and he brings

error. Reversed, in conformity to Supreme Court's answers to certified questions (108 S. E. 778).

Robt. L. Colding, of Savannah, for plaintiff in error.

Shelby Myrick and E. A. Cohen, both of Savannah, for defendant in error.

LUKE, J. Judgment reversed.

BROYLES, O. J., and BLOODWORTH, J., concur.

(27 Ga. App. 717)

AMERICAN LAUNDRY CO. v. HALL
(No. 12125.)

(Court of Appeals of Georgia, Division No. 2
Nov. 29, 1921.)

(Syllabus by the Court.)

1. Bailment §14(1) — Delivery of memorandum of articles received with notice of limitation of liability does not create contract limiting liability.

Where a bailee, such as a laundry company, in accepting articles of wearing apparel from a customer, leaves with the customer a paper containing a memorandum of the articles bailed, with a printed notice thereon to the effect that in the event of loss or damage to the articles the bailee's liability therefor shall not exceed a certain sum to be determined by its proportion to the amount charged for the laundering of the articles, the mere receipt by the customer of the memorandum containing such printed notice does not amount to an agreement and assent to the terms of the notice, and therefore there arises no special contract whereby the customer consents to any limitation of liability of the bailee on account of the latter's negligence.

2. Certiorari §68—Certiorari properly denied when evidence sufficient.

The evidence authorized the verdict rendered for the bailor against the bailee for an amount in excess of the limitation stated in the notice for the negligent loss and damage to the articles bailed. The judge of the superior court therefore did not err in overruling the petition for certiorari.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by B. E. Hall against the American Laundry Company. Judgment for plaintiff, and petition for certiorari overruled, and defendant brings error. Affirmed.

D. K. Johnston, of Atlanta, for plaintiff in error.

Morris Macks and S. A. Massell, both of Atlanta, for defendant in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

(27 Ga. App. 686)

**J. L. RILEY & CO. v. LONDON GUARANTY
& ACCIDENT CO., Limited.**
(No. 12332.)

(Court of Appeals of Georgia, Division No. 2
Nov. 18, 1921.)

(Syllabus by the Court.)

1. Accord and satisfaction §2(2), 5, 11(1), 20, 23, 27—Principal and agent §78(1)—Claim may be disputed or undisputed if agreement supported by consideration; defeats recovery when proved; adjustment of unliquidated claim is sufficient consideration; agent may set off claims against principal; dispute as to counterclaim renders claim a disputed one; acceptance of amount offered in full satisfaction of disputed claim is accord and satisfaction; no accord and satisfaction from the acceptance of offer as full satisfaction when claim not in bona fide dispute; when claim disputed, payment made and accepted as discharge is binding, though not more than was admitted to be due; bona fides and not merits of contention is controlling; bona fides generally question for jury; good faith of debtor in claiming set-off held for jury.

This was a suit for \$1,000 alleged to be a balance due on account of insurance premiums collected by the defendants as general agents of the plaintiff. The defendants denied indebtedness, and set up as their primary defense a plea of accord and satisfaction. As a secondary defense they set up by way of recoupment a counterclaim in the amount sued for. The plea alleges that for several years the defendants had been the general agents of the plaintiff in their insurance business, under a contract providing for the termination of such agency after 90 days' written notice; that the plaintiff, through its special representative, had contracted to pay them \$1,000, in consideration of the cancellation of their agency contract, without the giving of the stipulated previous notice so that new agents could be immediately substituted, and for the further consideration that the defendants should turn over their business, including new business, to the substituted agents, and in lieu of the full previous commissions thereon should accept a brokerage commission; that the defendants performed their part of this agreement; and that, after deducting the \$1,000 credit thus due, they settled in full for all premiums collected by them. The sole dispute under both pleas relates to the credit claimed of \$1,000. While the evidence as to the making of such an alleged contract by the special agent of the company, as well as his authority so to act, was in sharp conflict, the defendants offered testimony which might be taken to support this portion of their plea, together with evidence tending to show the plaintiff's ratification of the alleged agreement by the acceptance of benefits thereunder. By the plea of accord and satisfaction it is alleged, and it is undisputed under the evidence: That at the time the defendants made their last payment to the plaintiff, they had collected as premiums, and then held, the amount of \$1,139.67. That on June 1, 1916, they made a remittance to the plaintiff of \$139.67 by check, on the back of which and just above the place of indorsement was written the following: "En-

dorsement of this check is acknowledgment of payment in full of the following: If incorrect return to J. L. Riley & Co., Atlanta, Ga. Collections for February, March, April & May, 1916." That accompanying this check was a letter stating, by detailed items the balances due the company for collections of premiums during the four months stated on the check, and giving the total as \$1,139.67, below which was written the following: "Less amount agreed upon by your Mr. S. B. Wright, Jr., Special Agent, for surrender of agency, \$1,000.00—Check herewith, \$139.67;" that the letter and the check were received by the plaintiff on June 5, 1916, and the check indorsed and cashed, and that in about two weeks thereafter the plaintiff made protest as to the allowance of the \$1,000 credit. It is clear from the letters in evidence that the claim for this amount had been made and disputed long prior to the mailing of the check. *Held*:

1. All claims, whether disputed or undisputed, may furnish the subject-matter of an agreement in accord and satisfaction, provided such agreement, like all other contracts, is supported by a consideration. When such a valid plea is proved as laid, the rights of the creditor are controlled thereby.

(a) Where the amount of the claim is unliquidated, the mere adjustment of such a bona fide dispute by the express terms of a new agreement will of itself afford a valid consideration, sufficient to render the new agreement binding, and this would be true whether the new agreement had been actually performed or not. Sections 4326, 4328, Civil Code 1910.

(b) "As a general rule, when a principal sues his agent for an accounting or to recover money which has come into his hands by virtue of the agency, the agent has the right of set-off or counterclaim in order to enforce demands which he has against the principal." *Clark & Skyles, Agency*, § 427, p. 963. Such a bona fide dispute as to the right of the agent to a counterclaim which he would thus have a right to set-off against such an otherwise undisputed demand renders the claim, when taken as a whole, a disputed one. 1 R. C. L. 198, § 33; *Tanner v. Merrill*, 108 Mich. 58, 65 N. W. 664, 31 L. R. A. 171, 62 Am. St. Rep. 687.

(c) When a party makes an offer of a certain sum to settle a claim, the amount of which is in bona fide dispute, with the condition that the sum offered, if taken at all, must be received in full satisfaction of the claim, and the party receives the money, he takes it subject to the condition attached to it, and it will operate as an accord and satisfaction. *Redmond v. Atlanta, etc. Ry.*, 129 Ga. 133, 141, 58 S. E. 874; *Ryan v. Progressive Publishing Co.*, 16 Ga. App. 83 (1, 2), 84 S. E. 834. Such would not be the rule, however, where the claim is not in bona fide dispute, and where the party receiving the money or property merely accepts a portion of that which already belongs to him, and which the payer could not have withheld under any bona fide right or claim. *Alfred Struck Co. v. Slicer*, 23 Ga. App. 62, 65, 97 S. E. 455. In the case last cited, if the pleadings had not shown on their face that the defendant's contention, forming the basis of the alleged accord and satisfaction, was not bona fide, in that it was contrary to his express agreement govern-

ing the amount of his fee, the payment made in the alleged accord and satisfaction would have been sufficient to form the basis of such a plea, in that the defendant, to the benefit of the plaintiff, would have parted with something which he had a right to withhold, and such payment would not have amounted to a mere surrender of a portion of plaintiff's own property.

(d) Where any part of a claim is in good faith disputed, a payment thereon, when made and accepted as in discharge of the whole indebtedness, is binding accordingly, even though the payment should go no further than to cover the amount admitted to be due. *Chicago, etc., R. Co. v. Clark*, 178 U. S. 353, 367, 20 Sup. Ct. 924, 44 L. Ed. 1099; *Ostrander v. Scott*, 161 Ill. 339, 43 N. E. 1089; *Melroy v. Kemmerer*, 218 Penn. 381, 67 Atl. 699, 11 L. R. A. (N. S.) 1018, 120 Am. St. Rep. 888, Case Note, 1022; 1 R. C. L. 196, § 31.

(e) In determining the validity of an agreement in accord and satisfaction of a disputed claim, it is not the merit, but the bona fides, of the debtor's contention which is the controlling factor; and this, as a general proposition, is a question of fact for the jury. *Ryan v. Progressive Publishing Co.*, supra. (3); *Dickerson v. Dickerson*, 19 Ga. App. 269, 91 S. E. 346. In the instant case the defendants, in their alleged agreement of accord and satisfaction, relied solely, as the basis of the contention then made, upon a previous agreement which they claimed had been made with the plaintiff through one of its agents, whereby the defendants were to receive \$1,000 for the immediate surrender to the plaintiff of their agency. Since the evidence of the plaintiff disputes and denies in toto all of the defendant's evidence with respect to the existence of any such surrender agreement, whether valid or invalid, authorized or unauthorized, the question as to the good faith of the debtors' contention as then made should, for this reason, have been submitted to the jury.

2. Trial \S 176—Contention that evidence demands finding in party's favor does not authorize direction of contrary verdict if such position wrong.

While it is true that, "where both parties to a cause consent that the court direct a verdict, though each moves that it be directed in his own favor, neither party can complain that the court erred in directing a verdict, though the losing party may except upon the ground that the verdict directed is erroneous" (*Sovereign Camp, W. O. W., v. Beard*, 105 S. E. 629; *Mims v. Johnson*, 8 Ga. App. 850, 70 S. E. 139), yet, in the absence of any such agreement, "the mere fact that a party to a litigation contends that the evidence demands a finding in his favor does not amount to a concession that, if this position is not correct, a verdict may be directed in favor of the other party." *Broadhurst v. Hill*, 137 Ga. 833, 841, 74 S. E. 422.

3. Insurance \S 84(6)—Accord and satisfaction defeats liability without regard to plea of recoupment based on counterclaim and embraced in the agreement; finding that accord and satisfaction invalid because set-off not asserted in good faith defeats plea in recoupment.

If, in accordance with the rulings above made, it shall be again shown on the second

trial that there had been an agreement in accord and satisfaction, and if it should further appear to the satisfaction of the jury that the agreement was valid for the reason that it was entered upon under and by virtue of a bona fide contention of the defendants, such a finding must necessarily and without more be taken as sufficient to relieve the defendants of liability under their primary defense of accord and satisfaction, without going into the additional or secondary defense setting up the validity of the same claim by way of recoupment; since the validity of such claim need not be determined under the second plea, when the mere bona fide insistence thereon is sufficient under the other plea to relieve the defendants of liability. If on the second trial the jury should find that there had been an agreement in accord and satisfaction, but that it was invalid, in that it was based on a contention of the defendants on which they did not in good faith insist, for the reason that no agreement of any sort had ever been made by which the plaintiff's alleged agent had agreed in its behalf to pay them the thousand dollars, then it necessarily follows that the additional plea of recoupment could not avail; since it is based, not only upon the existence of such a contract, but upon its validity as well. It might be said, however, that if on the second trial the defense of accord and satisfaction should not be relied on, and the defendants' evidence offered under the plea of recoupment should be the same, it would require a finding of the jury upon the question as to whether or not the alleged contract with the special agent had been made, and, if so, whether he was acting within the scope of his authority, and, if not, whether the contract, if made, was ratified by the acts and conduct of the plaintiff. *Roberts v. Bank of Eufaula*, 20 Ga. App. 221, 92 S. E. 1015.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by the London Guaranty & Accident Company, Limited, against J. L. Riley & Co. Judgment for plaintiff, and defendant brings error. Reversed.

Moore & Pomeroy and Jos. H. Ross, all of Atlanta, for plaintiff in error.

Westmoreland & Smith, of Atlanta, for defendant in error.

JENKINS, P. J. Judgment reversed.

STEPHENS and HILL, JJ., concur.

(27 Ga. App. 719)

PLANTERS' BANK v. WARE. (No. 12404.)

(Court of Appeals of Georgia, Division No. 2. Nov. 29, 1921.)

(Syllabus by the Court.)

1. Husband and wife §155—Married woman may borrow money for payment of husband's debts, but not from creditor.

A married woman borrowed from a bank \$1,500, \$1,000 of which, according to her own

testimony, was procured for the purpose of enabling her husband to buy out his partner's interest in a partnership. A check in the amount of the loan was turned over by the bank to the wife, who, after indorsing it, delivered it to her husband. On the same day and in one contemporaneous transaction, the husband disposed of this check and of certain other moneys belonging to him, as follows: \$1,000 was paid to the partner in purchase of his partnership interest, and other and larger sums were paid by the husband to the bank on debts owing to the bank by the partnership. Held: A married woman may lawfully borrow money and give it to her husband to apply in satisfaction of his debts (*Allen v. National Bank of Tifton*, 14 Ga. App. 299, 80 S. E. 691); but if the lender is the husband's creditor and makes the loan to the wife for the purpose of collecting his own indebtedness, her obligation cannot be enforced (*Ginsberg v. People's Bank*, 145 Ga. 815, 89 S. E. 1086).

2. Husband and wife §155—That part of obligation represents husband's debt does not relieve wife from another portion definitely ascertained.

That a part of an obligation contracted by a married woman represents a debt of the husband would not relieve her from liability for any portion for which she may have become legally bound, provided such respective portions may be definitely ascertained and separated. *Johnston v. Gullede*, 115 Ga. 981(1), 42 S. E. 354; *Jones v. Harrell*, 110 Ga. 373 (1, 2), 375, 35 S. E. 690; *Lanier v. Olliff*, 117 Ga. 397(2), 43 S. E. 711.

3. Husband and wife §232(1)—Married woman held to have burden of showing obligation for borrowed money represented husband's debt; evidence held not to show money borrowed by wife was used to pay husband's debt to lender.

In the instant suit by the bank on the note thus made by the married woman, it was incumbent upon her to show that her obligation represented the debt due the bank by her husband; and since, under the undisputed evidence of the bank's officials, \$1,000 of the loan went to the partner of the husband in purchase of the partnership business, in accordance with what the wife herself testified was the agreement and understanding, and since the contemporaneous payments to the bank on the partnership debts are by undisputed evidence fully accounted for as having been made out of other funds held by and belonging to the husband, except as to \$500, the defendant failed to carry the burden imposed by her plea in respect to the \$1,000 portion of the loan. The verdict for the defendant was therefore unauthorized, and the court erred in overruling the plaintiff's motion for a new trial.

Error from City Court of La Grange; Duke Davis, Judge.

Action by the Planters' Bank against Mrs. J. R. Ware. Judgment for defendant, and plaintiff brings error. Reversed.

Hatton Lovejoy, of La Grange, for plaintiff in error.

M. U. Mooty, of La Grange, and Hall & Jones, of Newman, for defendant in error.

JENKINS, P. J. Judgment reversed.

STEPHENS and HILL, JJ., concur.

(27 Ga. App. 723)

CALLAWAY v. WYNNE. (No. 12635.)

(Court of Appeals of Georgia, Division No. 2.
Nov. 29, 1921.)

(Syllabus by the Court.)

1. Frauds, statute of \S 32—Undertaking whereby promisor substituted and original promisor released not within statute.

"The provision of the statute of frauds which requires that the promise to answer for the debt, default, or miscarriage of another must be in writing, in order to bind the promisor does not include an original undertaking whereby a new promisor, for a valuable consideration, substitutes himself as the party who is to perform, and the original promisor is thereby released." *Williams v. Garrison*, 21 Ga. App. 44(1), 93 S. E. 510.

2. Trial \S 259(1)—Failure to charge more fully not error, in absence of written requests.

While the charge might have submitted to the jury the contentions of the defendant more completely and fully, there were no written requests to charge; the instructions were sufficient, and the charge was not harmful for any of the reasons assigned.

3. New trial \S 70—Properly denied when evidence sufficient.

There was evidence to support the verdict, and the court did not err in failing to grant a new trial.

Stephens, J., dissenting.

Error from Superior Court, Wilkes County; E. T. Shurley, Judge.

Action by F. M. Wynne against Sam Callaway. Judgment for plaintiff, and defendant brings error. Affirmed.

W. A. Slaton, of Washington, Ga., for plaintiff in error.

Colley & Colley, of Washington, Ga., for defendant in error.

HILL, J. Judgment affirmed.

JENKINS, P. J., concurs.

STEPHENS, J. (dissenting). To my mind only one inference can be drawn from either the allegations in the petition as amended or from the entire evidence, and that is that the obligation alleged to have been assumed by the defendant, Sam Callaway, to the plaintiff was to answer for the debt of Brant-

ley Callaway, who was not released, and that such promise of the defendant, not being in writing, was within the statute of frauds, and therefore unenforceable.

(27 Ga. App. 676)

HEWITT v. STATE. (No. 12773.)

(Court of Appeals of Georgia, Division No. 1.
Nov. 18, 1921.)

(Syllabus by the Court.)

1. Criminal law \S 1178—Exceptions not argued treated as impliedly abandoned.

Exceptions not specifically argued in the brief for the excepting party in this court will be treated as impliedly abandoned, and will not be considered where there is "no general insistence upon all the grounds of the motion."

2. Criminal law \S 596(1), 1151—Applications for continuances are addressed to court's discretion, which is reviewable only for plain abuse; denial not abuse of discretion when there were other witnesses to same facts.

"All applications for continuances are addressed to the sound legal discretion of the trial judge (Pen. Code 1910, § 992), and his decision thereon will not be reversed unless there has been a plain, palpable, and flagrant abuse of this discretion."

3. Judges \S 46—Relative guaranteeing payment of attorney's fee not a "voluntary prosecutor."

The fact that one has "contracted to guarantee the payment of the fee to be paid by the prosecutor to an attorney employed to aid the solicitor general in the prosecution of defendant" does not make him a volunteer prosecutor.

4. Criminal law \S 867, 956(13)—Remarks of sheriff and prosecuting counsel not ground for mistrial when not shown to have been heard by jury.

Under the facts of this case the judge properly refused to provide a new panel of jurors from which to strike, or to declare a mistrial.

5. Criminal law \S 1064(1)—Special ground of motion for new trial must be complete.

Before a special ground of the motion for a new trial will be considered, it must be complete within itself, and understandable without reference to other parts of the record.

6. Sufficiency of evidence.

There is some evidence to support the verdict.

Error from Superior Court, Pierce County; J. I. Summerall, Judge.

Will Hewitt was convicted of an offense, and he brings error. Affirmed.

S. Thos. Memory, of Blackshear, for plaintiff in error.

A. B. Spence, Sol. Gen., of Waycross, for the State.

BLOODWORTH, J. [1] 1. As the alleged errors of the court in rejecting certain affidavits in support of the sixth and seventh grounds of the motion for a new trial, and upon the rejection of which error is assigned in the bill of exceptions, are not referred to in the brief of counsel for plaintiff in error, they will be treated as impliedly abandoned, and will not be considered by this court where there is no "general insistence upon all the grounds of the motion." Ga. L. 1921, p. 232, § 1.

[2] 2. Where a motion was made to continue a case on account of the absence of a witness, and it was made to appear that there were present several other witnesses who would testify to the same facts, we cannot say, as a matter of law, that there was a "plain, palpable, and flagrant abuse" of the discretion of the trial judge when he refused to continue the case. Especially should a new trial not be granted in this case on account of the refusal of the judge to grant a continuance, as among the witnesses sworn there were three who testified to the same material fact to which it was alleged the absent witness would swear.

"It is not cause for reversing the denial of a continuance that the movant made a legal showing as to the absence of one witness; it appearing by the same showing, on cross-examination, that another witness was present by whom he could prove the facts to which the absent witness was expected to testify, and it not appearing that the discretion of the court was abused." *Huffman v. State*, 95 Ga. 469 (2), 20 S. E. 216.

In *Curry v. State*, 17 Ga. App. 377 (1), 87 S. E. 685, this court held that—

"All applications for continuances are addressed to the sound legal discretion of the trial judge (Penal Code, § 992), and his decision thereon will not be reversed unless there has been a plain, palpable, and flagrant abuse of this discretion"—citing *Sealy v. State*, 1 Ga. 213, 44 Am. Dec. 641; *Howell v. State*, 5 Ga. 48; *Roberts v. State*, 14 Ga. 6; *Revel v. State*, 26 Ga. 275; *Long v. State*, 38 Ga. 491; *Oglesby v. State*, 121 Ga. 602, 49 S. E. 706; *Rawlins v. State*, 124 Ga. 31, 52 S. E. 1; *Lyles v. State*, 130 Ga. 294, 60 S. E. 578; *Parker v. State*, 3 Ga. App. 336, 59 S. E. 823.

See, also, *Blount v. State*, 18 Ga. App. 204 (1), 89 S. E. 78.

[3] 3. The fifth ground of the motion for a new trial alleges error "because the court erred in overruling the motion made by defendant to disqualify his honor, J. I. Summerall, presiding in said case," the alleged reason for his disqualification being that—

"One T. L. Tuten was a volunteer prosecutor and an illegitimate son of John Aspinwall, and that the said T. L. Tuten was related to his honor, J. I. Summerall, within the degree prohibited by the statute; that the said T. L. Tuten had contracted and guaranteed the payment of the fee to be paid by the prosecutor to an attorney, R. G. Mitchell, Jr., em-

ployed to aid the solicitor general in the prosecution of the defendant, Will Hewitt, in said case, and that the said attorney was actually rendering such aid on the trial of the case at the time of said motion."

Section 4642 of the Civil Code of 1910 provides in part that—

No judge "can sit in any cause or proceeding in which he is pecuniarily interested, or related to either party within the fourth degree of consanguinity or affinity."

In *Luke v. Batts*, 11 Ga. App. 783 (3), 76 S. E. 165, it was held that—

"The statutory grounds of the disqualification of a judicial officer, as contained in Civil Code, § 4642, are exhaustive. *Elliott v. Hipp*, 134 Ga. 844, 68 S. E. 736, 137 Am. St. Rep. 272, 20 Ann. Cas. 423."

While in *Lyens v. State*, 133 Ga. 587 (4), 66 S. E. 792, it was held that:

"Where one contributes to a fund to be used in employing an attorney to aid the solicitor general in the prosecution of a particular person for an alleged offense with which he is charged, and the attorney does render such aid upon the trial of the case, the person so contributing is to be considered as a volunteer prosecutor, and one who is related within the fourth degree to such volunteer prosecutor is not competent to sit as a juror on such trial"

—this rule will not be extended to one who has only "contracted to guarantee the payment of the fee to be paid by the prosecutor to the attorney employed to aid the solicitor general in the prosecution of the defendant."

[4] 4. The sixth ground of the motion for a new trial is based upon an alleged error in the refusal of the court to allow to the defendant "a new panel of jurors from which to strike, on the ground that such evidence and statements were prejudicial to the rights of defendant, and were very damaging to him, denying him the right to a fair and impartial trial." Ground 7 alleges that the court erred in overruling a motion to declare a mistrial, for the same reason alleged in ground 6. The "evidence and statements" referred to were a conversation between the sheriff and counsel employed to assist the state. The sheriff testified that he approached the said counsel and asked him if he had any objection to the jury going to the speaking that night (a speech at the courthouse by Mr. Bryan), and he said that "he did not, and didn't suppose you [counsel for the defendant] had any." The sheriff then said: "Well, Judge Summerall told me that Mr. Memory [counsel for the defendant] objected to it." Even if the error alleged in either of these grounds would be sufficient to require the grant of a new trial in the event the conversation was heard by the jury, before it could avail the movant it must affirmatively appear with reasonable certainty that the conversation was loud enough to be heard by members of the jury, and in this

case it does not so appear from any legal evidence adduced. On the contrary, the sheriff testified:

"I was not talking nothing like loud enough for them to hear it. I do not think they heard it. The whole court was in an uproar. Mr. Mitchell was talking in a low tone like I was. I went and leant over there and asked him about it. * * * I just thought I would speak to him just between me and him, and I don't think the jury heard it. They were making a big racket around here. They were in the box at the time."

He further testified that some of the jurors were 12 or 15 feet from him, and others possibly 20 feet away. The above ruling is correct even though upon the hearing of the motion for a new trial on the following morning one of the attorneys for plaintiff in error swore:

"I am associated in the representation of this defendant. I heard the sheriff's statement just now that he was speaking in the same tone that he was using when he was talking to Judge Mitchell last night about this entertainment, and I could understand what he said."

The attention of this witness was, by the very circumstances themselves, directed to what the sheriff was then saying, and this witness further testified that he did not know "what the jury was doing," or "how much racket was in the courthouse" the night before when the sheriff was talking to counsel who was assisting the solicitor general.

[5] 5. The eighth ground of the motion for a new trial will not be considered by this court, because it is not complete within itself and not understandable without reference to other parts of the record.

[6] 6. Under a charge to which no exceptions were taken, and which will be presumed to be full and correct, the jury passed upon the contested questions of fact; their finding was approved by the presiding judge, there was evidence which positively identified the accused as the assailant of the prosecutor, and this court cannot say that there is no evidence to support the verdict.

Judgment affirmed.

BROYLES, O. J., and LUKE, J., concur.

(27 Ga. App. 636)

TROUP v. STATE. (No. 12777.)

(Court of Appeals of Georgia, Division No. 1.
Nov. 17, 1921.)

(Syllabus by the Court.)

Criminal law \S 1023(12)—Revocation of parole not reviewable as final judgment.

This case is controlled by the principle announced in *Antonopoulos v. State*, 107 S. E.

359, where it was held: "Where one is sentenced for a violation of a criminal statute, and, under the provisions of the acts of the General Assembly approved August 16, 1913 (Laws 1913, p. 112; Park's Pen. Code, §§ 1081 [a], [b], [c], [d]), on certain conditions named in the order, is allowed to serve the sentence 'outside the confines of the chain gang, jail, or other place of detention,' and while serving the sentence violates the terms of his parole, and the court, upon the defendant being brought before it, and after due examination, revokes its leave to the defendant to serve his term outside the chain gang or other place of detention, this is not such a final judgment as is subject to review on a bill of exceptions." See *Antonopoulos v. State*, 151 Ga. 466, 107 S. E. 158.

Under the above ruling the writ of error must be and is dismissed.

Error from City Court of Baxley; H. J. Lawrence, Judge.

Thomas Troup was convicted of an offense, and leave to serve his term outside the chain gang or other place of detention was revoked, and he brings error. Writ dismissed.

V. E. Padgett, of Baxley, for plaintiff in error.

C. H. Parker, Sol., of Baxley, for the State.

BLOODWORTH J. Dismissed.

BROYLES, O. J., and LUKE, J., concur.

(27 Ga. App. 644)

DEWITT v. STATE. (No. 12836.)

(Court of Appeals of Georgia, Division No. 1.
Nov. 17, 1921.)

(Syllabus by the Court.)

1. Burglary \S 27—Indictment for having possession of explosives, etc., held sufficient.

The general demurrer to the indictment was properly overruled.

2. Burglary \S 27—Indictment for having possession of explosives, etc., need not allege whether offense was committed in daytime or nighttime.

An indictment drawn under section 183 (a) of Park's Penal Code need not specify whether the alleged violation of the law occurred in daytime or at night.

3. Indictment and Information \S 110(18)—Indictment in language of statute for having possession of explosives, burglar's tools, etc., held not defective.

The indictment was not subject to demurrer on the ground that it contained the generic terms "implements and things," and "other crime," without specifying the particular implements and things or naming the specific crime.

4. Criminal law §814(17)—Failure to charge on circumstantial evidence not error when there was direct evidence.

It is only where a case is wholly dependent on the law of circumstantial evidence that the trial judge is required to give in charge to the jury the law of circumstantial evidence.

5. Criminal law §814(15)—Instruction as to accomplice's testimony not required when there was no evidence that witness was accomplice.

"Where there was no evidence that a witness for the state was an accomplice, the court was not bound to charge Pen. Code 1896, § 991 [section 1017 of the Penal Code of 1910], as to the necessity of corroboration, even though the defendant contended the witness was an accomplice." *Robinson v. State*, 84 Ga. 674, 11 S. E. 544.

6. Sufficiency of evidence.

The evidence is sufficient to support the verdict.

Error from Superior Court, Floyd County; *Moses Wright*, Judge.

F. Dewitt was convicted of an offense, and he brings error. Affirmed.

Porter & Mebane, of Rome, for plaintiff in error.

E. S. Taylor, Sol. Gen., of Summerville, and J. F. Kelly, of Rome, for the State.

BLOODWORTH, J. The indictment in this case is based upon section 183 (a) of Park's Penal Code (Ga. L. 1910, p. 136) and is as follows:

That the defendant, "feloniously and with force and arms, did unlawfully have in his possession an eight-ounce bottle containing about seven ounces of nitroglycerin, and eight dynamite caps with fuses attached to them, and six dynamite caps without fuses and other explosives, and other implements and things adapted, designed, and commonly used for the commission of burglary, larceny, safe cracking, and other crimes, with the intent to use, employ, and allow the same to be used and employed in the commission of a crime and did then and there know that the same were so intended to be used."

To this indictment a general demurrer and special demurrers were filed. These were overruled. Upon the trial the accused was convicted. He made a motion for a new trial, this was overruled, and he excepted.

[1] 1. The indictment, with sufficient fullness and certainty, sets out a crime, and the general demurrer thereto was properly overruled.

[2] 2. The second ground of the demurrer is as follows:

"Because it is not alleged in said bill of indictment whether the defendant had in his possession said nitroglycerin, dynamite caps, explosives, and other implements adapted, designed, and used for the commission of bur-

glary, larceny, safe cracking, and other crimes in the day or night time."

There is no merit in this ground of the demurrer. Where an act provides that it shall be unlawful for a person to have in his possession "in the day or night time" certain enumerated implements and things, the plain purpose of the act is to prevent any person from having these articles in his possession at any time, either in the day or in the night. As the punishment is the same whether the possession be in the day or in the nighttime, these words could well have been left out of the act. Had a different punishment been provided for having any of these implements or things in the day and having them in the night, then it would have been necessary to allege in the indictment the specific time, whether day or night, "in order to regulate the appropriate punishment for the particular offense." See *Wingard v. State*, 13 Ga. 400 (2); *Hinton v. State*, 68 Ga. 323 (1).

[3] 3. The third and fourth grounds of the demurrer will be discussed together. They are as follows:

"Because said bill of indictment alleges that the defendant was in possession of other implements and things, adapted, designed, and commonly used for the commission of burglary, and so on, without alleging what the other implements and other things consisted of. That said bill of indictment should set forth of what said implements and other things consisted. That the terms 'implements and things' is only a conclusion, and such description is indefinite. That because of said bill of indictment failing to set forth of what said implements and things consisted, the defendant cannot properly prepare his defense in said case."

"Defendant demurs to the words in said bill of indictment, 'other crimes,' and says that said bill of indictment should set forth of what said other crimes consist. That the defendant cannot properly prepare his defense to said charge because he is not advised of what said other crimes consist. That the expression so used in said bill of indictment, 'other crimes,' is a conclusion of the pleader, and for said reason is demurrable."

The accused was charged with a statutory offense, and the indictment follows substantially the language of the statute. Section 954 of the Penal Code of 1910 provides that—

"Every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct, which states the offense in the terms and language of this Code, or so plainly that the nature of the offense charged may be easily understood by the jury."

In *Stoner v. State*, 5 Ga. App. 717, 63 S. E. 602, this court held that—

"As a rule, it is sufficient in an indictment for a purely statutory offense to describe the offense in the words of the statute"—citing *Penal Code*, § 954; 1 Bish. Cr. Law, 359; 11 Enc. Pl. & Pr. 520.

The Supreme Court, in *Glover v. State*, 126 Ga. 594 (1), 55 S. E. 592, held:

"An indictment which charges the offense defined by a legislative act in the language of the act, where the description of the acts alleged as constituting the offense is full enough to put the defendant on notice of the offense with which he is charged, is sufficiently specific."

The indictment in this case not only follows substantially the language of the statute, but it is so plain that the nature of the offense charged may be easily understood by the jury, and is sufficiently full and specific to meet all the objects requiring particularity in setting out an offense enumerated by the Supreme Court in *Wingard v. State*, 13 Ga. 400 (2). The court did not err in overruling the third and fourth grounds of the demurrer. See, in this connection, *Barbour v. State*, 21 Ga. App. 243, 94 S. E. 272.

[4] 4. There was direct evidence to connect the defendant with the crime charged. "It is only where a case is wholly dependent upon the law of circumstantial evidence that the trial judge is required to give the law of circumstantial evidence." The indictment being supported by direct as well as circumstantial evidence, it was not erroneous for the court to fail to charge the law of circumstantial evidence. *Williamson v. State*, 22 Ga. App. 787, 97 S. E. 195. See cases cited.

[5] 5. There being in this case no evidence to authorize it, the court did not err "in failing to give in charge to the jury the law of accomplice and instruct the jury that it could not convict the defendant on the testimony of the accomplice unless the testimony of said accomplice was corroborated by other witnesses or other corroborating circumstances in the case." This is true even though the defendant contended that the witness was an accomplice. *Walker v. State*, 118 Ga. 34 (2), 44 S. E. 850. Where there is an accomplice but the state does not rely entirely upon his evidence to connect the accused with the offense, it is not incumbent upon the court, without request, to instruct the jury touching corroboration. *Robinson v. State*, 84 Ga. 674 (1), 11 S. E. 544; *Cantrell v. State*, 141 Ga. 98 (3), 80 S. E. 649.

[6] 6. The evidence is amply sufficient to support the verdict, no error of law is shown to have been committed, the finding of the jury is approved by the presiding judge, and the motion for a new trial was properly overruled.

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 716)

J. H. WILKES & CO. v. J. F. MADDEN & SONS. (No. 12112.)

(Court of Appeals of Georgia, Division No. 2
Nov. 29, 1921.)

(Syllabus by the Court.)

1. Sales \S 384(4)—Seller not entitled to recover freight charges on refused property.

Where personal property is shipped by a seller to a purchaser under a contract of sale whereby the purchaser is obligated to pay the freight charges, the contract price having been agreed upon and fixed so as to include a sum sufficient to cover such charges, the seller, who has after the purchaser's breach of the contract in refusing to accept and receive the goods from the carrier at the point of destination, paid the freight charges and retained the property for his own use, cannot, since the purchaser is under no contractual obligation to pay the freight charges as such, recover the cost of such charges from the purchaser; but the seller's remedy is a suit against the purchaser for a breach of the contract, under the Civil Code 1910, \S 4181, where his measure of damage is the difference between the contract price and the market price at the time and place for delivery.

2. Sales \S 384(4)—Seller not entitled to recover return freight charges.

The seller's entire damage for a breach by the purchaser of such a contract being the difference between the contract price and the market price at the time and place for delivery, it follows that the seller not only is not entitled to recover from the purchaser the freight charges above set out, but cannot recover the freight charges incurred by him in shipping the property from the point of destination back to the original shipping point.

3. Nonsuit properly awarded.

The trial judge therefore did not err in awarding a nonsuit.

Error from City Court of Zebulon County; E. F. Dupree, Judge.

Action by J. H. Wilkes & Co., against J. F. Madden & Sons. Judgment of nonsuit, and plaintiff brings error. Affirmed.

Wm. H. Beck, of Griffin, for plaintiff in error.

Reagan & Reagan, of McDonough, for defendant in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

(27 Ga. App. 564)

REVIS v. BANK OF LA GRANGE.
(No. 12535.)(Court of Appeals of Georgia, Division No. 1.
Nov. 16, 1921.)*(Syllabus by the Court.)*

1. Evidence \Leftrightarrow 432—Parol evidence admissible to show partial failure of consideration for note sued on.

Where negotiable promissory note purports to have been given "for value received," and suit is brought thereon by the payee, the maker may plead and by parol prove what the real consideration is, for the purpose of showing that the consideration has either totally or partially failed.

2. Appeal and error \Leftrightarrow 302(3)—Ground of motion for new trial not setting forth evidence excluded not considered.

A ground of a motion for a new trial complaining of the exclusion of certain documentary evidence will not be considered when the evidence referred to is not set forth either literally or in substance in the motion or attached to it as an exhibit.

Error from City Court of La Grange; Duke Davis, Judge.

Action by the Bank of La Grange against C. H. Revis. Judgment for plaintiff, and defendant brings error. Reversed.

A. H. Thompson, of La Grange, for plaintiff in error.

E. T. Moon, of La Grange, for defendant in error.

LUKE, J. The Bank of La Grange sued C. H. Revis, Sr., on a promissory note for the principal sum of \$1,259.94, less certain credits, and for interest and attorney's fees. The defendant answered that he was not indebted to the plaintiff in the sum stated, alleging that the note sued on included \$500 and interest on another note, which he had previously paid, and that therefore the note was without consideration as to the sum of \$500. The case proceeded to trial, and the verdict was adverse to the defendant. He made a motion for a new trial, which was overruled, and he excepted.

[1] The first ground of the amendment to the motion for a new trial is as follows:

"Because the court erred in ruling out the following evidence of the defendant, O. H. Revis, on the objections of the plaintiff's counsel: On direct examination defendant sought to show by the witness C. H. Revis, the defendant, as follows: 'Q. You say that you executed the note sued on. What was the consideration of the note? A. There were executions and claims against me, amounting to \$750, which the plaintiff took up and paid off. Some

time before that I had borrowed \$500 of the plaintiff, giving my note therefor, and also executing a deed to secure the note. Later on I paid off this \$500 note and interest to the plaintiff and the deed was canceled off record. At the time I executed the note sued on I observed that it included the \$500 note which I had previously paid off. This note for \$500 was never delivered back to me when paid, and I called plaintiff's attention to it at the time I signed the note sued on. Mr. Render, the president of the bank, then and there stated that he would credit this last note with the \$500. I then signed the same. The credit was never placed thereon and he is suing me for \$500 more than I owe on this note. I have not received any consideration on this note for the \$500 which I had formerly paid. The only amount I am due on the note now sued on is \$759.94 less the credits appearing on the note and those credits for which I have the receipts.'"

The court excluded this evidence, on the ground that parol contemporaneous evidence is inadmissible to vary the terms of a written contract. In doing so we think he erred, since the defendant was not trying to vary the terms of a written contract, but was endeavoring to show by the evidence excluded that there had been a partial failure of consideration. This the law recognizes he has a right to do, notwithstanding the general parol evidence rule, it being no longer an open question in this state that—

"One is not precluded from showing by parol that the real consideration of a contract is in fact different from the one actually recited in the instrument, for the purpose of proving that what is thus shown to be the true consideration has failed." *Rheney v. Anderson*, 22 Ga. App. 417, 418, 96 S. E. 217.

See, also, *Anderson v. Brown*, 72 Ga. 713 (3); *Burke v. Napier*, 106 Ga. 327, 32 S. E. 134; *Camp v. Matthews*, 143 Ga. 393, 85 S. E. 196; *Simmons v. International Harvester Co.*, 22 Ga. App. 358, 96 S. E. 9.

[2] The only other special assignment of error complains of the exclusion of a deed tendered in evidence by the defendant, and this ground, under repeated rulings of the Supreme Court and of this court, cannot be considered, since the documentary evidence referred to is not set forth either literally or in substance in the ground of the motion for a new trial or in an exhibit thereto. *Arnold v. Mitchell*, 23 Ga. App. 658, 99 S. E. 135, and cases cited.

For the reason stated above, the court erred in overruling the motion for a new trial.

Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(27 Ga. App. 524)

SOUTHERN FLOUR & GRAIN CO. v. CENTRAL TEXAS EXCH. NAT. BANK.
(No. 12110.)

(Court of Appeals of Georgia, Division No. 2.
Nov. 1, 1921. Rehearing Denied
Nov. 18, 1921.)

(Syllabus by the Court.)

1. Carriers ⇐58—Bank with which draft attached to bill of lading deposited held owner of the grain shipped.

Where a purchaser orders from a seller grain which is consigned by the seller to itself, with a memorandum on the bill of lading to notify the purchaser, and contemporaneously the seller draws a draft on the purchaser for the price of the grain, payable to a bank, to which is attached the bill of lading, indorsed by the seller, or in blank, and deposits with the bank the draft with bill of lading attached, and the amount of the deposit is credited to the depositor's general account, the bank becomes the purchaser of the draft with bill of lading attached, and the owner of the grain represented thereby.

2. Carriers ⇐58—Bank holding draft with bill of lading held entitled to maintain trover when purchaser refused to pay or surrender grain; bank suing in trover entitled to amount of draft with interest when not more than highest value of grain.

Where, in the case above stated, the bank presents the draft, with the bill of lading, to the purchaser of the grain and demands payment, and the purchaser refuses to pay the draft or to deliver the grain on demand, the bank has the right to bring an action of trover against the purchaser and to demand a verdict for the amount of the draft, with 7 per cent. interest, where the amount is not more than the highest proved value of the grain between the date of the conversion and the trial. *O'Neill Mfg. Co. v. Woodley*, 118 Ga. 116, 44 S. E. 980; *Milltown Lumber Co. v. Carter*, 5 Ga. App. 353, 63 S. E. 270.

3. Carriers ⇐58—In trover by bank holding draft with bill of lading, direction of verdict for amount of draft with interest held not error.

There was no error in directing a verdict for the plaintiff for the amount of the draft with 7 per cent. interest, this being less than the highest proved value of the grain, which the plaintiff had elected to take, and which the evidence, with all reasonable inferences and deductions therefrom, proved was its legal right.

(Additional Syllabus by Editorial Staff.)

4. Carriers ⇐58—Evidence held not to show seller was agent of holder of bill of lading in making agreement with buyer.

Where the sellers of grain deposited bill of lading and draft for the price with a bank, evidence held not to show that the sellers' representative in agreeing that the buyer might hold such grain as a margin against loss on other shipments was acting for or on behalf of the bank.

5. Carriers ⇐58—Evidence held not to show that bank holding draft and bill of lading surrendered its title.

Where a bank holding the draft and bill of lading for a shipment of grain permitted it to be delivered to the buyer for storage to prevent damage to the grain, evidence held not to show that it surrendered its title thereto.

6. Carriers ⇐58—Doctrine as to innocent person to bear loss from third person's acts held inapplicable against holder of bill of lading.

Where the bank, holding the draft and bill of lading for a shipment of grain, permitted delivery to the buyer for storage, and the sellers thereafter agreed that the buyer might hold it as margin to protect against loss on other shipments, the doctrine that the one of two innocent persons who put it in the power of a third person to inflict injury must bear the loss could not be invoked against the bank's legal rights.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by the Central Texas Exchange National Bank against the Southern Flour & Grain Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The Central Texas Exchange National Bank brought an action of trover against the Southern Flour & Grain Company for two carloads of oats. At the appearance term the defendant filed a general denial. At the beginning of the trial it filed two amendments, setting up in substance the following defenses: The defendant had purchased from the firm of McKie & Tilton, in Waco, Tex., a number of carloads of oats to be shipped to Atlanta, Ga. These oats were shipped by the firm in Texas under bills of lading with attached drafts on the defendant, drawn by the firm and payable to the plaintiff bank. It was claimed by the defendant that a number of these carloads did not come up to the grade contracted for, and thereupon the defendant and the sellers of the oats began negotiations for the purpose of adjusting the contracts between them as to the grades of the oats, including the two carloads involved in the present suit. When these carloads arrived in Atlanta they were graded "hot, musty, and wet." Thereupon the defendant wired to McKie & Tilton, informing them of the defective condition of these two carloads; their telegram containing the following: "Instruct bank to release lading. Will store in order to save ruining." The drafts and bills of lading covering these two cars were in the hands of the Third National Bank of Atlanta, having been forwarded by the plaintiff bank for collection. On receipt of this telegram from the defendant, McKie, of McKie & Tilton, went to the plaintiff bank in Waco and exhibited the telegram, requesting the bank for a release of the bills of lading, in order

that the cars might be stored, and asked that it be complied with. Thereupon the plaintiff bank telegraphed the Third National Bank, authorizing it to surrender to the defendant the bills of lading covering the two cars involved in the suit.

It is further alleged by the grain company, as a matter of defense, that at this time there were also seven cars of oats in Atlanta against which drafts on the grain company and bills of lading were held for collection by the Third National Bank, against which the grain company held various claims arising out of off grades of the oats purchased from McKie & Tilton. At this time McKie, of the firm of McKie & Tilton, went to Atlanta for the purpose of adjusting the differences, and had an interview with the president of the grain company. As a result of this interview McKie agreed with the grain company that if it would pay the drafts against the seven other cars the grain company might hold the two cars involved in this suit, and which had been released for storage as a margin to cover deductions justified by off grades in the seven cars paid for, and the defendant alleged that the off grades of the seven cars totaled \$840.06, which in the present suit is set up by the grain company as a counterclaim against the claim of the plaintiff bank.

The grain company alleges also as a matter of defense that it had no notice, and did not know until after it had paid the drafts covering the seven cars that the bills of lading covering the two cars in suit belonged to the plaintiff bank. It further alleges that the plaintiff bank authorized McKie, of the firm of McKie & Tilton, to come to Atlanta for the purpose of adjusting the differences alleged, and that any arrangement or adjustment made by McKie with the grain company in Atlanta was made when he was acting as the agent of the plaintiff bank, and for this reason the bank was bound by McKie's agreement with the grain company that the two cars in suit should be left with the defendant to indemnify it for any differences in the grades of the oats.

The undisputed evidence showed that drafts covering the cars in question were drawn on the defendant grain company by McKie & Tilton, payable to the plaintiff bank, which drafts the plaintiff bank bought, paying the full amount thereof, and credited to the account of McKie & Tilton, the bills of lading representing the oats being attached to the drafts, thereby putting the title to the oats in the bank. Subsequently the plaintiff bank released the bills of lading covering the two cars in suit, in compliance with the request of McKie & Tilton, made in pursuance of the telegram from the grain company, solely for the purpose of storing, in order to prevent the ruin of the oats, and the grain company was never authorized to make any other disposition of the oats,

unless the plaintiff was bound by the agreement of McKie in reference thereto. The evidence further showed that immediately after the grain company got possession of the two cars of oats it began to sell them, receiving 20 to 24 cents a bushel more than the amount of the original purchase price. The bill of exceptions contains a large mass of evidence touching the grades and conditions of the oats in the other cars received by the defendant from McKie & Tilton, with a view of establishing the amount of the alleged counter-claim. On the question of the agency of McKie for the plaintiff bank the only evidence of a positive character throwing any light thereon is found in the evidence of Mr. Du Pree, an officer of the plaintiff bank, who testified as follows:

"I have not at any time, either directly or through any authorized agent, surrendered our claim of ownership over those two cars of oats covered by the bills of lading referred to. The suit being conducted in Atlanta, Ga., about these two cars of oats, is being prosecuted with my knowledge and authority. The account of McKie & Tilton was credited in full upon the date the items were deposited in our bank. The telegram from the Southern Flour & Grain Company, under date of September 12, asking McKie & Tilton for the privilege of storing these cars, or rather the contents of the cars, was immediately brought to the bank by McKie & Tilton, and they requested that we grant the permission, which was done. It was not the purpose or intention of the bank, in the granting of their request, to give authority to them to sell it; these are new people to us. We knew nothing about them and we were simply seeking to assist our customers in coming to a common understanding with their client, and this was followed by Mr. McKie's visit to Atlanta, upon which occasion he hoped to do the same thing."

Referring to the same subject Mr. Hoppe, the president of the defendant grain company, testified that—

"Mr. McKie stated the purpose of his visit was to adjust the claims on the cars we had paid and on those that were unpaid, and the payment of the drafts held in the Third National Bank, including the drafts covering the cars sued on. * * * He said that if we would pay the seven drafts we could hold the two cars turned over to us without pay to protect us against any loss or difference in grade of the seven cars unpaid. * * * Mr. McKie did not tell me, while he was in Atlanta, at any time before we paid those seven drafts, that these drafts and the two drafts covering the two cars sued for belonged to the Central Texas Exchange National Bank. * * * He told me they were his, and, as I stated in this answer, that we could hold them as a margin."

Evidence was also introduced to show that demand for the payment of the drafts covering the two carloads of oats was made on the defendant grain company subsequently to the negotiations between McKie and the grain company and the refusal by the

grain company either to pay the drafts drawn on it for the oats or to return the oats. At the conclusion of the evidence the judge directed a verdict for the plaintiff for the amount of the drafts.

McElreath & Scott, of Atlanta, for plaintiff in error.

Smith, Hammond & Smith, of Atlanta, for defendant in error.

HILL, J. (after stating the facts as above). [1, 2] 1. Under well-settled law and the repeated rulings of the Supreme Court, the undisputed evidence proved that the plaintiff bank held title to the two carloads of oats involved in the suit.

"Where a consignor of goods delivers them to a common carrier to be transported to a distant point, consigned to the order of the shipper, with direction to notify a designated person at the place of delivery, and a bill of lading is duly issued by the carrier to the consignor, and the latter attaches the bill of lading to his draft for the price of the goods on the person to be notified, and delivers it with the bill of lading, which is indorsed in blank, to his bank to be placed to his credit on his general account, and the amount of the deposit is credited to the depositor's general account and drawn against by him, the bank acquires title to the goods represented by the bill of lading." *Alexander v. First National Bank of Fresno*, 140 Ga. 266(2), 78 S. E. 1071.

The undisputed evidence in this case places the plaintiff bank clearly within the principle of law here announced. See, also, *National Bank of Webb City v. Everett*, 136 Ga. 372, 71 S. E. 660. The plaintiff having proved title, conversion, refusal to deliver or to pay on demand, it was entitled to a verdict unless the matters of defense set up caused such a conflict in the evidence as would require solution by a jury.

[3, 4] 2. It may be conceded that the defendant proved, as claimed, that an agreement had been entered into between it and McKie, representing McKie & Tilton, from whom the defendant had purchased, that the grain company could keep the two carloads of oats as an indemnifying margin against off grades of the oats contained in the other seven cars. But it must be conceded also that this arrangement constituted no defense unless McKie was acting for, or on behalf of, the plaintiff bank. And this is the claim of the defendant company. But this mental attitude is not only not based on evidence relating to the subject of agency between McKie and the plaintiff bank, but the only evidence on the subject is directly and positively to the contrary. The officer of the bank testified positively that the bank had never, directly or through any authorized agent, surrendered its claim of ownership over the two cars of oats covered by the bills of lading, and the only other witness on the subject is the president of the defendant company, who tes-

tified that McKie had positively told him, when he was endeavoring to adjust the differences arising out of the off grades of the oats, that they belonged to McKie & Tilton. This is the only evidence on the subject of agency between McKie, of McKie & Tilton, and the plaintiff bank, and, instead of tending to establish that relationship, it expressly negatives it.

[5] 3. The defendant grain company insists that if the plaintiff bank did hold title to the two carloads of oats it had surrendered the title thereto when they authorized the Third National Bank to deliver to it the bills of lading covering the two cars, and that the circumstances were sufficient to authorize the inference that the surrender was made for the purpose of enabling McKie, representing McKie & Tilton, to adjust the matters of difference between the defendant and McKie & Tilton, and that the arrangement which had thereupon been entered into by the defendant and by McKie was binding upon the plaintiff. This contention is not supported by the evidence. To determine whether or not the plaintiff had surrendered title to the two cars, we must consider the evidence which is not in conflict. This shows that the defendant company got possession of the cars as a bailee for the plaintiff bank and for the sole purpose of storing the cars to prevent the ruin of the oats. This was the purpose of the bailment, and, as far as the evidence discloses, the plaintiff bank relied solely on this fact. The purpose of this bailment was, without any authority whatever, afterwards changed by McKie, of McKie & Tilton, who authorized the grain company to hold the two cars as a margin for security for alleged claims against other cars already paid for. This apparently was a fraud perpetrated, not by the bank, or with knowledge on the part of the bank that it was being perpetrated, but it was perpetrated by a third party without the slightest authority from the bank, and after this party had sold to the bank the oats in question, and to induce the grain company to pay the drafts for the other oats.

[6] 4. Learned counsel for the plaintiff in error, in their able and exhaustive brief, failing to establish any agency whatever between McKie & Tilton and the plaintiff bank that would authorize the inference that the bank intended to release its title to the two carloads of grain or change the temporary character of its bailment in any manner, insists that, if neither the Texas bank nor the grain company was guilty of fraud and both were in a legal sense innocent, the loss should fall on the Texas bank, on the principle that when one of two innocent persons must suffer by an act of a third person, he who put it in the power of the third person to inflict the injury must bear the loss. This is a sound principle of equity, but we do not think, under the evi-

dence, that it can be invoked against the legal rights of the plaintiff bank. It may be conceded that the grain company was under the impression that McKie & Tilton were the owners of the oats in question, and therefore had a right to make any arrangement with reference to them, but the evidence is undisputed and irresistible that the plaintiff bank had the title to the oats in question and consented to their delivery to the grain company for the sole purpose of storage, and never at any time, either directly or through any authorized agent, surrendered this claim of ownership. We do not feel warranted in concluding that the defendant grain company obtained possession of the bank's property under false pretenses of a bailment with intent to appropriate the property to its own use.

It is clearly shown that the act of the third person which might result in injury to one of two innocent persons was the act of McKie in untruthfully claiming to be the owner of the oats in question. The evidence clearly shows that the plaintiff bank as an innocent party would suffer great loss if the grain company, after getting possession of these oats under the pretense of storing them in order to save them from ruin, and at once beginning to sell them at a price from 20 to 24 cents a bushel greater than the original purchase price, should be allowed to retain possession of this money to pay the alleged counterclaim of about \$800 against McKie & Tilton. This would amount to an appropriation of the property of the bank that is wholly unwarranted by the facts, the law, or equitable principles.

5. In an action of trover the plaintiff has the option to demand a verdict either for damages alone, or for the property alone and its hire, if any. Civil Code 1910, § 5930. In the present case the plaintiff elected a money verdict for the highest proved value of the property. And the evidence from the grain company's books showed that it had sold all the oats in question for an amount exceeding the amount of the original drafts, which was the amount sued for in this case. The learned trial judge ruled that the minimum of the plaintiff's recovery was the amount of the drafts, and for this amount the verdict was directed. A careful consideration of the evidence in the case convinces us that the verdict as directed by the court was demanded, and certainly the defendant cannot be heard to complain as to the amount of the verdict, as its own evidence proves that it has received from the sale of the oats not only a profit over the contract price, but a sum exceeding the amount of the drafts for which the verdict was directed.

Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(27 Ga. App. 613)

MORAE v. STATE. (No. 12718.)

(Court of Appeals of Georgia, Division No. 1.
Nov. 16, 1921.)

(Syllabus by the Court.)

1. Criminal law \S 823(4)—Failure to define crime not error in view of indictment and charge as to burden of proof.

Where an indictment is full and minute and covers every element of the crime with which the accused is charged, and the judge in his instructions to the jury reads to them the indictment, and tells them that the burden is upon the state to establish beyond a reasonable doubt the guilt of the accused as charged in the indictment, it is unnecessary to give to the jury the definition of the crime as laid down in the Code.

2. Criminal law \S 814(17)—Failure to charge on circumstantial evidence not error when evidence not wholly circumstantial.

This case is not dependent wholly upon circumstantial evidence, and it furnishes no ground for a new trial that the court failed to charge the law touching such evidence.

3. Sufficiency of evidence.

There is some evidence to support the verdict.

(Additional Syllabus by Editorial Staff.)

4. Criminal law \S 1159(2)—Verdict supported by evidence cannot be disturbed.

Where there is some evidence to support the verdict, the Court of Appeals, in the absence of legal error, has no authority to interfere.

Error from Superior Court, Wilcox County; O. T. Gower, Judge.

W. B. McRae was convicted of simple larceny, and he brings error. Affirmed.

Hal Lawson, of Abbeville, for plaintiff in error.

J. B. Wall, Sol. Gen., Jesse Grantham, and Saml. Kasewitz, all of Fitzgerald, for the State.

BLOODWORTH, J. [1] 1. The first ground of the amendment to the motion for a new trial alleges that the judge erred because he "failed to give in charge to the jury the legal definition of simple larceny." The indictment set out the charge of simple larceny fully and minutely. In his instructions to the jury the judge quoted all of that portion of the indictment which charged the defendant with simple larceny, including the words "did wrongfully and fraudulently take and carry away with intent to steal the same." The judge further charged the jury that—

"The burden is upon the state to establish to your satisfaction beyond a reasonable doubt the guilt of the accused as charged and alleged in this bill of indictment before you would be authorized to convict."

In *Smith v. State*, 63 Ga. 168 (14), the Supreme Court held:

"The accusation being under section 4627 of the Code, and being full and minute in setting forth the acts laid to the prisoner's charge, it was unnecessary to read to the jury any of the Code, or to state what particular act or acts had to be proved in order to make out the case. This information was conveyed to the jury by reading to them the accusation, and calling upon them to render a verdict of guilty or not guilty."

Under the above ruling and when the entire charge is considered, there is no merit in this ground of the amendment to the motion for a new trial.

[2] 2. The other ground of the amendment to the motion for a new trial alleges error because "the court failed to charge the law of circumstantial evidence as laid down in the Penal Code of Georgia, § 1010." This case does not rest entirely upon circumstantial evidence, and without a proper and timely request therefor the court did not err in failing to instruct the jury on the law of circumstantial evidence. "It is only where a case is solely dependent upon circumstantial evidence that the court is required to instruct the jury as to the law of such evidence." *Hegwood v. State*, 138 Ga. 274 (1), 75 S. E. 133. In *Reddick v. State*, 11 Ga. App. 150 (3), 74 S. E. 901, this court held:

"When the facts from which the inference of guilt or innocence is to be drawn are all established by direct proof, and only the intent with which the alleged criminal act was committed, or the degree of criminality, must be inferred, the trial judge, in the absence of a timely request, is not required to give in charge to the jury the usual rule applicable to circumstantial evidence."

See, also, *Scarboro v. State*, 24 Ga. App. 29 (7), 99 S. E. 637, and citations.

[3, 4] 3. No error was committed upon the trial: there is some evidence to support the verdict, and "this court has repeatedly held that, in the absence of legal error, it has no authority to interfere with a verdict supported by some evidence."

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 619)

DEVOE v. BEST MOTOR CO. (No. 12450.)

(Court of Appeals of Georgia. Division No. 1. Nov. 17, 1921.)

(Syllabus by the Court.)

1. New trial ¶128(2)—Motion must show ground of exclusion of evidence and that it was over objection.

In order for the rejection of testimony to be a ground for a new trial, the motion for a

new trial must show upon what ground the testimony was excluded (unless it is shown that the judge rejected the testimony upon his own motion), and that it was excluded over the objections of the plaintiff in error or his counsel made to the court at the time of the exclusion. *Central of Ga. Ry. Co. v. Jaques*, 23 Ga. App. 396 (2), 98 S. E. 357; *Steed v. Cruise*, 70 Ga. 168(4); *Summerlin v. State*, 25 Ga. App. 568 (1), 571, 572, 103 S. E. 832. Under the above ruling, the first ground of the amendment to the motion for a new trial is too defective to be considered.

2. Release ¶24(2), 58(4)—Question whether plaintiff understood what he was signing held for the jury; plaintiff held not required to tender back amount paid before pleading fraud.

The question as to whether the plaintiff, who could not read or write, understood what he was signing when he made his mark to the settlement paper, should have been submitted to the jury. It was not necessary, under his testimony, for him to tender back the money before he could plead fraud in getting him to sign a paper in settlement of his claim. See *Butler v. Richmond & Danville R. Co.*, 88 Ga. 594 (2), 15 S. E. 668.

3. Verdict improperly directed.

Under the above rulings it was error for the court to direct a verdict for the defendant.

Luke, J., dissenting.

Error from City Court of Floyd County; W. J. Nunnally, Judge.

Action by Charles Devoe against the Best Motor Company. Judgment for defendant, and plaintiff brings error. Reversed.

See, also, 25 Ga. App. 257, 103 S. E. 40.

Harris & Harris, of Rome, for plaintiff in error.

J. P. Jones, of Rome, and E. V. Carter, Sr., of Atlanta, for defendant in error.

PER CURIAM. Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

LUKE, J., dissents.

LUKE, J. (dissenting). 1. I cannot concur in the ruling announced in the first paragraph of the decision in this case. I have heretofore upon two occasions dissented from similar rulings. The only burden that has to be carried by a plaintiff in error in an assignment of error upon the rejection of testimony offered by him is that of showing that the evidence offered has legal and probative value in the case. If such testimony be rejected, it matters not upon what ground of objection it was excluded. The ground of objection, whatever it may be, could certainly have no effect upon the admissibility of the evidence. The ground of objection

could not add to or take from the evidence—its legality upon the issues involved in the case. The majority of the court, in my opinion, has been confused by the precedents which require that objections urged to the admissibility of evidence admitted be shown when error is assigned.

2, 3. Neither can I agree to the conclusion reached in the ruling stated in paragraph 2 of the decision, nor, therefore, to the judgment of reversal in this case. This was an action brought by Devoe against Best Motor Company for damages on account of the death of his minor son, Charles Devoe, Jr. The suit was met by a plea of accord and satisfaction, supported by a writing signed by Devoe acknowledging receipt of \$152.75 in full settlement for his son's injury. The plaintiff sought to avoid the effect of this instrument by proof of fraud in its procurement. The evidence in this regard was substantially as follows: The morning after his boy's injury the plaintiff went to see one Best, manager of the Best Motor Company, and asked him what the company proposed to pay him for the loss of his boy. Best directed him to Mr. Willingham, who told him he was sorry his boy was hurt, and further said:

"We are going to help you some. * * * It is better to get a little than none. We will give you \$50 to rest up a few weeks."

Plaintiff testified also that he could not read or write; that his hearing was defective; that he was overwrought because of his son's death; and that, though the receipt was read over to him, he signed it in ignorance of its contents. Defendant's evidence was, in effect, that the plaintiff was not overreached, that the writing was carefully read over and explained to him, and that neither his appearance nor his conduct indicated in the slightest degree that he did not know what he was signing. It was admitted that the plaintiff received \$50 in cash. The remainder of the money receipted for was paid for the undertaker's bill and the hospital bill. None of this money was ever repaid or tendered back.

Answering the contention of the plaintiff that the settlement was made by a stranger, and was therefore invalid, the reply is: (1) That the evidence does not warrant this conclusion; and (2) that, in any event, if what is given by the stranger is accepted in satisfaction by the creditor, and his act is author-

ized or subsequently ratified by the debtor, this is a complete accord and satisfaction. 1 Corpus Juris, 535, §§ 27, 28, and the leading case of *Leavitt v. Morrow*, 6 Ohio St. 72, 67 Am. Dec. 834. It follows that it was not improper to exclude the evidence tending to show that an insurance company paid Willingham's fee and also the money expended under the settlement. Moreover, the judge's order allowing the amendment to the petition setting up fraud recited that "that portion [of the amendment] alleging that payments were made by an insurance company is refused," this order was not excepted to, and it is doubtful if the pleadings would have authorized the introduction of the evidence excluded.

Plaintiff's contention that defendant had previously obligated itself to pay the hospital bill and the undertaker's bill, and that these items could not furnish any consideration for the settlement, even if admitted, does not change the complexion of this case. The \$50 actually paid the plaintiff was kept by him and never tendered back. It is the law of this state that—

"In order to obtain a rescission of the contract of release and recover upon the original cause of action, restoration or tender of the amount paid for the release is necessary." *Western & Atlantic R. Co. v. Atkins*, 141 Ga. 743 (2), 82 S. E. 139.

The real question for decision here is: Did the facts of this case relieve plaintiff from restoring or tendering back the fruits of his contract? He contends that his case comes within the rule of the case of *Butler v. H. & D. Railroad Co.*, 88 Ga. 594, 15 S. E. 668. The rule there established is that it is not necessary to restore or to offer to restore benefits received on account of a claim or debt entirely distinct from the subject-matter of the accord and satisfaction. For cases elucidating and distinguishing that decision, see *Western & Atlantic R. Co. v. Atkins*, supra; *Western & Atlantic R. Co. v. Burke*, 97 Ga. 560, 25 S. E. 498; *Petty v. Brunswick, etc., R. Co.*, 109 Ga. 666, 35 S. E. 82. In the case at bar it is neither pleaded nor proved that the plaintiff had any claim against the defendant other than that arising out of the tort sued for. Clearly the plaintiff's attempt to avoid the necessity of restoring or tendering back the fruits of his contract was ineffectual, and the judgment of the court directing a verdict for the defendant, in my opinion, was correct.

(27 Ga. App. 610)

PHINAZEE v. STATE. (No. 12711.)(Court of Appeals of Georgia, Division No. 1.
Nov. 16, 1921.)*(Syllabus by the Court.)*

1. Homicide \S 309(1)—Instruction on provocation in statutory language without explanation or qualification held not error.

The court when instructing the jury upon the law of manslaughter did not err in charging all of section 65 of the Penal Code of 1910, including the provision that "provocation by words, threats, menaces, or contemptuous gestures shall in no case be sufficient to free the person killing from the guilt and crime of murder," although the provision quoted was charged without explanation or qualification. *Deal v. State*, 145 Ga. 33(1), 88 S. E. 573; *Id.*, 18 Ga. App. 70(7), 88 S. E. 902.

2. Instructions not erroneous.

The instructions complained of upon the subjects of "other equivalent circumstances," and "cooling time," were distinctly favorable to the accused, and were not harmful error (if error at all) for any reason assigned.

(a) The excerpt from the charge of the court upon the subject of justifiable homicide, given in connection with the charge upon "cooling time," when considered in connection with the entire charge, was sufficiently full, in the absence of a request for more particular instructions upon that subject.

3. Homicide \S 300(5, 9), 302, 303—Instruction held not to confuse law of justifiable homicide and self-defense; instruction held not erroneous because of absence of evidence of mutual combat; instruction as to justification properly omits defense of habitation or property when there is no evidence thereof.

Complaint is made of the following charge: "Every person has the right to take human life when necessary to prevent the loss of his own life, or in defense of his person against one who manifestly intends or endeavors, by violence or surprise, to commit a felony on him." This charge is not subject to the exceptions: (1) That it "confused and commingled the law of justifiable homicide as contained in sections 70 and 71 of the Penal Code with the law of self-defense as contained in section 73 of the Code," or (2) that the provisions of section 73 were not applicable to the case, as there was no evidence of mutual combat. The charge here complained of consisted substantially of the applicable portions of section 70, and did not contain any part of section 73.

(a) In giving the above charge the court properly omitted that part of the section relating to the defense of habitation or property, as neither the evidence nor the defendant's statement authorized any instruction upon those phases of the law of justifiable homicide.

4. Criminal law \S 1178—Ground for new trial treated as abandoned when not referred to or insisted upon.

The fifth ground of the amendment to the motion for a new trial is treated as abandoned, since it is not referred to in the brief of counsel for the plaintiff in error and there is no

statement in the brief that all the grounds are insisted upon.

5. Ground of motion without merit.

There is no substantial merit in the sixth ground of the amendment to the motion for a new trial.

6. Homicide \S 309(4)—Evidence as to mutual intent to fight held to justify instruction on voluntary manslaughter; defendant's statement that she did not intend to kill deceased held to authorize instruction on manslaughter.

"It is well settled by numerous rulings of the Supreme Court and of this court that the law of voluntary manslaughter may properly be given in charge to the jury on the trial of one indicted for murder, where, from the evidence or from the defendant's statement to the jury, there is anything deducible which would tend to show that he was guilty of manslaughter, voluntary or involuntary, or which would be sufficient to raise a doubt as to whether the homicide was murder or manslaughter." *May v. State*, 24 Ga. App. 379, 382, 100 S. E. 797, 799, and citation.

(a) In the instant case some of the evidence and the defendant's statement to the jury showed that a very brief time before the homicide the defendant and the deceased quarreled, that the deceased called the defendant vile and opprobrious names, that both left the scene of the quarrel and returned near thereto almost immediately, the deceased with a razor and the defendant with a pistol, and that the deceased advanced upon the defendant with the razor in her hand, and that the defendant shot and killed her. These circumstances were amply sufficient to show a mutual intent to fight, and the court properly charged the law of voluntary manslaughter. Furthermore, the defendant, in her statement to the jury, said that when she was told that the deceased was dead she said that she "didn't intend to kill her." This statement tended to show that the killing was not necessary to save the defendant's life, and that she so realized at the time of the killing, and this admission, in connection with the evidence adduced, authorized a charge upon the law of manslaughter; there being no contention that the shooting of the deceased was accidental.

7. Criminal law \S 935(1)—New trial properly denied when verdict authorized.

The verdict was authorized by the evidence, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Lamar County; W. E. H. Searcy, Jr., Judge.

Eldora Phinazee was convicted of homicide, and she brings error. Affirmed.

Redding & Lester, of Barnesville, for plaintiff in error.

E. M. Owen, Sol. Gen., of Zebulon, for the State.

BROYLES, O. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 515)

BRANDT v. BUCKLEY. (No. 12580.)

(Court of Appeals of Georgia, Division No. 2.
Oct. 24, 1921. Rehearing Denied
Nov. 18, 1921.)

(*Syllabus by the Court.*)

1. Corporations \S 121(7)—Measure of damages for nondelivery of stock paid for in advance is actual or market value.

Where the purchase price of corporate stock has been paid to the seller in advance, and he fails to make delivery in accordance with the contract, the general measure of damages recoverable by the buyer for the breach is the actual or market value of the stock at the time when and the place where delivery should have been made.

2. Corporations \S 121(5)—Purchaser suing for nondelivery of stock must submit evidence of actual or market value.

In an action by a purchaser of corporate stock to recover damages in such a case, it is incumbent on him to submit evidence as to the actual or market value of the stock at the time and place when and where delivery should have been made.

3. Corporations \S 121(5)—Evidence \S 113 (4)—Verdict for damages for nondelivery of stock unauthorized when there was no evidence of value; evidence of market value three years after breach not evidence of value; no presumption that par value was actual value when evidence showed depression in value.

This being such a case, and there being no evidence of the actual or market value of the stock at the time when and place where it should have been delivered under the contract, the verdict for the plaintiff for general damages was unauthorized, and for this reason the refusal of a new trial was error.

Error from Superior Court, Clarke County; W. L. Hodges, Judge.

Action by Paul Buckley against R. Brandt. Judgment for plaintiff, and defendant brought error to the Supreme Court, which transferred the case (107 S. E. 773) to the Court of Appeals. Reversed.

In November, 1915, Paul Buckley brought an action against Rudolph Brandt to require the defendant to specifically perform a contract by delivering to him certain shares of corporate stock which he had purchased of the defendant, under the terms of a contract between them executed January 10, 1914, and for which stock he had, on the date of the contract, paid the defendant the agreed price. A copy of the contract was attached to the petition as an exhibit. It appears from the contract that Brandt, in consideration of \$1,000 paid him by Buckley, "and other valuable consideration," sold to Buckley a third interest in two specified and numbered letters patent, together with a like interest in any

subsequent patents or improvements, in connection with a certain computing cloth-measuring machine covered by the letters patent, and that might be made prior to the organization of a corporation for the purposes set forth in the contract. Brandt further agreed to organize, together with such persons as he might associate with him, a corporation for the purpose of manufacturing and selling computing cloth-measuring machines under the patents referred to, and such other patents as might be granted to him in connection with such machine, and to sell and transfer to such corporation as might be so organized all of such letters patent, receiving from the corporation in payment therefor such number of its shares of stock as might be agreed upon between him and his associates in the enterprise, and that when the shares of stock should be so issued to him he would transfer and assign to Buckley one-third of the number of shares of such stock that might be issued to Brandt. The petition alleges that the defendant and his associates had a charter granted to them under the corporate name of the American Cloth Register Company, and that the corporation was duly organized and 4,400 shares of the common stock and 400 shares of the preferred stock of the corporation were issued to Brandt, and 3,600 shares of stock in the corporation were held in the treasury as treasury stock. It is alleged that under the contract he is entitled to have transferred and assigned to him by the defendant one-third of all the shares issued to the defendant, but that the defendant refused, on demand, to make such transfer. The main and substantial prayer of the original petition is for a decree requiring the defendant to specifically perform his contract by assigning or transferring to the plaintiff one-third of the stock mentioned.

On the trial the petition was first amended as follows:

"Petitioner alleges that by reason of the failure of the said Brandt to secure the additional patents for the improvements he had so made on said invention and to make formal transfers of the same to said American Cloth Register Company, as in equity and good conscience he was bound to do, the ownership of said patents and inventions by said company is uncertain and the value of the stock in said American Cloth Register Company is necessarily depressed, so as to make a recovery for the value of the stock to which plaintiff is entitled * * * [a] wholly inadequate and insufficient measure of relief to petitioner. * * * As hereinbefore alleged, the said Brandt is the owner of a majority of the stock in the American Cloth Register Company, and he is likewise the president and general manager of the same, and absolutely controls and dominates the policy of said corporation. Said defendant is thus in a position to manipulate

the affairs of said company to fit the exigencies of this litigation, and has exercised his power in the manner above stated so as to render the value of the stock in said corporation small, uncertain, and difficult of ascertainment. Petitioner further alleges that the value of said stock cannot be readily ascertained, as in the case of ordinary corporations, but that the same is of a peculiar character and its value is to a large extent prospective and dependent upon whether formal transfers of all patents, letters patent, and inventions which should have been made to it have been so made, and likewise dependent upon a successful and profitable operation of the business, which has not been attempted by said defendant. The conduct of said defendant, Brandt, with reference to said corporation has thus made uncertain and difficult of ascertainment the value of said stock, and petitioner's damages are irreparable, and the only fair and adequate relief that can be granted petitioner is the rendition of a decree for specific performance of said defendant's contract with the plaintiff as prayed."

The testimony of the plaintiff tended to sustain the allegations of this amendment.

The plaintiff submitted no evidence as to the value of the stock, either common or preferred, and the only evidence tending to show its value at any time was the testimony of the defendant. He testified:

"The last sales made of the stock of the American Cloth Register Company (the corporation whose stock is here involved) were made in September, 1918. I don't know exactly how many shares were sold, but I think about 10 or 12. The par value of the stock is \$100 per share, and this stock was sold at the rate of \$75 per share for the preferred stock. The common stock has never been sold. No price has ever been put on it."

After the defendant had so testified, a second amendment to the petition was made, as follows:

"The defendant having in his pleading and testimony in the court shown that he has by voluntary act of his own transferred and assigned to others 440 shares of the common stock in the American Cloth Register Company and 40 shares of the preferred stock in said company, which stock the plaintiff alleges he was entitled to have transferred to him under the contract sued on, and the defendant's counsel contending that a decree for specific performance of said contract could not be decreed for the reason that the plaintiff [the defendant?] has by the transfer of said stock put it out of the power of this court to enter any decree for specific performance, and plaintiff's counsel having taken the further position that a decree could not be enforced against the defendant for the reason that since the filing and service of the petition and process the defendant has voluntarily removed his domicile to the state of Connecticut and is now a resident of said state, the plaintiff now prays that damages be awarded him for the breach of said contract, and that the plaintiff be awarded as such damages the sum of \$15,666.66, being the value of 146½ shares of the com-

mon stock in said company at the value of \$100 per share and 13½ shares of the preferred stock of said company at \$75 per share."

The action having been converted by amendment into one for the recovery of damages for the failure of the defendant to deliver the corporate stock in pursuance of the contract set forth in the petition, a verdict was rendered in favor of the plaintiff for \$15,666.66, which was the specific amount of damages prayed for in the amendment of the plaintiff quoted above. The defendant moved for a new trial on the ground that the verdict was contrary to the evidence and without evidence to support it. Upon the overruling of the motion he excepted.

Green & Michael, of Athens, for plaintiff in error.

Erwin, Erwin & Nix, of Athens, for defendant in error.

HILL, J. (after stating the facts as above). [1, 2] This suit, as finally framed by amendment, was for damages on account of the breach of a contract for the delivery of certain corporate stock for which the plaintiff had paid the defendant. There is evidence to establish the contract and its breach by the defendant. The vital point is whether there is any evidence authorizing the jury to find that the amount of their verdict in favor of the plaintiff represents the damages recoverable under the law for the breach of the contract. The general rule is that the measure of damages recoverable of the seller for failure to deliver goods sold is the difference between the contract price and the market value at the time and place for delivery; and it is incumbent on one who seeks to recover such damages to submit evidence as to the market price at the time and place for delivery, in order to recover compensatory damages. In the absence of such evidence no actual damages can be recovered. To this general rule as to the measure of damages there are some exceptions. *Bloom v. Americus Grocery Co.*, 116 Ga. 784, 43 S. E. 54; *Sizer v. Melton*, 129 Ga. 143 (7), 58 S. E. 1055; *Edwards v. Hale*, 129 Ga. 302, 304, 58 S. E. 817; *Hardwood Lumber Co. v. Adam*, 134 Ga. 821, 68 S. E. 725, 32 L. R. A. (N. S.) 192. This is the general rule where the purchase price has not been paid. A contract for the sale of stock in a corporation is governed by substantially the same principles as a contract for the sale of any other personalty, both as to its formation and as to its construction and performance. 3 *Clark & Marshall, Private Corp.* § 608. And the remedy of the parties in the case of a breach of the contract for the sale of stock in a corporation is substantially the same as in the case of a contract for the sale of any other personal property. *Id.* § 615. The claim of

the buyer for damages for the failure of the seller to make delivery is ordinarily a claim for unliquidated damages, and the general damages recoverable in such a case, if the price has been paid in advance, is the market value of the subject-matter of sale, because by reasonable diligence the subject-matter may be obtained by the buyer in the market at its market value. 24 R. C. L. 69, § 335.

"In case of a nondelivery of stock in accordance with the contract, if the purchase-price has been paid, the general measure of damages is the actual or market value of the stock at the time when delivery should have been made, or, in other words, at the time of the breach of the contract." 14 C. J. 717, § 1097, and cases cited in note 58.

Where the buyer has paid the purchase price, and—

"stands on the contract, as by suing for its breach, he must be content if the law places him in the position he would have occupied if the contract had been performed. This it does by permitting the recovery of the market value of the property at the time and place when and where it should have been delivered." 2 Sutherland, Damages (4th Ed.) § 656, notes 75 and 76.

In *Bank of Culloden v. Bank of Forsyth*, 120 Ga. 575, 48 S. E. 226, 102 Am. St. Rep. 115, it was held that the measure of damages for the failure of a bank to make a transfer on its books and to issue a certificate therefor of stock in the bank owned by a purchaser is the value of the stock at the time of the demand and refusal to transfer and issue the certificate.

[3] There was no exception to the charge of the court in the instant case, and it is not in the record. We therefore assume that the court instructed the jury that the rule for the recovery of damages in the case was that which we have stated. There was no evidence tending to show the market value of the corporate stock at the time the defendant contracted to deliver it to the plaintiff. As set forth in the preceding statement of facts, the only evidence tending to show the value of the stock at any time was that of the defendant, who testified:

"The last sales made of the stock of the American Cloth Register Company (the corporation whose stock is here involved) were made in September, 1918. I don't know exactly how many shares were sold, but I think about 10 or 12. The par value of the stock is \$100 per share, and this stock was sold at the rate of \$75 per share for the preferred stock. The common stock has never been sold. No price have ever been put on it."

This evidence tended to show the value of the preferred stock in September, 1918, when the last sales of it were made, more than four years after the contract was executed, and

nearly three years after the institution of this suit, and, of course, nearly three years after the breach of the contract. This evidence, therefore, threw no light on the value of the preferred stock at the time the defendant should have delivered it under the contract, nearly three years previously. According to the evidence there was no market value for the common stock at the time the defendant agreed to deliver it, nor at any other time, as none of it had ever been sold, nor had any price ever been "put on it." Even if, in the absence of evidence of actual sales, the par value of paid-up stock is presumptively its market value, no such rule could apply in the case at bar, in view of the allegations of the first amendment made to the petition, which the plaintiff's evidence tended to sustain, to the effect that by certain acts of the defendant the value of the stock was greatly lessened, even from the organization of the corporation. So if the par value was \$100 per share, its value was greatly depressed by the alleged acts of the defendant. It was therefore incumbent upon the plaintiff to establish the actual value of the common stock at the time the defendant agreed to deliver it by showing the property of the corporation as compared with its liabilities, or its dividend earning capacity at that time. 14 C. J. 718, § 1099. There was no such evidence.

We confidently conclude that there was no evidence to authorize the verdict rendered in behalf of the plaintiff for \$15,866.66 as damages for defendant's breach of contract, and the court therefore erred in refusing a new trial.

Judgment reversed.

JENKINS, P. J., and STEPHENS, J., concur.

(27 Ga. App. 704)

BRANDT v. COMPUTING CLOTH-MEASURING MACH. CO. (No. 12581.)

(Court of Appeals of Georgia, Division No. 2
Nov. 18, 1921.)

(Syllabus by the Court.)

1. Courts ⇐217—When prayers for specific performance stricken, finding that contract was binding on defendant disregarded as surplusage.

An equitable petition filed in the superior court by its allegations was essentially a petition for specific performance of a certain contract with prayers for incidental relief. The petition contained also a prayer for a specific money verdict, based upon the binding effect of the contract in question. All the prayers of the petition were stricken by amendment, except that which asked for a money verdict and the further finding that the contract sued upon

(108 S.E.)

"is binding according to its terms and provisions" upon the defendant. A verdict was found in accordance with these prayers, and a writ of error was sued out to the Supreme Court. On considering the record that court (108 S. E. 61) ruled that the case be transferred to the Court of Appeals, as one at law based on contract. *Held:* The verdict, in substance and effect, was for the specified sum of money, and that portion thereof relating to the contract may be treated as surplusage.

(Additional Syllabus by Editorial Staff.)

2. Patents \Leftrightarrow 203—Evidence held to support recovery of amount agreed to be paid for assignment.

In an action against the assignee of patents on his agreement to pay the sum of \$2,000 therefor upon organization of a firm or company to manufacture and sell the patented machines, evidence held sufficient to support a recovery of such sum, as against the objection that the patents were worthless and the company organized to manufacture machines under different patents.

3. Appeal and error \Leftrightarrow 1033(9)—Defendant could not complain that verdict was for less than evidence warranted.

Where a verdict for plaintiff for \$2,000 would have been amply supported by the evidence, defendant could not complain that the jury found a verdict for only \$1,500.

Error from Superior Court, Clarke County; W. L. Hodges, Judge.

Suit by the Computing Cloth-Measuring Machine Company against R. Brandt. Judgment for plaintiff, and defendant brought error to the Supreme Court, which transferred the case (108 S. E. 61) to the Court of Appeals. Affirmed.

This was an equitable petition filed by the Computing Cloth-Measuring Machine Company against R. Brandt, in the superior court of Clarke county, asking for the specific performance of a contract and for other incidental relief. The contract, briefly stated, embraced certain letters patent upon a computing cloth-measuring machine, which had been issued by the commissioner of patents to Eugene A. Luster, and the contract assigned these patents, together with a model, with the absolute and exclusive right to manufacture and sell all machines and devices and all improvements that might thereafter be made upon the same in conformity with said patent rights and model. Under the terms of this contract, and as a consideration for the assignment of the patent rights and other privileges acquired by the defendant from the Measuring Machine Company, he agreed to organize a firm or company to manufacture and sell the machines that might be manufactured thereunder, and upon the organization of such firm or company he was to pay the measuring machine company \$2,000 in cash, and when a certain

number of machines had been sold he should pay the further sum of \$2,000, and that thereafter he or his assigns or successors in title were to pay a royalty for each machine sold up to the number of 1,000 machines. It was further agreed that Brandt should spend \$1,000, more or less, not exceeding \$2,000, in further perfecting such measuring machines and the organization of a firm or company to manufacture the same. The petition alleged that in pursuance of this agreement Brandt went forward and organized the company for the purpose of manufacturing and selling the machines, the said corporation having been chartered in the state of Delaware, under the name of the American Cloth Register Company, and under the terms of the contract the sum of \$2,000 was then due and payable. In the original suit the American Cloth Register Company was made a party defendant, and the measuring machine company sought to obtain jurisdiction of the Delaware corporation by service by publication. Subsequently this defendant, and all reference to it, was stricken from the petition. Among the prayers of the petition was one that judgment should be rendered against the said R. Brandt for \$2,000, which had become due, under the terms of the contract, upon the organization of the Delaware corporation. There was a further prayer that a decree be entered that the contract of May 8, 1913, which was the contract sued upon, "is binding according to its terms and provisions upon the said Brandt." By amendment all of the prayers of the petition were stricken therefrom by the plaintiff, except these two.

Brandt, in his answer, admitted organizing the Delaware corporation, but contended that, on being organized in pursuance of the agreement with the plaintiff, he found, after using his best endeavors to perfect the model obtained from the plaintiff, by the expenditure of large sums of money, he became convinced that the patent so acquired from the plaintiff was worthless, and he abandoned it; the paragraph of his answer on this point alleging as follows:

"Defendant distinctly avers that neither he nor his associates are operating under the Luster patents, being the patents referred to in the plaintiff's petition, but releases all rights and claims to said patents, and that the plaintiff in this case is entirely welcome to the same."

Other contentions raised by the defendant in his original answer and the amendments are to the effect that an official of the measuring machine company made certain false representations to him when he acquired the said patent rights. He further averred that he had expended a large sum of money and a great deal of his time and skill in

endeavoring to perfect the patents for the machines acquired from the plaintiff, much more than the \$2,000 which he had agreed to expend for the purpose of perfecting them, and that this sum amounted to \$13,000 or \$14,000, which he set up as a counterclaim in the nature of recoupment. Subsequently, however, by amendment he abandoned this counterclaim. On the trial all the material prayers were stricken from the petition, except the prayer that a decree should be entered pronouncing the contract binding upon Brandt, and the further prayer that the plaintiff should be given a judgment for \$2,000 against the said Brandt. Brandt abandoned all the defenses set up in his original answer, and on the trial of the case the only issues submitted to the jury were the two stated above, and he insisted that the Luster patents for the machine which had been assigned and transferred to him by the plaintiff were found to be worthless, after a faithful, earnest, and persistent effort on his part to perfect the same, and that thereupon he had abandoned these patents as worthless, and that the Delaware corporation which he had organized was for the purpose of acquiring inventions for a measuring machine which he had devised and for which he held patents entirely independent of the Luster patents. After considering the case made by these issues the jury returned a verdict against the defendant for \$1,500 principal and \$446 interest, and further found that the contract in dispute was binding upon Brandt; and judgment was entered accordingly. The defendant filed a motion for a new trial, which was overruled, and he excepted.

Green & Michael, of Athens, for plaintiff in error.

Erwin, Erwin & Nix, of Athens, for defendant in error.

HILL, J. (after stating the facts as above). [2] Originally filed as an equitable petition praying for the specific performance of a contract, all equitable features of the case were eliminated, by amendments, and, when the case reached the Supreme Court, on an investigation thereof the case was transferred to this court for adjudication, on the ground that, properly construed, the petition as amended made a plain action at law based on contract. Reduced to its last analysis, the petition as amended asked only for a money judgment of \$2,000, which it was alleged was due the plaintiff under the contract; for, of course, it could not be contended that the money was due unless the contract was valid and binding upon Brandt. This makes it necessary for this court to decide only the question made by this issue, and the evidence on this issue, although quite voluminous, may be substantially stated as follows:

There was no dispute that the contract as set out in the petition was entered into by the parties. Under the terms of this contract the Luster patents were transferred and assigned to Brandt for a consideration of \$4,000. Brandt agreed that he was to perfect the measuring machine covered by the Luster patent and was to organize a company for the purpose, and when this company was organized he was to pay the \$2,000 to the plaintiff, and when the machines were perfected he was to pay the additional \$2,000, and thereafter royalties on the machines as manufactured. The evidence clearly shows that, in accordance with the terms of this contract, Brandt did proceed to organize a company and did endeavor to perfect and manufacture the measuring machines covered by the Luster patents, which had been transferred to him by the plaintiff. He set up, however, as a defense to the payment of the \$2,000, that after an earnest and faithful endeavor he found that the Luster patents, or rather the machines according to the Luster patents, were so defective that they were worthless; that thereupon he abandoned the effort to perfect or manufacture this machine and proceeded to organize a company in Delaware for the manufacture of a different machine, wholly independent of the Luster patents. The evidence for the plaintiff tends to establish the fact that Brandt's contention that the Luster patents were worthless and he had abandoned them was untrue, and as a matter of fact he had organized this Delaware company for the purpose of manufacturing machines under the Luster patents and according to the terms of his contract made with the company. This evidence was by expert witnesses, who called the attention of the court to the similarity in the machines which Brandt proposed to manufacture in the Delaware company to those covered by the Luster patents. Brandt by his testimony alone denied these facts.

[3] One significant fact insisted upon by the plaintiff is that Brandt never informed the plaintiff of the alleged worthless character of the Luster patents; that no contention of this sort was set up until the trial; and the plaintiff further calls attention to what are claimed to be admissions on the part of Brandt, made in case filed by Paul Buckley against him in the superior court of Clarke county. In that case it was sought to recover the value of stock alleged to have been issued by the Delaware company organized by Brandt, and it was alleged by Brandt that this Delaware company was organized for the purpose of manufacturing and selling the measuring machines covered by the Luster patents, which had been assigned to him by the measuring machine company, and the stock in question had been issued to him by the Delaware company for the assignment by him of the right to manufacture and sell the machines under the Luster

GILBERT v. STATE. (No. 12696.)

(Court of Appeals of Georgia, Division No. 1.
Nov. 16, 1921.)*(Syllabus by the Court.)*

1. Criminal law \S 656(3)—Witnesses \S 359—Question as to number of convictions for selling whisky properly excluded; remarks of judge in excluding question not error.

The trial judge did not err in refusing to allow a witness to answer the question, "How many times have you been convicted of selling whisky recently?" nor in stating, in connection with that ruling, "She does not have to answer anyhow, unless she wants to; that is not the way to prove it anyway."

2. Criminal law \S 1169(2)—Larceny \S 43—Evidence as to condition of stolen automobile when recovered properly admitted; admission harmless where other witness testified to the same effect.

No error was committed in permitting a witness to testify as to the condition of the stolen automobile at the time it was recovered.

3. Criminal law \S 696(2), 921—Refusal to rule out evidence not ground for a new trial when exception went to whole evidence, part of which was admissible; objection to evidence admitted provisionally waived when no motion made to exclude.

(a) "A ground of a motion for a new trial to the effect that the court erred in excluding the testimony specified as a whole is not a good ground, when a part of the testimony so specified is objectionable."

(b) Where evidence is admitted provisionally and no motion is thereafter made to exclude it, objection to it will be held to have been waived.

4. Criminal law \S 918(10, 11)—Remarks of judge not available on motion for new trial unless motion for mistrial made.

Where certain language used by the judge in passing upon objections to testimony is alleged to be prejudicial to the cause of the defendant, but no motion for a mistrial is made, and the case proceeds, without objection to the remarks of the judge, no question as to the prejudicial nature of these remarks can be raised in the motion for a new trial.

5. Criminal law \S 511(1)—Evidence independent of that of accomplice held to take case to jury.

In this case there is some evidence which within itself, and independently of the testimony of the accomplice, would lead to an inference of guilt of the accused.

(Additional Syllabus by Editorial Staff.)

6. Criminal law \S 407(1)—Jury authorized to consider defendant's failure to reply to accusation as implied admission of guilt.

Under Civ. Code 1910, \S 5782, relative to the effect of silence as an admission, defendant's failure to reply when charged with an alleged accomplice with getting the car claimed

er patents. While admissions or allegations of facts in pleadings are conclusive only on the parties in the case or their privies as admissions in judicio, yet these allegations made by Brandt in the Buckley suit were admitted by the trial court as extrajudicial admissions, and certainly, if relevant to the issue, gave strong support to the contentions of the plaintiff that Brandt's denial that he did organize the Delaware company for the purpose of carrying out the agreement made with the plaintiff was not true; and these admissions, taken in connection with the expert evidence in behalf of the plaintiff's claim, were sufficient to establish the contention of the plaintiff that it was entitled to the payment of the \$2,000 which Brandt had expressly agreed to pay upon the organization of the company for the purpose of manufacturing and selling the machines made under the Luster patents. Without further elaboration of the evidence as to this issue, this court is of the opinion, from a careful consideration thereof, that the evidence is clearly sufficient to support a verdict for \$2,000 against the defendant. The fact that the jury found a verdict for \$1,500 with interest is not a matter of which the defendant Brandt can complain, in view of the fact that under the evidence a verdict for \$2,000 would have been amply supported by the evidence.

[1] The verdict, in addition to finding for the plaintiff the sum of \$1,500 as principal, with interest, further found "that a decree be entered to the effect that the contract sued upon is binding by its terms and provisions upon the said Brandt." This part of the verdict may be treated as a matter of inducement or surplusage, for there is nothing in the verdict, construed as a whole, that requires the defendant to do anything except to pay the money portion of the verdict. The verdict simply finds the validity of the contract between Brandt and the Computing Cloth-Measuring Machine Company as the reason why the payment should be made, and this is the view the Supreme Court must have taken in its judgment transferring the case to this court for adjudication. Treating the verdict, therefore, as a money verdict, and the other portion thereof, referring to the contract, as surplusage, we have reached the conclusion that the general grounds of the motion are without merit.

The specific assignments of error in the amended motion for a new trial relating to the rulings on testimony and refusal to charge do not present any reason why the money verdict, which is amply supported by the evidence, should be set aside and a new trial granted.

Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

to have been stolen might properly have been construed by the jury as an implied admission of his guilt.

7. Criminal law §741(5)—Sufficiency of corroboration of accomplice is for jury.

Under Pen. Code 1910, § 1017, relative to the necessity of corroboration of the testimony of an accomplice, the sufficiency or weight of corroborative evidence is a question solely for the jury.

8. Criminal law §1156(2) — Discretion of court in denying new trial not disturbed for insufficiency of corroboration of accomplice.

Where the jury found the evidence to corroborate an accomplice sufficient, the Court of Appeals will not interfere with the trial judge's discretion in overruling the motion for a new trial.

Error from Superior Court, Fulton County; Jno. D. Humphries, Judge.

Henry Gilbert was convicted of larceny of an automobile, and he brings error. Affirmed.

H. A. Allen, of Atlanta, for plaintiff in error.

Jno. A. Boykin, Sol. Gen., and E. A. Stephens, both of Atlanta, for the State.

BLOODWORTH, J. Robert Thweatt, Dewey Bland, and Henry Gilbert were indicted for the larceny of an automobile. Upon the trial of the defendant Henry Gilbert a verdict of guilty was rendered against him, the jury recommended that he be punished as for a misdemeanor, and this recommendation of the jury was complied with.

[1] 1. The trial judge did not err, upon objection made, in refusing to allow a witness for the state, the owner of the stolen automobile, to answer the question, "How many times have you been convicted of selling whisky recently?" Nor did the judge err in stating, in connection with said ruling:

"She does not have to answer anyhow, unless she wants to. You cannot make a person answer those questions. That is not the way to prove it anyhow." *Morgan v. State*, 17 Ga. App. 125(3), 86 S. E. 281.

[2] 2. No error was committed when a witness was permitted to testify as to the condition of the stolen automobile at the time it was recovered. Even if it was error to admit this evidence, the error was harmless, as another witness, without any objection being made thereto, testified to the condition of the car, and his evidence showed its condition to be substantially the same as was testified to by this witness.

[3] 3. Exception is taken to the refusal of the judge to "rule out all of the evidence of the sheriff as being incompetent, immaterial, and irrelevant," and because "it does not in any way connect this defendant with this automobile." This alleged error of the

court will not require the grant of a new trial, for two reasons: (a) This exception went to the entire evidence of the sheriff, and a part of it was clearly admissible. *Jones v. Teasley*, 25 Ga. App. 784 (1-b), 106 S. E. 46, and cases cited. (b) This evidence was admitted provisionally, and, as no motion was thereafter made to exclude it, counsel for the plaintiff in error will be held to have waived his objection thereto. *Stone v. State*, 118 Ga. 705 (9), 45 S. E. 630, 98 Am. St. Rep. 145; *Quinn v. State*, 22 Ga. App. 634 (2), 97 S. E. 84, and cases cited.

[4] 4. It is insisted that a new trial should be granted because certain language of the court, used in passing upon objection to testimony made by counsel for the defendant, "was calculated to give a jury of laymen the impression that the court thought counsel for movant was making captious objections, and if the jury did get that impression from the language used by this court, it was calculated to prejudice them against the defendant on trial." No motion was made to declare a mistrial because of the use by the judge of the language alleged to be prejudicial. "Counsel, having failed to make such motion and having proceeded without objection with the trial, cannot, after conviction, raise the question as to the prejudicial nature of the remarks complained of in a motion for a new trial." *Perdue v. State*, 135 Ga. 277 (1), 69 S. E. 184. See, also, *Woodall v. State*, 25 Ga. App. 8 (3), 102 S. E. 913.

[5-8] 5. There is some evidence which, within itself and independently of the evidence of the accomplice, would lead to an inference of the guilt of the accused. In his statement at the trial the plaintiff in error admitted that early in the morning of the day on which the car was stolen he was in a café in Atlanta with the other defendants, and went with them in the stolen car to Ocee, "back in the mountains," and that one of them (Thweatt) asked him to drive the car. The car was recovered by the sheriff of Forsyth county. A witness testified:

"I had them together. Gilbert accused Thweatt of driving the car, and Thweatt accused Gilbert. They both insisted that the other drove the car. Each man was claiming that the other drove the car."

Another witness testified that the accused "said he did go to the mountains with the boys" (those jointly indicted with him). Another witness swore that Thweatt said to the accused: "You just as well come on and take your medicine. You know you got the car." While Thweatt was present the accused did not deny the above statement, but after Thweatt left he did deny it. When Thweatt said to the accused, "You know you got the car," had he been guiltless he would most probably have denied the charge. As he made no reply, the jury were authorized

to construe his silence as an implied admission of his guilt. See Civil Code 1910, § 5782; McElroy v. State, 125 Ga. 40, 53 S. E. 759. In Davis v. State, 25 Ga. App. 532 (2), 103 S. E. 819, this court held:

"While the testimony of an accomplice must be corroborated by other evidence, which directly connects the accused on trial with the perpetration of the crime, before such testimony will authorize a conviction of a felony, yet the law does not require that the corroborating evidence shall in and of itself alone be sufficient to warrant a verdict of guilty, or that the testimony of the accomplice shall be corroborated in every material particular. On the contrary, slight evidence that the crime was committed by both defendants, and identifying them with it, will corroborate the testimony of the accomplice and warrant a conviction"—citing Penal Code 1910, § 1017; Evans v. State, 78 Ga. 351; Pritchett v. State, 92 Ga. 33(1), 18 S. E. 350; Boswell v. State, 92 Ga. 581, 17 S. E. 805; Chapman v. State, 112 Ga. 56(2), 37 S. E. 102; Dixon v. State, 116 Ga. 186(7), 42 S. E. 357; Nance v. State, 126 Ga. 95(1), 54 S. E. 932.

The sufficiency or weight of corroborative evidence is a question solely for the jury. In this case they have found it sufficient, and, their finding having been approved by the trial judge, this court will not interfere with the discretion of the trial judge in overruling the motion for a new trial.

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 587)

HORNE v. STATE. (No. 12628.)

(Court of Appeals of Georgia, Division No. 1,
Nov. 16, 1921.)

(Syllabus by the Court.)

1. Criminal law § 264—Arraignment for misdemeanor held sufficient.

"Where, in the trial of one charged with a misdemeanor, upon arraignment of the prisoner the indictment was read to him by the solicitor general and a plea of not guilty was entered, no other or more formal arraignment was required. Penal Code, § 946; 12 Cyc. 344, and citations." Fears v. State, 125 Ga. 739 (2), 54 S. E. 667.

2. Witnesses § 61(1)—Evidence of conversation with defendant's wife admissible on trial for wife beating.

Evidence of a third person as to a conversation had with the wife of one charged with wife beating is not inadmissible on the ground "that the wife would be an incompetent witness and any statement she might have made would not be admissible as against the defendant," since a wife is competent "to testify against her husband upon his trial for any criminal offense committed, or attempted to

have been committed, upon her person." Penal Code 1910, § 1037, par. 4.

3. Criminal law § 363, 366(6)—Res gestae depends rather on spontaneity than on precise time; evidence of wife's appearance, condition, and statements within five minutes held admissible on trial for wife beating.

"Inquiry as to whether particular sayings constitute a part of the res gestae of the transaction turns on the particular circumstances of each case, and is directed rather to the spontaneity of the events related, considered as a part of the occurrence under investigation, than to the precise time which may have elapsed between the main fact and the statements made in reference to it." Cobb v. State, 11 Ga. App. 52 (5), 74 S. E. 702. Under the above ruling and the facts of the instant case, the evidence of a witness as to the wife's personal appearance and physical condition, and as to statements made by the wife, within five minutes after her alleged beating by her husband, was admissible as a part of the res gestae. See, also, Walker v. State, 137 Ga. 398 (3), 73 S. E. 868.

4. Criminal law § 935(1)—New trial properly denied when verdict authorized by evidence.

The evidence amply authorized, if it did not demand, the conviction of the defendant, and the court did not err in overruling the motion for a new trial.

Error from City Court of Tifton; Jas. H. Price, Judge.

H. T. Horne was convicted of wife beating, and he brings error. Affirmed.

Smith & Christian, of Tifton, for plaintiff in error.

R. E. Dinsmore, Sol., of Tifton, for defendant in error.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 693)

WILLIAMS v. McCRANIE. (No. 12372.)

(Court of Appeals of Georgia, Division No. 2,
Nov. 18, 1921.)

(Syllabus by the Court.)

1. Evidence § 546, 555—Testimony of physician as to direction of bullet held admissible.

The court did not err in admitting the testimony of a physician in reference to the opinion given by him as to whether the bullet wound inflicted by the defendant upon one of the plaintiff's witnesses, who claimed to have seen the homicide, had entered from the front or the rear of the witness. This evidence was admissible for what it was worth, although the physician testified that he hardly thought he was entitled to an opinion, for the reason that he did not examine the wound at the point of exit; since the question as to whether a witness in a particular instance is qualified

to give an opinion is to be determined by the court and is not governed by opinion of the witness himself as to his competency. *Glover v. State*, 129 Ga. 717, 718(9), 59 S. E. 816. The witness, although an expert, gave his reason for his opinion, as follows: "I can give you my best opinion as I got it from that careless examination. I saw the front of it. Where the bullet goes in, it is always a cleaner cut wound; where it comes out it lacerates the tissues. In other words, the point of entrance is clean cut and smooth, and the point of exit is more ragged. The front part of the wound on Josh Terry's head looked pretty smooth to me. I will not say positively about the back part of it, because I was rather careless about my examination. There were blood clots in the back of his hair, but I am not prepared to say that the back part of the wound was lacerated. I will say positively that the front part of the wound was smooth. I have never seen a bullet wound with both a smooth entrance and a smooth exit. The entrance is always smooth."

2. Death \S 21, 104(1)—Charge on justifiable homicide proper; justifiable homicide defined.

Exception is taken to the following portion of the charge: "Not only must the killing be in self-defense, but it must be necessary to prevent the attack and injury amounting to a felony on the person killing, or the person killing must really and honestly so believe at the time, and in good faith have acted upon such belief and not in a spirit of revenge." The defendant contends that, since, under Penal Code 1910, § 70, self-defense always justifies, the court improperly placed a double burden upon defendant in thus instructing the jury that there were other things which had to concur in order for the defense to excuse the homicide. This excerpt from the charge, while giving in disjunctive form the doctrines of justification as embodied in both sections 70 and 71 of the Penal Code, does not confuse them. Self-defense does justify but the slayer must be thereby protecting himself from the commission of a felony upon his person, and the taking of human life is not justified as being in self-defense where it is only some lesser injury which by the killing is sought to be avoided. *Simmons v. State*, 79 Ga. 696(8), 4 S. E. 894; *Battle v. State*, 103 Ga. 53, 54(4), 29 S. E. 491. As was also in substance further charged in the disjunctive form, the defendant would have been justified if the circumstances were such as to excite the fears of a reasonable man that such a felonious attack upon his person was about to be perpetrated, and in the killing he really acted under such fears and not in a spirit of revenge.

3. Appeal and error \S 1066—Instruction, defining "homicide" as defined by statute, not prejudicial error, though matter embraced in definition not involved.

The judge charged in its entirety the substance of the first sentence of section 4425 of Civil Code 1910, as follows: "The word 'homicide,' used in this section shall be held to include all cases where the death of a human being resulted from a crime or from criminal or other negligence." While no issue of negli-

gence was in any way involved, either under the pleadings or the evidence, "it was not cause for a new trial that the judge read in charge to the jury a Code section, part of which was applicable to the case under consideration and part not; it not appearing that the reading of the inapplicable part was calculated to mislead the jury, erroneously affected their verdict, or was prejudicial to the rights of the complaining party." *Eagle & Phenix Mills v. Herron*, 119 Ga. 389(3), 46 S. E. 405.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Homicide.]

4. Death \S 95(2)—Method of computing present value of future earnings stated; "present worth."

Exception is taken to the following excerpt from the charge: "After you have fixed upon the amount representing the yearly earnings of the deceased and the number of years he would probably have lived, you can by multiplying the one by the other determine approximately what would have been the gross amount of the earnings of his whole life. The gross amount must be reduced to its present cash value, which would necessarily be less than the gross amount, and which may be arrived at by dividing this gross sum by one dollar, plus the legal rate of interest, 7 per cent. per annum, for the expectancy years of the deceased." The exception is without merit, and is admittedly controlled by the ruling of this court, in *Standard Oil Co. v. Reagan*, 15 Ga. App. 571(5), 589, 591, 84 S. E. 69. "The present worth of a debt payable at some future period without interest is such a sum as being put at interest will amount to the debt at the period when the debt becomes due." *Sanford's Higher Analytical Arithmetic*, 226. The rule given by this author to obtain the present worth is to "divide the given sum or debt by the amount of \$1 for the given time at the given rate; the quotient will be the present worth."

5. Evidence \S 501(10)—General statement as to annual value of decedent's services not inadmissible in action for death.

The rule which precludes a witness in a case such as this from proving the amount of damages by a mere general statement would not exclude testimony as to the annual value of the decedent's services, especially where, as here, the witness, who is subject to cross-examination, goes into details as to the facts upon which his opinion is based. *Central of Ga. Ry. Co. v. Hartley*, 25 Ga. App. 110, 112(4), 103 S. E. 259, 262, and cases there cited. See, also, *Wrightsville & Tennille R. Co. v. Gornto*, 129 Ga. 204, 206(1), 58 S. E. 769.

6. Trial \S 296(11)—Court's reference to life expectancy of average person of deceased's age held not to justify reversal.

The exception taken to the reference by the court to the life expectancy, under the annuity table, "of an average person of the age of deceased," could not justify a reversal on the theory that the court thus inferentially fixed the expectancy of the deceased, especially since the court had already charged that the

tables were not binding upon the jury, and that they were not obliged to use them at all, and had previously instructed them that, "if in the case at bar the expectancy of the deceased would, under the evidence, have probably been greater or less than that of the average man, the amount of the damages to be allowed, if any, should be diminished or increased accordingly."

7. Death \S 58(1), 104(1, 6)—Trial \S 25(8)—Charge on earning capacity of deceased held justified; charge on effect of plea of justifiable homicide held proper; admission entitling defendant to open and close; unlawful killing presumed.

The remaining grounds of the motion for a new trial are without merit. In the judge's statement of the plaintiff's contentions he did not err in including her contention that the deceased was an expert automobile mechanic. A number of witnesses testified as to his mechanical ability in that line. See *Napier v. Strong*, 19 Ga. App. 401, 409(4), 91 S. E. 579. Nor was it error, especially in view of such evidence, to charge upon what might have been the increased earning capacity of the decedent. The remaining ground of the motion, upon which counsel appear especially to rely, is treated in the opinion.

Error from City Court of Thomasville; H. H. Merry, Judge pro hac.

Action by Mrs. Parrish McCranie against W. W. Williams. Judgment for plaintiff, and defendant brings error. Affirmed.

This was a suit for damages on account of the homicide of the plaintiff's husband, the petition alleging that he was unlawfully and intentionally shot and killed by the defendant, not by the commandment or with the permission of law, and not in self-defense or in defense of habitation, property, or person, under any such circumstances as would justify the killing. The defendant, by his original plea, admitted his residence in the county where the suit was brought, admitted the shooting and killing of the plaintiff's husband, and that it was not done by the commandment of law, and denied each and every other allegation set forth by the petition. By amendment the plea alleged:

"It is true that on the 11th day of October, 1919, the defendant shot the petitioner's husband, Parrish McCranie, with a pistol, inflicting wounds which resulted in the death of the said Parrish McCranie, but the defendant alleges that he killed the said Parrish McCranie in self-defense, and that said killing was justifiable homicide, and that at the time of the said killing the said Parrish McCranie was manifestly intending and endeavoring by violence and surprise to commit a felony on the said W. W. Williams."

The jury found a verdict for the plaintiff in the sum of \$20,000. The defendant excepts to the overruling of his motion for new trial.

Titus, Dekle & Hopkins, of Thomasville, and Branch & Snow, of Quitman, for plaintiff in error.

Thos. W. Hardwick, of Atlanta, and E. L. Joiner, W. J. Hammond, and C. E. Hay, all of Thomasville, for defendant in error.

JENKINS, P. J. (after stating the facts as above). [1-7] Exception is taken to the following portion of the charge of the court:

"The court instructs you as a matter of law that the effect of the admissions in the answer that the defendant did kill the plaintiff's husband by shooting him with a pistol, as charged in paragraph 2 of the petition, and by the filing of the amendment to the answer, specifically pleading justification, is to establish prima facie that said killing was unlawful, and that, if the plaintiff has proved sufficient facts or data from which the jury can form a reasonable estimate as to the value of the life of the said deceased, then such proof, together with said admission and said plea, would make out a prima facie case."

This instruction is alleged to be error, and harmful to the defendant under the pleadings in the case, for two reasons:

(1) That the admission in the answer to paragraph 2 of the petition, and the admission in his plea of justification whether standing separately or taken together, did not in law have the effect of establishing prima facie that the killing was unlawful, nor did the statements contained in said plea in law constitute an admission that the killing was prima facie unlawful; and (2) "that the effect of such plea of justification, either standing alone or taken along with the answer, when considered with the testimony of the plaintiff as to the amount of damages, did not amount to a prima facie case for the plaintiff in the sense that the term 'prima facie' case is used in the law."

The defendant contends that—

"Mere proof of damages by the plaintiff without more, would have made out no [prima facie] case, and that it was harmful error for the court to have coupled this proof of damage with a statement in the defendant's plea of justification, and thereupon charged the jury as a matter of law that the admission of an unlawful killing by the defendant in his plea, considered with the proof of damage, would make out a prima facie case for the plaintiff;" that, "without proof in this case from which an unlawful killing would arise, the plaintiff would in no event have been entitled to have recovery; and that, therefore, the court supplied the proof that the plaintiff should have made by telling the jury that the defendant had admitted that the killing was prima facie unlawful."

It cannot be said, nor did the judge charge, that the admission in the defendant's plea had the effect of establishing what could be strictly called a complete prima facie case in favor of the plaintiff. The admission did not cover the amount of the damage. Under the provisions of section 4488 of Civil Code

1910, this was not necessary, however, in order for the defendant to obtain the opening and conclusion by assuming the affirmative of the main issue under a plea of justification. This section of the Code provides as follows:

"In every case of tort, if the defendant was authorized by law to do the act complained of, he may plead the same as a justification; by such plea he admits the act to be done, and shall be entitled to all the privileges of one holding the affirmative of the issue; but such plea shall not give to the defendant the right to open and conclude the argument before the jury, unless it is filed before the plaintiff submits any evidence to the jury trying the case."

In actions *ex contractu* and in cases arising *ex delicto*, where the act complained of is not such as could be justified under the law, in order to obtain the opening and conclusion the defendant must admit a complete *prima facie* case, and to do that he must make such admissions as would, without more, *prima facie* entitle the plaintiff to recover in the amount sued for. *Brunswick & Western R. Co. v. Wiggins*, 113 Ga. 842 (2), 39 S. E. 551, 61 L. R. A. 513. In the instant case the judge did not state to the jury that the defendant had made such an admission as would without more, *prima facie* entitle the plaintiff to recover in the amount sued for, but in substance he instructed them that the plaintiff would be entitled to recover such damages as she had proved, unless the defendant had carried his portion of the burden by showing that the admitted homicide, though presumed by law to be unlawful, was in fact justifiable. This, we think, is in clear accord with the recent ruling in *Darby v. Moore*, 144 Ga. 758, 759 (5), 87 S. E. 1067, in which the Supreme Court upheld as sound the following charge:

"I charge you, gentlemen, that defendant having admitted by his pleadings the killing of O. G. Moore, and that the plaintiff is the widow of O. G. Moore, I charge you that the plaintiff would be entitled to recover damages for the slaying of her husband, unless it is shown to you that such killing was justifiable, or excusable, under the rules of law which will be hereafter given to you in charge."

Where the act which the defendant admits is one which as a matter of law is presumed to be unlawful a *prima facie* presumption of its unlawfulness follows, not as an additional admission, but as a legal consequence; and this result the defendant cannot escape by attaching to his admission of the act a plea of justification. This presumption of law is the thing which by his plea he proposes and assumes to disprove, and this is incumbent upon him to do. He must show that, contrary to the legal presumption, the admitted act was in fact lawful. By his admission of the act charged, coupled with a plea of justification, he does not place himself out of court

by himself admitting the unlawfulness of the act. This he in fact denies. The law raises the presumption, the actual truth of which the defendant denies. The resulting legal inference is something which he cannot be heard to dispute; but since it is *prima facie* only, it is his privilege to deny and disprove its truth. It cannot be disputed that when the homicide is shown or admitted the law presumes malice, and it devolves upon the defendant to show justification. This the counsel for defendant do not, in their exceptionally able arguments, undertake to controvert. They do not deny that the defendant by his plea voluntarily assumed the burden of showing that the killing was justifiable. What they object to is the statement by the judge that, upon the admission of the act of killing, the law raised a mere *prima facie* presumption that it was unlawful. Their contention is that—

"No presumption or inference of the law will arise against him from such a plea, nor will he be held to have admitted even *prima facie* that the act, which he has voluntarily assumed to prove was a lawful act, was an unlawful act. This would be to put upon him the additional burden, not only of proving by his evidence that the alleged act was lawful, but of going to the jury handicapped by a solemn admission that his act, which he has assumed to show was lawful, was unlawful."

They argue that the rights of the defendant, under the quoted section of the Code (section 4488) are nullified by the charge that the effect of admitting the act of killing raises a *prima facie* legal presumption that the killing was unlawful, when the admission is coupled with the plea of justification. As we see it, there would be no burden for the defendant to assume, if, after admitting the killing, the law did not *prima facie* establish that such act was unlawful. The legal presumption is the very thing which the defendant finds it necessary to deny and disprove. It is not the existence, but the truth, of this presumption which the defendant under his plea of justification seeks to dispute. Nor, as we see it, does his plea of justification burden him with any admission that his act was unlawful. This he denies. It is the law, not the defendant, which says that the admitted act shall be deemed unlawful until the contrary shall be shown; and this, under his plea, it is his privilege to disprove. The only burden which the defendant has assumed is the one which he seems to admit he has assumed, to wit, the burden of showing that the killing was lawful. It is true that the provisions of section 4488, *supra*, give to a defendant pleading justification in an action of tort the right to the opening and conclusion by assuming the affirmative of the main issue, without admitting a complete *prima facie* case; but they do not give him such a privilege strip-

ped of the attendant burden of carrying the onus which he thus actually assumes.

Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(27 Ga. App. 720)

ADAMS v. LOUISVILLE & N. R. CO. et al.
(No. 12472.)

(Court of Appeals of Georgia, Division No. 2
Nov. 29, 1921.)

(Syllabus by the Court.)

1. Carriers \Leftrightarrow 11, 355—Duty to keep ticket offices open for reasonable time before trains; passenger's duty to use diligence to obtain ticket.

It is the duty of railroad companies to keep their ticket offices open for the sale of tickets for a reasonable time before the departure of trains, and the rules of the Railroad Commission of this state prescribe the method by which such duty shall be performed. It is the duty of passengers to use proper diligence in supplying themselves with tickets before boarding trains. *Southern Ry. Co. v. Fleming*, 128 Ga. 241, 57 S. E. 481.

2. Carriers \Leftrightarrow 256, 381(1)—Rights of passenger not afforded opportunity to purchase ticket, stated; train rate may be collected from junction point where passenger fails to obtain ticket; presumption that tickets were on sale and could have been purchased.

A passenger who has not been afforded a reasonable opportunity to purchase a ticket before boarding a train can only be charged the regular ticket rate for his fare, and he cannot while en route be required to leave the train in order to make such a purchase (*Central R. Co. v. Strickland*, 90 Ga. 562, 16 S. E. 852); but where a passenger, without fault on his part, boards a train without having provided himself with a ticket, and where he tenders and pays to the conductor the regular ticket rate, but only to the junction point of the carrier's line, and where he fails to show any reason which would explain his failure to there provide himself with a ticket for the remainder of his journey, the conductor of the other train is entitled to demand fare at the train rate instead of the ticket rate (*Brown v. Central of Ga. Ry. Co.*, 128 Ga. 635, 58 S. E. 163). The presumption is that tickets were on sale and could have been purchased at the junction office. *Ga. Ry. & El. Co. v. McAllister*, 126 Ga. 447 (2), 451, 54 S. E. 967, 7 L. R. A. (N. S.) 1177.

Error from Superior Court, Warren County; E. T. Shurley, Judge.

Action by H. A. Adams against the Louisville & Nashville Railroad Company and others. Judgment for defendants, and plaintiff brings error. Affirmed.

L. D. McGregor, of Warrenton, for plaintiff in error.

E. P. & J. Cecil Davis, of Warrenton, and

Miles W. Lewis, of Greensboro, for defendants in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(27 Ga. App. 722)

WHITCOMB v. PAYNE, Agent. (No. 12482.)

(Court of Appeals of Georgia, Division No. 2
Nov. 29, 1921.)

(Syllabus by the Court.)

1. Testimony held conflicting.

The record discloses a conflict in the testimony as to whether or not the defendant complied with its statutory duty to blow the whistle of the locomotive in approaching the crossing at which the homicide of the plaintiff's husband occurred. While there was plain and positive testimony going to establish a compliance with such duty, there was some evidence which, if accepted by the jury, would nevertheless have authorized a finding to the contrary.

2. Negligence \Leftrightarrow 136(31)—Railroads \Leftrightarrow 350 (7, 13)—Questions of negligence and contributory negligence held for jury.

The railroad having thus failed to show by undisputed evidence that it had used all ordinary and reasonable care, the direction of a verdict in its favor was erroneous, since it devolved upon the jury to say whether or not the defendant, under the disputed testimony, was guilty of this negligence as charged, and, if so, whether the company had proved that the negligence per se of the decedent in approaching the crossing in an automobile at a rate of speed greater than that permitted by law, when taken together with any other proven act or omission on his part in approaching such place of danger which they as a matter of fact might have adjudged to constitute negligence, contributed to the homicide and exceeded in degree the negligence of the defendant, or whether such negligence on the part of the decedent contributed to the homicide and amounted to a lack of ordinary care. *Central of Ga. Ry. Co. v. Larsen*, 19 Ga. App. 413, 81 S. E. 517; *Tenn., etc., R. Co. v. Neely*, 27 Ga. App. —, 108 S. E. 629.

Error from Superior Court, Walker County; Moses Wright, Judge.

Action by Olga Whitcomb against J. B. Payne, Agent, etc. Judgment for defendant, and plaintiff brings error. Reversed.

Norman Shattuck and Henry & Jackson, all of La Fayette, for plaintiff in error.

J. Branham and Maddox & Doyal, all of Rome, and Rosser & Shaw, of La Fayette, for defendant in error.

JENKINS, P. J. Judgment reversed.

STEPHENS and HILL, JJ., concur.

(89 W. Va. 538)

PRESTON v. DIXON et al. (No. 4232.)(Supreme Court of Appeals of West Virginia.
Nov. 15, 1921.)*(Syllabus by the Court.)*

1. Joint tenancy §9—Where joint tenant redeems from judicial sale, others may redeem their interests by paying proper part of purchase price.

A purchase of the common property by one joint tenant at a judicial sale made to satisfy a lien against such property for which all of the joint tenants are bound is for the benefit of all, and each may redeem his interest in the property by paying his proper proportion of the purchase price.

2. Joint tenancy §9—Where joint tenant, on assignment of vendor's lien, sues and purchases land under execution, the other may redeem.

Where one of the joint owners of a tract of land, subject to a vendor's lien which both of such owners are under obligation to discharge, pays off such lien, and takes an assignment of the same to himself, and brings a suit in his own name as assignee of the vendor to subject the whole of the common property to sale in satisfaction of such lien, and at a sale decreed in such suit becomes the purchaser of such property, he will be held to have made the purchase for the common benefit, and his co-owner may redeem his interest in such land by paying his proper proportion of the purchase money.

3. Joint tenancy §8, 13—Where joint tenant sells part of common property purchased at judicial sale to bona fide purchaser, such tenant must account to co-owner for price.

Where, in such case, the joint tenant, who purchased at the judicial sale, sells a part of such common property to a bona fide purchaser before any proceeding is instituted by the other interested party for the purpose of redeeming his interest therein, such purchaser will be protected, but such co-owner will be compelled to account for the purchase money so received by him.

Appeal from Circuit Court, Greenbrier County.

Suit by A. D. Preston against Fred Dixon, Jr., and others. Decree for the defendants, and the plaintiff appeals. Affirmed.

T. N. Read, of Hinton, and Price & McWhorter, of Lewisburg, for appellants.

Dillon & Nuckolls, of Fayetteville, for appellees.

RITZ, P. Plaintiff by this appeal seeks to reverse a decree of the circuit court of Greenbrier county which set aside a sale made to him of certain lands belonging to the plaintiff and the defendant jointly, and decreed that the defendant might have his interest in said lands upon payment of his proportion

of the purchase money paid therefor by the plaintiff.

On the 14th day of December, 1908, the plaintiff and one Samuel Dixon purchased from S. T. Hedrick a tract of 225.41 acres of land, lying in Greenbrier county, at the price of \$5,635.25. Of this sum \$2,254.10 was paid in cash, and for the residue two notes were given for the sum of \$1,690.57 each, payable in one and two years from date, with interest, and secured by a vendor's lien in the deed of conveyance from Hedrick to Dixon and Preston. At or about the same time the parties also purchased another small tract of land, lying near the above tract, for the sum of \$200, all of which was paid in cash, and the title to which was taken in the name of the plaintiff, A. D. Preston, for the benefit, however, of both parties. It appears that the purpose of the parties in purchasing these lands was to operate them for the purpose of manufacturing cement, or else sell them for the purpose of such operation. Nothing was ever done, however, in furtherance of this purpose. On the 19th of June, 1911, Samuel Dixon conveyed his one-half interest in the 225.41-acre tract of land to his son Fred Dixon, Jr., reciting in said deed a consideration of \$2,500. After the purchase of this land by Preston and Dixon an arrangement was made with the former owner by which he remained on the land and paid rent therefor; the rent being credited upon the interest accruing upon the deferred purchase-money notes, and being insufficient at any time to entirely discharge such interest. The two deferred purchase-money notes were not paid by Dixon and Preston, and in the fall of 1916 some correspondence was had between Fred Dixon and his father, Samuel Dixon, on the one hand, and Preston on the other, in regard to the payment of these notes.

It appears that Preston paid off the notes to Hedrick on the 7th of December, 1916, and then wrote to Fred Dixon advising him that he (Preston) had been called upon to discharge the notes, and that he had done so, and demanding of Dixon that he pay his one-half of the amount necessary therefor, and inclosed a statement showing this amount to be \$2,044.47, which included one-half of certain taxes paid in addition to the one-half of the deferred purchase money notes. This communication was answered by Samuel Dixon, in which reply Preston was advised to draw a draft for the amount upon Fred Dixon through the American National Bank of Washington, D. C., attaching thereto the notes and tax tickets, and the same would be paid. Preston made no reply to this letter, nor did he draw the draft as requested; his excuse being that he did not want to part with the tax tickets and the paid notes. He made no further effort to collect the

amount from Fred Dixon, nor did he make any further demand upon him that he pay the same. At the time Preston paid off these notes he took a deed of assignment from the holder of the vendor's lien by which the same was transferred, set over, and assigned to him, together with the notes secured thereby. On the 12th of February, 1917, Preston then brought a suit for the purpose of enforcing the vendor's lien assigned to him by the holder thereof, Hedrick, against the whole tract of land, and asked for a sale of the whole tract of land in satisfaction of the lien so assigned to him. At the time he brought this suit he wrote a letter to Samuel Dixon, inclosing a copy of the process, and asked him to have it accepted by his son Fred Dixon. To this letter Samuel Dixon replied, declining to accept service of process, or to have it served on his son, and further advised that there was no necessity for the institution of any suit, and calling the attention of Preston to his former letter asking him to draw a draft for the amount through the American National Bank of Washington, D. C., and again advising him that if he would draw such draft the same would be paid. Preston paid no attention to this, but had an order of publication posted and published against Fred Dixon, and proceeded with the cause.

On the 17th of April, 1917, a decree was entered granting the relief asked for by the plaintiff. This decree found that the plaintiff was entitled to recover the amount of the vendor's lien, adjudicated that the same was a lien upon the 225.41-acre tract of land, and decreed said tract of land to be sold in satisfaction of said lien, and further provided that the proceeds of such sale should be applied: First, to the payment of costs of suit and expenses of sale; second, to the payment of plaintiff's lien, with legal interest; and, third, that any residue should be divided equally between the plaintiff, A. D. Preston, and the defendant Fred Dixon, Jr. The term of the court at which this decree was entered adjourned on the 19th of April, two days after its entry. The sale provided for in the decree was made on the 26th of May, 1917, and at this sale Preston became the purchaser of the land for the sum of \$5,635.25, the exact amount of the original purchase price paid by him and Samuel Dixon therefor. This sale was confirmed on the 26th of June, 1917, and in that decree credit is given Preston for the amount of the vendor's lien upon the purchase price of the property, which left a balance of \$1,511.05. This amount he paid, and out of it the costs of suit and expenses of sale were paid, and the residue, \$1,365.83, in accordance with the provisions of the decree of April 17, 1917, was divided, and one-half thereof paid to Preston and a check for the

other one-half thereof sent to Fred Dixon, Jr., by registered mail. This check was received by Fred Dixon and held by him until the filing of this proceeding to set aside the sale, but was never used, and in fact is filed with his petition herein. The special commissioner who made the sale at which Preston became the purchaser made a deed conveying the land to Preston, and shortly thereafter Preston sold 100 acres off of the tract to a man by the name of A. A. Scott for the sum of \$4,000, leaving remaining 125.41 acres.

On the 16th day of May, 1919, Fred Dixon filed his petition, in which he asked that the decree of sale and the deed to Preston, above referred to, be set aside, or that the same be held to be for his benefit, as well as the benefit of Preston. Preston insisted that Dixon was not entitled to file this petition because the same was not tendered within two years from the entry of the decree complained of. In addition to desiring to redeem his one-half interest in the 225.41-acre tract, Dixon in his pleadings attempted to have the legal title for the small tract of about 10 acres abstracted from Preston to the extent that he (Dixon) was the owner thereof. Dixon also asked that the sale made by Preston to Scott of the 100 acres for \$4,000 be set aside. The circuit court held that Dixon was not entitled to have the interest of the parties in the small tract of 10 acres determined in this proceeding, and declined that relief. He also declined to set aside the deed made by Preston to Scott for the 100 acres, holding that Scott was protected under section 8 of chapter 132 of the Code (sec. 4942), but held that Dixon was entitled to the benefit of this sale, and that Preston must account to him for one-half of the purchase money received from Scott, and further held that Dixon was entitled to redeem his half interest in the remaining 125.41 acres by paying to Preston one-half of the amount paid by Preston to the original vendor, as well as one-half of any taxes or other proper expenses which Preston had paid.

Preston contends that the court erred in allowing Dixon to attack the sale made by the commissioner at which he became the purchaser of the land, for the reason that it was more than two years from the entry of the decree until the filing of the pleading attacking the same, and that because of this lapse of time said decree could not be attacked by Dixon under the provisions of section 14 of chapter 124 of the Code (sec. 4750); and, further, that even though the attack on the decree was made in time, still no error has been shown therein; while Dixon contends that the two-year period of limitations provided by the statute relied upon does not begin to run from the entry of the decree of sale, but only from the entry of the decree confirming the same, his contention being

that the decree of sale was not a final decree; and, further, that even though two years had expired, that would not prevent him from bringing the suit to redeem his interest under the facts shown to exist in this case; that he and Preston being cotenants in the property, the purchase by Preston at a sale made under a lien against the whole property was nothing more than a redemption by Preston from the lien, and that he is entitled to have the benefit of such redemption upon paying his one-half of the costs thereof, which he offers to do. Dixon also assigns as cross-error the refusal of the court to set aside the sale made to Scott of the 100 acres, and also the refusal of the court to determine the rights of himself and Preston in the small 10-acre tract, the legal title to which is held by Preston admittedly as a trustee for himself and Samuel Dixon.

[1] It is very well established that a cotenant in dealing with common property must exercise the utmost good faith toward those jointly interested with him. If there is an incumbrance upon the property which all of the cotenants are obligated to pay, the discharge of it by one cotenant is simply a redemption for the benefit of all, upon the others paying their proper share; and it has likewise been repeatedly held that where the common property is sold, either under a decree of court or under a deed of trust given to secure a debt which all of the common owners are obligated for, and is purchased by one of the cotenants at such sale, such purchase amounts to no more than a redemption of the joint property, and inures to the benefit of all of the cotenants, should they desire to take advantage thereof by paying their proper proportion of the indebtedness. *Freeman on Cotenancy and Partition*, § 151; *Weaver v. Akin*, 48 W. Va. 456, 37 S. E. 600; *Reed v. Bachman*, 61 W. Va. 452, 57 S. E. 769, 123 Am. St. Rep. 996; *Goodloe v. Woods*, 115 Va. 540, 80 S. E. 108; *Roberts v. Thorn*, 25 Tex. 728, 78 Am. Dec. 552; *McLaughlin v. Estate of Curtis*, 27 Wis. 644; *Titsworth v. Stout*, 49 Ill. 78, 95 Am. Dec. 577; *Moon v. Jennings*, 119 Ind. 130, 20 N. E. 748; 21 N. E. 471, 12 Am. St. Rep. 383; *Nalle v. Parks*, 173 Mo. 616, 73 S. W. 596; *Mahoney v. Nevins*, 190 Mo. 360, 88 S. W. 731; *Caldwell v. Caldwell*, 173 Ala. 216, 55 South. 515; *Tisdale v. Tisdale*, 2 Sneed (Tenn.) 596, 64 Am. Dec. 775.

[2] What was the effect of the purchase made by Preston at the special commissioner's sale? It must be borne in mind that when he discharged the vendor's lien he took a regular deed assigning the same to himself. He did not rely upon the equitable lien which would arise in his favor against Dixon's half of the land for one-half of the money paid by him. He did not bring a suit to subject Dixon's one-half of the land to the satisfac-

tion of this equitable lien, but he did bring a suit as holder of the vendor's lien to subject the whole of the land, and to have sale of the whole of the tract in satisfaction of the lien against it. This suit could have no different effect than if it had been brought by Hedrick, the original owner of the vendor's lien. Preston stepped into Hedrick's shoes by reason of the assignment to him by Hedrick, and the suit was brought to enforce that lien against the whole tract of land, and the decree was for the sale of the whole tract of land in satisfaction of the lien. Now, it is quite well settled that if Hedrick had brought exactly the same kind of suit which was brought by Preston as his assignee, and a joint tenant had purchased the common property at a sale made in such suit, such a purchase would have been for the common benefit, and could be taken advantage of by any of the cotenants upon paying their proper proportion of the purchase price. But could Preston give the proceeding a different color because he was enforcing the lien as Hedrick's assignee? Can it be said that the assignment and transfer of the notes to him, and of the vendor's lien securing them, would add anything to a suit brought by him to enforce that lien against the whole tract of land that would not have attached to such a suit had it been brought by his assignor? If the suit had been brought by his assignor, and at a sale the land purchased by a stranger, then, of course, no complaint could be made by Dixon; and so in this case, if the land had been bought at the sale by a stranger, neither of the parties could complain. Manifestly the court had jurisdiction to enforce the lien. Preston could, however, have brought a suit seeking to subject only the interest of Dixon to the satisfaction of his equitable lien for the amount which he had paid in discharge of notes that Dixon should have paid. This suit, however, would not have been a suit to enforce a vendor's lien. The common property would not have been involved in the suit as such. It would have been a suit only involving the undivided interest of Dixon, and the vendor's lien against the whole tract of land would not have been involved, but only the establishment of Preston's equitable lien against Dixon's half, and the procurement of satisfaction thereof by a sale of that interest. Preston, however, treated himself as a purchaser of the vendor's lien and took an assignment thereof. In this way he acquired an incumbrance against the joint estate, and under the doctrine of the above authorities such acquisition was for the common benefit. When he brought the suit to enforce this lien, he was acting for both himself and Dixon, for the purchase of the lien by him was for the benefit of both, and he could not, by bringing a suit to enforce it, exclude

Dixon from the benefits arising from such enforcement. What were these benefits? Nothing less than the procurement of a sale of the land, and when Preston became the purchaser at the sale in the absence of outside bidders, he became such for the purpose of protecting the property in which they were both interested. Preston stands in no different position than if the suit to enforce the vendor's lien had been brought by his assignor and he had become the purchaser at a sale made in such a suit, in which event it is quite clear from the authorities that his co-owner would be entitled, upon paying his proportion of the purchase price, to have his original interest in the subject-matter of the purchase, provided, always, such a condition had not arisen as to destroy his rights. No such condition is shown to have existed here. We are therefore of opinion that Dixon was entitled to maintain a bill to redeem his half interest in the land.

It may be said, however, that Dixon did not file such a bill; that he filed a petition and answer and cross-bill apparently in the original suit brought by Preston to enforce the vendor's lien for the purpose of opening up that proceeding and having relief therein. It is true that the pleadings filed were attempted to be filed in that suit. Their allegations, however, are sufficient for a bill to redeem the interest of Dixon, and to re-vest the title thereto in him. Process was duly served upon Preston and upon Scott, the purchaser of the 100 acres, and full defense was made thereto, and there is no reason why the court may not treat these pleadings as an original bill, and grant the relief to which Dixon has shown himself entitled.

A great deal of argument is indulged in by the parties as to whether or not Dixon's petition and answer and cross-bill were filed in time to open up the decree of sale. In view of the conclusion we have reached, this is entirely immaterial. Dixon's right to redeem does not depend upon opening up the vendor's lien suit. The purchase made by Preston in that suit amounted to nothing more than a redemption of the land for the common benefit, and Dixon is entitled to redeem his interest from Preston so long as he is not barred of that right in some of the ways provided by law.

[3] Did the court err in refusing to set aside the sale by Preston of the 100 acres to Scott? Scott claims to be protected as a purchaser under the provisions of section 8 of chapter 132 of the Code, while Dixon contends that Scott was required to take notice of everything of which the record would have informed him. The court in the vendor's lien suit undoubtedly had jurisdiction of the subject-matter and of the parties. Its decrees entered in that suit were not void. The

purchase by Preston made in that suit was interpreted by the court as being for his exclusive benefit. But does that fact deprive Scott of his title to the 100 acres? This purchase was made by Scott after Preston's title was complete, and there was no proceeding pending to reverse or correct the decree entered by the circuit court in the vendor's lien suit. It matters not that Scott did not purchase directly from the special commissioner. Under our holdings he is protected, under the provisions of section 8 of chapter 132 of the Code, when he purchases from a party to the suit, to the same extent as though he had been a purchaser at the judicial sale. *Chapman v. Branch*, 72 W. Va. 54, 78 S. E. 235.

Nor did the court err in refusing to take cognizance of the interests of the parties in the 10-acre tract referred to in the pleadings. Their interests in this tract were entirely separate and distinct from their interests in the 225.41-acre tract. In fact, it does not appear that Fred Dixon has any interest in the 10-acre tract, or had such an interest at the time of the institution of the suit, or at the time he filed this proceeding to redeem his interest in the other tract. It involved a controversy, if, indeed, there is any conflict between the parties in regard to it, entirely dissociated with the matters involved here and likely between different parties.

Upon a careful review of the matters presented, we are of opinion that the decree of the circuit court correctly determines the interests of the parties, and the same will therefore be affirmed.

(89 W. Va. 279)

STATE v. WEISSENGOFF. (No. 4197.)

(Supreme Court of Appeals of West Virginia.
Oct. 18, 1921. Rehearing Denied Dec. 9,
1921.)

(Syllabus by the Court.)

1. Criminal law \S 1153(3)—Departure from usual order of introducing evidence not error unless discretion is abused.

A departure from the usual order of introduction of evidence in the trial of a case does not constitute error, unless it amounts to an abuse of discretion in the trial court.

2. Witnesses \S 401—Party making opposing witness his own while cross-examining may indirectly contradict his testimony.

Although a party making an opposite witness his own, by cross-examination as to matter not testified to in chief, cannot directly impeach him by the testimony of another witness, he may prove, by such other witness, any fact that is admissible as part of his case, notwithstanding conflict in the evidence of the two

witnesses, and thus impliedly and indirectly contradict the witness so made his own.

3. Witnesses \S 305(1)—Privilege because tending to incriminate waived by answering without objection.

The privilege of a witness to decline to answer a question tending to incriminate him is strictly personal, and is waived and lost, for the purposes of the trial, by his answering it without protest or objection, and in such case the trial court may properly overrule a motion to strike out his answer to such question.

4. Criminal law \S 351(8)—Evidence showing defendant's attempt to obtain perjured testimony is admissible.

Testimony tending to prove an attempt on the part of the defendant in a criminal case to obtain perjured testimony in his behalf is relevant, material, and therefore admissible, even though its probative value is slight.

5. Criminal law \S 390—Any evidence tending to prove defendant's innocent intention admissible.

Upon a material issue as to the actual bona fide intention of a party to a transaction, anything that casts light upon his motive and purpose, and tends to prove innocence of intentional wrongdoing, is admissible. For such purpose, action under advice of counsel as to matters involving positive law, ignorance of which does not excuse, is admissible.

6. Criminal law \S 814(3)—Instruction not supported by any evidence is error.

An instruction that includes an hypothesis not supported by any evidence at all cannot properly be given.

7. Criminal law \S 778(11)—Proof of merely technical flight will not warrant an instruction thereon.

Proof of a merely technical flight by an accused person, if any at all, attended by circumstances rendering it highly improbable that he actually fled from the scene of the alleged offense, does not appreciably tend to prove flight as an incriminating fact, wherefore an instruction cannot properly be predicated upon it.

8. Homicide \S 296—Testimony on whether accused knew he was resisting an officer with a valid writ held to justify instruction as to whether officer commanded him to stop.

Upon an issue in a criminal case as to whether the accused, in resisting an officer, knew he was resisting an attempt of the latter to put him under arrest by virtue of a valid writ then in his possession, testimony to the effect that, before the struggle began, the officer commanded the accused to stop, told him he had a warrant for him, and, at the beginning of the struggle, declared him to be under arrest, justifies inclusion in an instruction of an inquiry as to whether, in the struggle, the officer commanded him to stop, the attempt to enforce the order being, in law, a repetition thereof.

9. Criminal law \S 785(3)—Instructing that jury may arbitrarily believe or disbelieve any witness is error.

It is reversible error to instruct the jury in a trial that they may arbitrarily believe or disbelieve any witness testifying in the case.

10. Criminal law \S 821(2)—Accidental omission of material instruction does not excuse error.

Inadvertence or accident in the omission to give a proper and material instruction requested does not excuse the error in the failure to give it.

Error to Circuit Court, Grant County.

Pete Weissengoff was convicted of involuntary manslaughter, and sentenced to imprisonment in the county jail, and to pay a fine, and he brings error. Reversed, verdict set aside, and cause remanded for new trial.

Neely & Lively, of Fairmont, for plaintiff in error.

E. T. England, Atty. Gen., Chas. Ritchie, Asst. Atty. Gen., Arthur Arnold, Pros. Atty., of Piedmont, and Harry G. Fisher, of Keyser, for the State.

POFFENBARGER, J. The new trial awarded Peter Weissengoff, by the decision on a former writ of error in this case, reported in 85 W. Va. 271, 101 S. E. 450, resulted in his conviction of involuntary manslaughter and imposition of imprisonment in the county jail, with labor on the public roads, and a fine of \$2,000, by way of punishment. On this writ of error, he complains of the judgment, assigning errors in the judgment itself, and predicating several other assignments of error upon rulings made in the trial, respecting admission and exclusion of evidence and the giving and refusal of instructions.

[1, 2] On his cross-examination, certain questions were propounded to him, respecting a matter not referred to nor brought out on his examination in chief, and, after he had answered them, a motion to strike out that part of his evidence was overruled. One ground of this motion was lack of right in the state to elicit the information by cross-examination, its admissibility being assumed. This pertains to the mere order or mode of introduction of evidence, a matter largely left in the discretion of the trial court. It is not error to adhere to the rules of practice. On the other hand, the court has discretion to relax them. In the latter case, there is no error, in the absence of an abuse of discretion. *Bond v. National Fire Ins. Co.*, 77 W. Va. 736, 88 S. E. 389; *State v. Littleton*, 77 W. Va. 804, 88 S. E. 458; *Pocahontas Collieries Co v. Williams*, 105 Va. 708, 54 S. E. 868. We have no decision in which a judgment has been reversed for departure from the rule limiting the cross-examination

to the subject-matter of the examination in chief.

The questions under consideration related to an alleged conversation between the accused and one Albert Davis, relied upon by the state as suggesting acceptance of money from the accused, by Davis, with which to procure testimony favorable to the former. They were all answered without protest or objection, and then a motion was made to strike out the answers.

[3] It may be true that the questions tended to incrimination of the witness, and he was under no duty to answer them. But, if so, in answering them he waived his constitutional privilege. Right to it is strictly personal, and, if not promptly claimed, it is waived, and so lost. *Taylor v. U. S.*, 152 Fed. 1, 81 C. C. A. 197; *Morgan v. Halberstadt*, 60 Fed. 592, 9 C. C. A. 147; *Eggers v. Fox*, 177 Ill. 185, 52 N. E. 269; *State v. Laudano*, 74 Conn. 638, 51 Atl. 860; 40 Cyc. 2552; 28 R. C. L. 428.

Admissibility of Davis' testimony to the conversation, which the court likewise refused to strike out, depends upon whether the alleged fact was relevant and material to the issue. If it was the ruling was correct, even though it may not have been admissible for impeachment of the accused. The state could prove the fact by Davis, in support of its case, notwithstanding the implied contradiction of the accused in doing so, even though it be conceded that the cross-examination made him the state's witness as to the transaction. *Lambert v. Armentrout*, 65 W. Va. 375, 64 S. E. 260, 22 L. R. A. (N. S.) 556; *Hickory v. U. S.*, 151 U. S. 303, 14 Sup. Ct. 334, 38 L. Ed. 170.

[4] Admittedly, the accused asked Albert Davis, while the trial was in progress, if he had not heard a certain person, who does not seem to have testified, say the sheriff, Donald P. Davis, was drinking or drunk on the occasion of the transaction in which he was killed. Davis testified that he had gone further, and said in that connection, "Money is no object to me. I want to get out of it." This alleged conversation seems to have been regarded as involving solicitation to Davis to obtain perjured testimony for the accused and an offer of money for that purpose. A jury could so interpret it, if they believed the suggestion as to money, which the accused denied. Being susceptible of such interpretation, it was the province of the jury to say what it meant, and it was admissible, if in any legitimate sense probative. *State v. Sheppard*, 49 W. Va. 582, 603, 39 S. E. 676. An attempt to prevent a fair trial by corruption of a witness is admissible evidence against the party resorting to it. *Maynard v. Bailey*, 85 W. Va. 679, 102 S. E. 480, 9 A. L. R. 981. Vagueness of this evidence detracts from its value, but its probative value is not the test of admissibility.

No doubt the court, if requested, would

have instructed the jury not to consider Davis' testimony as matter directly contradicting the statement of the accused. A general objection to it did not impose that duty on the court, however.

[5] The liberality of the rule, justifying admission of this evidence, would have admitted the testimony of the accused, tending to prove ignorance on his part, at the time of the attempted arrest, of the sheriff's possession of a capias authorizing it. If permitted, he would have told the jury he had been advised by his attorneys that his case had been continued at the April term of court, until the July term, and, in substance, that he could go about his business until that time. Having direct bearing upon a vital issue in the case—resistance of arrest, resulting in the death of the officer—this evidence was improperly excluded. Neither liability of the accused to arrest, forfeiture of his recognizance, issuance of the capias, the officer's possession thereof, nor its validity was in issue or contradicted by this evidence. It pertained solely to the intention and purposes of the accused, on the occasion of the fatal transaction. Upon an issue as to the actual bona fide intention of an actor in any transaction in which such intent is material, anything that directly casts light upon his probable motives is competent for the consideration of the jury. *Blodgett Paper Co. v. Farmer*, 41 N. H. 398; *Harvey v. Stevens*, 58 N. H. 338; *Tobin v. Walkinshaw*, Fed. Cas. No. 14,070; *Bottomley v. United States*, Fed. Cas. No. 1,688. Nothing is better calculated to accomplish such a result under the circumstances here disclosed than the advice of counsel.

There was no error in the giving of the state's instruction No. 1. In connection with its correct statement of the theory of the prosecution, it included the timeworn rule of presumption of intention as to consequences of a wrongful act. Properly guarded, as it was here, this rule may always go to the jury in homicide cases, if there is evidence of such acts resulting in death. *State v. Taylor*, 57 W. Va. 228, 50 S. E. 247; *State v. Clifford*, 59 W. Va. 1, 52 S. E. 981.

[7] Instruction No. 4 given for the state should have been refused. It propounds the theory of flight of the accused as an incriminating circumstance. After the tragedy occurred at the West Virginia end of the bridge, between Piedmont, W. Va., and Westernport, Md., the accused merely went from that place to his home in Westernport. In the collision, both he and some of his children were hurt. If it can be said there was technical flight in leaving the state, the circumstances were such as fully repelled all inferences of guilt arising from it. All taken together, they do not appreciably tend to prove consciousness of guilt.

[8] An instruction was given over objection of the accused, based upon the alleged

conversation between him and the witness Davis, hypothetically submitting the theory of the state as to it, and telling the jury they might consider it as a circumstance with all the other testimony, in passing upon the guilt or innocence of the accused, if they believed Davis. It should have been refused because it embodies an hypothesis not sustained by any evidence at all, namely, an "attempt to influence any witness for the state." The conversation did not relate to Davis' own testimony, nor anything to which he could have testified, and Ravenscroft, the man mentioned, was not a witness.

The objection to the giving of the state's instruction No. 7 is untenable. There is evidence that Davis commanded the accused to stop, told him he had a warrant for him, jumped on the running board of the car, and said, "Pete, you are under arrest." This clearly tends to prove the hypotheses submitted by the instruction, which it is argued are unsupported by evidence. All that followed was an attempt to make good the order of submission to arrest.

[9] State's instructions Nos. 8 and 13 were improperly given over objections. In substance, they are the same as instructions disapproved in *State v. Ringer*, 84 W. Va. 546, 100 S. E. 413, and *State v. Long*, 108 S. E. 279, there interpreted as having authorized the jury arbitrarily to believe or disbelieve any witness testifying in the case. In both of those cases, the giving of such an instruction was held to be reversible error. We perceive no reason for departure from them as precedents.

[8] State's instruction No. 15 does not assume knowledge on the part of the accused of the sheriff's possession of the capias, while they were struggling for control of the car. It submits to the jury an inquiry as to previous arrest by virtue of the capias offered in evidence. This could not have occurred with his knowledge of the writ. At any rate, the reference to the writ, in the submission of that inquiry, was sufficient to carry knowledge on the part of the accused of its possession by the sheriff to the jury as part of the hypothesis, and the jury could not have been misled by the subsequent phrase, "knowing the sheriff held the capias." For the purposes of another trial, however, it should be made more specifically hypothetical as to knowledge of the writ.

[10] The court erred in its unintentional refusal to give instruction No. 10, requested by the defendant. It is identical with instruction No. 16, refused on the former trial, but approved by this court in our disposition of the former writ of error. That refusal thereof was inadvertent is immaterial. The result is just as detrimental as if it had been intentional.

It is impossible to concur in the view urged here, that the errors herein noted are harm-

less. The case involves an issue as to whether the fatality was occasioned by the accused or by the action of the deceased himself, and that is a question for jury determination in a trial free from erroneous rulings by the court, in the progress thereof, working prejudice to the accused.

As the judgment will have to be reversed for the errors herein noted, particularly those committed in rulings on instructions, it is unnecessary to enter upon an inquiry as to the extent of the constitutional limitation upon penalties applicable to misdemeanors, and not defined by statute. The verdict upon which the present judgment stands will be set aside, and then there will be neither a verdict nor a judgment. If there should be another conviction, the judgment to be rendered upon it may be clearly and concededly valid.

For the reasons stated, the judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

(89 W. Va. 186)

STATE v. McDONIE. (No. 4283.)

(Supreme Court of Appeals of West Virginia.
Oct. 4, 1921. Rehearing Denied
Dec. 9, 1921.)

(Syllabus by the Court.)

1. Jury \S 148(1)—Oath administered to jury in felony case need not be entered on record.

It is not necessary that the form of the oath administered to the jury in a felony case should be entered on the record. It is sufficient if the record shows that the jury was duly sworn.

2. Jury \S 148(1)—Recital that jury was duly sworn not overcome by recital giving effect of oath.

A recital in the order impaneling the jury in a felony case that the jury was duly sworn will not be overcome by another recital attempting to give the effect of the oath administered, which indicates a failure of full compliance with the form of oath usually administered in such cases.

3. Criminal law \S 564(3)—Venue need not be proven by direct testimony.

The venue in a criminal case need not be proven by direct testimony. When the facts proven show that the crime could not have been committed in any other county than that named in the indictment the venue is sufficiently proven.

4. Criminal law \S 304(6)—Court will take judicial notice that city is county seat of certain county.

Judicial notice will be taken of the fact that the city of Huntington, W. Va., is in the county of Cabell, and is the county seat thereof.

5. Assault and battery \S 83—Witnesses not recognizing defendant's voice may testify, where others did recognize voice.

Where the basis of a prosecution is successive assaults inflicted upon a child of tender

years, evidence of persons that, within a few days prior to the last assault, which resulted in the arrest of the defendant, they heard, coming from the house of the defendant, outcries indicating that the child was being severely castigated, and heard what they took to be the defendant's voice in connection therewith, is admissible; and the fact that some of the witnesses who testified to these occurrences may not have distinguished the defendant's voice does not render their evidence inadmissible, where it appears that other witnesses, who heard the same occurrences, did recognize the defendant's voice in connection therewith.

6. Mayhem ⚡—"To maim" defined.

"To maim" means to violently inflict a bodily injury upon a person, so as to make him less able to defend himself or annoy his adversary.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Maim.]

7. Criminal law ⚡800(3), 830 — Technical words charging offense should be defined, but refusing inaccurate instruction is not error.

In the trial of a criminal case, where technical words are used in charging the defendant with the offense, the court, upon request, should define such technical terms to the jury; but it is not error to refuse an instruction attempting to define such a technical term, when the definition given is not accurate.

8. Assault and battery ⚡82—Where defendant's punishment of his minor stepson was excessive, jury may infer malice and criminal intent.

In a prosecution against a stepfather for committing a felonious assault upon his six year old stepson, if it is shown that the treatment to which such stepson had been subjected was such as to result in serious bodily injury to him, the jury may from that fact find that the punishment inflicted was in excess of that which the law contemplates, and may also find from the same fact that such stepfather was actuated by malice, as well as that he acted with a criminal intent.

9. Criminal law ⚡404(4)—In prosecution for felonious assault, underclothing and bandages, found in the injured child's bed, held admissible.

In a prosecution against a stepfather for assault upon his stepson, the child's underclothing, found in the bed from which the child was removed by officers arresting the father, as well as bandages therein found, which apparently came from the legs of such child, are properly admitted in evidence, even though the witnesses did not notice these articles at the time they removed the child, but upon their return, later the same day, discovered and removed them.

(Additional Syllabus by Editorial Staff.)

10. Assault and battery ⚡83—In prosecution for felonious assault on stepson, officer's evidence as to finding child's mother in house held not erroneously admitted.

In prosecution of a stepfather for a felonious assault on a stepson, testimony of an officer to finding the child in bed and to his condition, and to finding his mother in a back room in the

dark, throwing a light on her, and asking her what she was doing there, held not erroneously admitted.

Error to Circuit Court, Mason County.

Joe McDonie was convicted of malicious assault, and he brings error. Affirmed.

D. B. Daugherty and R. L. Saunders, both of Huntington, and B. H. Blagg and Somerville & Somerville, all of Point Pleasant, for plaintiff in error.

E. T. England, Atty. Gen., R. A. Blessing, Asst. Atty. Gen., and Robt. L. Hogg, Pros. Atty., of Point Pleasant, for the State.

RITZ, P. The defendant was found guilty by a jury upon an indictment charging him with having committed a malicious assault upon his stepson, James Gibson, with intent to maim, disfigure, disable, and kill him, the said James Gibson; and to review a judgment sentencing him to confinement in the penitentiary, rendered upon said verdict, he prosecutes this writ of error.

It appears that in the month of June, 1920, the defendant, Joe McDonie, married Susie Gibson, who was the widow of James M. Gibson, and the mother of James Gibson, a boy 6 years of age. Prior to her marriage to McDonie this child had lived for some time with his grandparents, but when the McDones went to housekeeping in the city of Huntington the child was taken to live with his mother and stepfather. On the 21st of August, 1920, the child's uncle had information from some source that the boy was being mistreated, and went to the residence of the McDones to inquire about it. When he got to the McDonie residence, he asked Mrs. McDonie how the boy was, and upon being informed that he was all right he asked where he was, and if he might see him. He was informed by Mrs. McDonie that the boy was upstairs, but that he could not see him. He then attempted to go upstairs to see the child, but was prevented by Mrs. McDonie. He thereupon went to the telephone to call the police, and Mrs. McDonie attempted to prevent him from doing so; but in this he succeeded, and when the officers came they entered the house and found the child in a room upstairs lying in bed. An examination disclosed that he had been badly mistreated, and the chief of police directed the boy to be taken to a doctor for attention. The boy's uncle took him to a hospital, and called a doctor and also a trained nurse to attend him. He was examined upon his arrival at the hospital, and the doctor and nurse testify as to his condition at that time. It was found that he was very much emaciated, was suffering from shock, and from abrasions and bruises all over his body.

The nurse testifies that his head was one mass of bruises; that his left ear was torn

at the top and bottom, and that there was a deep abrasion at the back of this ear; that his right ear was also torn at the top, and a deep abrasion at the bottom of it; that two lower teeth were missing and the cavities filled with pus; that there was a deep abrasion in his lower lip, and his tongue cut in several places; that his throat was lacerated; that he was unable to swallow even water; that his back was covered with scratches, bruises, and cuts, many of which were infected, the nurse testifying that she counted 68 of these cuts on his back; that there was a cut in his left arm extending across the axillary; that there was a burn on his left hand of considerable size and that the knuckles of his right hand had a seared burn thereon; that the palms of both hands were blistered with burns, which left deep pits, in which there was pus; that his abdomen was a solid bruise, being black at the time of the examination, changing to green in 48 hours thereafter; that the back of one of his legs had two seared burns, underneath which there were scabs; on the left leg was one burn; that both feet were badly scalded, the burns extending from his toes up to his ankles and all over the feet, on one foot extending underneath and between the toes, so that gauze had to be kept between them to keep them from growing together. His condition was such that the child, according to the testimony of the physician and nurse, was on the verge of convulsions, and for three or four nights neither ate nor slept, but simply lay in a stupor. The doctor who attended him testifies that he was very much alarmed as to his condition and about his recovery.

The defendant and his wife were arrested and taken to jail. An indictment was found against them, charging them with maliciously wounding the child, and on their motion the case was removed for trial from Cabell county into the circuit court of Mason county. Upon the trial of the case the state introduced a number of witnesses, who testified that they heard screams from the child at various times during the week just previous to the arrest of the defendants; that they heard splashing in the bathtub, and the child calling for help while this was going on; and that they heard McDonie's voice apparently in the same room.

At the time he was arrested he admitted having whipped the child much harder than he should have, and also admitted that after he had so whipped him he tied his feet together, and held him in the bathtub, and turned the hot water in on him, and held him there for the purpose of scaring him, as he says; that the water was hotter than he thought it was, and severely scalded both of the child's feet, so badly that the skin pulled off them when his socks were removed after he was taken in charge by the police officers. McDonie denies that he ever whipped the child on any other occasion, except once very

moderately. He testifies that the occasion for the last whipping administered to him was that on the night before, when he came home to his supper about 8 o'clock, the child went upstairs with him; that he shaved and was getting ready to take a bath, when he noticed the child's absence; that he called down to his wife to know if he was downstairs, and upon being informed that he was not that he immediately dressed and went out and searched for the child; that this was about 10:30 o'clock in the evening; that this search continued until some time after midnight, and that the child was recovered and brought back by his uncle somewhere near 2 o'clock; that they then ate their supper and went to bed; that on the next day they got up about 11 o'clock in the morning, and had breakfast between that time and 12 o'clock; that after breakfast was over he made inquiry of his wife as to whether or not the boy should be corrected or chastised for running away the evening before, and his wife suggested that he be sent to bed and made to stay there all day. She told the boy to go upstairs and go to bed, and he says the boy refused to do so; that his wife thereupon got him some switches, and he took the switches and the boy upstairs and chastised him; that he was not able to make him submissive by the use of the switches, and he thereupon conceived the plan of tying his feet together and putting him in the hot water in the bathtub; that when he discovered that this water was hotter than he thought it was he allowed the boy to get out of the tub and get in bed, and he went to a drug store and got some salve, which his wife applied to the boy's feet, and put some bandages on them; and that he thereupon went out to his work, and was subsequently arrested on the street about 9 o'clock. It was further shown upon the trial that McDonie had been married to the boy's mother less than two months; that the boy's father had been killed in a railroad accident several years before, in fact before the boy's birth, and that in a suit to recover on account of his wrongful death the sum of \$3,750 was awarded, one-half of which belonged to the boy at the time of the occurrences herein referred to, and one-half to the mother. After being arrested, McDonie stated to a deputy sheriff at the jail that he had whipped the child because he had run away, and put him in the bathtub to scare him, and tied his feet together, but that he did not know the water was warm enough to do the child any injury. He also stated to another witness, while being taken to jail, that they were going to try to railroad him for the offense, and in reply to an inquiry stated that he did whip the child unmercifully; that he whipped the blood out of him all over. These statements McDonie did not deny, nor did he attempt in any way to explain them. His wife was introduced as a

witness in his behalf, and corroborated his statements as above outlined.

The theory of the state was that this child had been subjected to repeated indignities during at least the week prior to the arrest of the defendant; that this is borne out by the testimony of the witnesses who heard the child's outcries on different occasions, and heard McDonie's voice apparently directing his chastisement; that it is further borne out by the fact that his limbs and his body were covered with sores, a number of which were apparently of some age, from the reason that they had become infected and filled with pus; that the result of these repeated assaults or attacks and chastisements which culminated in the conduct above narrated on the 21st day of August was that the boy was at the point of death at the time he was rescued by his uncle. In fact, it was apparent from the testimony of the physician who attended him, and of the nurse in whose custody he was for two weeks, that, had he not received medical attention at the time he did, he would not long have survived.

[1, 2] The defendant assigns a number of errors committed by the court during the trial of this case, the first of which is that it appears from the record that the jury was not properly sworn. The order impaneling the jury relates that the plea of not guilty was entered and issue joined thereon, and proceeds:

"And thereupon came [naming the 12 jurors], 12 good and lawful men, selected in the manner required by law, duly qualified to sit in said case, who were duly sworn to well and truly try according to the evidence, and true deliverance make of the prisoner at the bar, Joe McDonie, whom they should have in charge."

It is contended by the defendant that, if the order had only recited that the jury had been duly sworn, it would have been sufficient, but that, inasmuch as it goes on and attempts to recite according to defendant's contention, the oath that was administered, and which oath does not appear to have all of the requisites of the oath required by law, this negatives the statement that they were duly sworn, and shows affirmatively that the oath administered was not the oath required by law. It is true that, if the recital in the order contains the oath actually administered, then it is not in the form ordinarily administered in felony cases. There is no statute prescribing any particular form of oath, but there is a form well recognized, with which the profession is fully acquainted, the requirements of which it is contended are not met by the oath administered in this case. Does the order in this case attempt to set out the oath actually administered; or, to state the proposition in another way, is the matter contained in the order, after the recitation that the jury was duly sworn, any-

thing more than the clerk's interpretation of what was done, merely a paraphrase by him of the oath actually administered? The order does not in so many words say that the language in it was the oath administered, but it does say in direct language that the jury was duly sworn; and can it be said that this positive declaration will be overcome by the further statement above quoted? It does not appear in the record that any objection was made to the oath administered to the jury at the time it was impaneled, and this fact is significant, for it is unthinkable that the defendant and the eminent counsel who represented him at the trial would sit by and permit an improper oath to be administered to the jury, without calling it to the attention of the court. The statement in the order is not very far from the requirements of the oath ordinarily administered in this kind of a case, and even though it appeared affirmatively that the oath was administered in that form, we are not prepared to say that it would not be a substantial compliance with the requirements of the law.

It is not necessary, however, for us to discuss this proposition, as we are of the opinion that this order does not undertake to quote the oath actually administered, but simply to give the clerk's interpretation of it, and that, inasmuch as the order shows affirmatively that the jury were duly sworn, we will presume, in the absence of something more positive to the contrary, that the law has been complied with; and this presumption is strengthened by the fact that, so far as the record shows, neither the prisoner nor his counsel made any objection to the oath as it was actually administered to the jury. This conclusion is fully supported by our decisions upon this question. *Lawrence v. Commonwealth*, 30 Grat. (Va.) 845; *State v. Sutfin*, 22 W. Va. 771; *Wells v. Smith*, 49 W. Va. 78, 38 S. E. 547; *State v. Kellison*, 56 W. Va. 690, 47 S. E. 166. In each of these cases the language used in the order, that the jury was duly sworn, was supplemented, in some of the cases by a statement that the jury was sworn to speak the truth upon the issue joined, and other qualifications showing the interpretation that the clerk, in making up the order, put upon the oath. In each of the cases, however, the court held that this recitation was only explanatory, and did not undertake to recite the oath actually administered, and was not, therefore, sufficient to overcome the positive declaration that the jury was duly sworn, particularly in view of the fact that it did not appear that any objection was made to the form of the oath at the time it was administered.

[3, 4] The defendant's next contention is that the venue was not properly proven. There is no merit in this contention. The evidence of the boy's uncle shows that he

observed the condition of the child in the city of Huntington, which is in Cabell county, W. Va., and the other witnesses all testified that the McDonie home in which it is claimed the crime was committed was in the city of Huntington. While they do not specifically state that the city of Huntington that they refer to is in Cabell county, still they do show that it is the same city referred to by the boy's uncle who testified in the case, thus conclusively showing that all of the transactions occurred in Cabell county. Further than this, we take judicial notice of the fact that the city of Huntington, W. Va., is in the county of Cabell, and is the county seat thereof. *State v. Hensley*, 86 W. Va. 434, 103 S. E. 204.

[5] The next ground relied upon by the defendant for reversal of the judgment is the action of the court in refusing to strike out certain evidence of Mrs. C. H. Vie, Mrs. Frank Williams, and Mrs. Cora Gill, upon the ground that their evidence did not connect the defendant with the occurrences testified to by them. Mrs. Vie testified that on one occasion, in the week before the occurrence which resulted in the arrest of McDonie, she heard the child screaming and being very severely chastised; that this was just a few days before the 21st of August; that it was in the nighttime, and that her husband was present. She does not testify that she heard McDonie's voice in connection with the transaction, but her husband testified in relation to the same occurrence, and he says that he heard a man's voice in connection with the whipping that the child was receiving, and that the voice sounded like McDonie's. This was sufficient to connect the defendant with this transaction. Of course, the probative force of it was for the jury. Mrs. Williams, who lived in an adjoining house, also testified that just previous to the time McDonie was arrested she heard the child's cries, and a noise indicating that he was being punished in some way in connection with water running in the bathtub, and that she heard Mr. McDonie's voice in connection with the transaction, but she could not distinguish anything he said. Mrs. Gill, who is the mother of Mrs. Williams, testified to this same occurrence, and while she did not say that she recognized the voice of McDonie, the fact that her daughter did is sufficient to admit her evidence as corroborative of the statements of her daughter as to what transpired.

[10] The action of the court in refusing to strike out certain statements made by Tom Harrison and John Coon is also relied upon for reversal. Harrison was one of the police officers who went to the McDonie home upon the occasion that the child was taken to the hospital. He testifies to finding the child in bed, and to its condition, and testifies to finding the mother in a back room in the dark, and throwing a light on her and asking

her what she was doing there. Coon also testifies to this same state of facts. The objection of the defendant goes to the action of the court in allowing the statements of Harrison and Coon as to finding the mother in an adjoining room to remain in the record. We see no objection to this. It, perhaps, had little, if any, probative force in connection with the case; but they were only detailing the conditions which they found in the house at the time they went there and removed the child. They told about finding the child in bed, about the condition of the bed, and the room in which the child was, and about the mother being in an adjoining room, in which there was no light. It would perhaps, have been more significant of bad conduct on the part of McDonie and his wife if no one at all had been found in the house. We do not see how it could in any way prejudice the defendant for these witnesses to testify to the fact that the child's mother was in an adjoining room at the time the child was removed.

[6] The defendant's counsel earnestly insist that the court committed error in refusing to give instruction No. 6 offered on behalf of the defendant. This instruction is as follows:

"The jury are hereby instructed that before you can legally convict the defendant of a felony you must believe from the evidence, beyond all reasonable doubt, that the defendant committed the act complained of with intent to maim, disfigure, disable, or kill, and unless you believe the defendant committed the act complained of, intending at the time to maim, disfigure, disable, or kill the said James Gibson, then you should acquit him of malicious or unlawful wounding. You are further instructed that to maim is to deprive a person of some member of the body; that to disfigure is to impair or injure the beauty, symmetry, or appearance, or to render unsightly or misshapen; that to disable is to cripple, or to render incapable of proper or effective action, and to kill is to deprive of life; and before you have a right to convict the defendant you must believe two things beyond all reasonable doubt, and such belief must be produced from the evidence: First, that the defendant maliciously or unlawfully did the things complained of in the indictment; second, that the acts were done with the intent to maim, disfigure, disable or kill, and unless you do believe both things from the evidence beyond all reasonable doubt, you should find the defendant not guilty of either malicious or unlawful wounding."

[7] It will be noted that in this instruction an attempt is made to define the terms "maim," "disfigure," "disable," and "kill," and it is true that no other instruction was given in the case which does define these terms. All of the other elements of the instruction are covered by other instructions given on motion of the defendant. Counsel for the defendant insists that the defendant was entitled to have these terms defined to

the jury, that they are words of technical signification, and that the jury might not know just what was comprehended within their meaning. We agree with this contention. It is true these words do have a technical signification, but we do not believe that this technical meaning is very much different from the meaning ascribed to them by the average person. However this may be, the defendant was entitled to have the jury told what these terms meant in the indictment in this case, as distinguished from the ordinary or colloquial significance which attaches to them. But, when the defendant seeks to define these terms, he must do it correctly and accurately. He cannot complain of the refusal of the court to give to the jury a definition, unless that definition is accurate. Now, this instruction tells the jury that to maim is to deprive a person of some member of the body. This, no doubt, is the popular meaning ascribed to this term; but it is not the technical meaning, and it was this technical meaning that the defendant complains that he was not allowed to have given to the jury. The technical meaning of the term "maim" is to violently inflict a bodily injury upon a person, so as to make him less able to defend himself or to annoy his adversary. 4 Blackstone's Commentaries, 206; 6 New Oxford English Dictionary, 260.

It may be said that it is technical to justify the refusal of this instruction for the failure to properly define this term. The answer to this criticism is that the defendant's only contention of his right to have it defined is because it is a technical term and has a technical meaning. The definition as given tells the jury that in order to maim it is necessary to deprive one of some member of his body. This is not so at all. To so injure a fighting member of the body that it cannot be used, or cannot be used as effectively as it could theretofore, is as much maiming as it is to entirely sever the member, and when we consider this instruction in connection with the facts proven in this case the vice of this definition at once appears. The principal offense alleged against the defendant was the scalding of the boy's feet. This might not result in the boy losing his feet, or either of them; but it can very well be seen that it might result in their being of less use to him in repelling or making an attack. In fact, the nurse says that, if he had not received attention when he did, the toes of one of his feet would have grown together. This would not have been maiming under the definition given of this word in the instruction, but it would in fact be maiming in the legal sense of the term.

[8] Complaint is also made of the action of the court in refusing to give instruction A and instructions Nos. 1 and 4. Instruction A and instruction No. 1 are mandatory. Instruction No. 4, which was refused, is in effect mandatory. All of these instructions

would have compelled an acquittal of the defendant, and that was their purpose. They are attempted to be justified on the theory that this defendant stood in the position of a parent to this child, and that no malice or wrongful intent could be attributed to him from the fact alone that defendant chastised or corrected the boy. This contention is quite correct. A parent, or one standing in loco parentis, has the authority to administer chastisement or correction to his child. The moral sense of children is not sufficiently developed in all cases to admit of a successful appeal to the child to desist from wrongdoing without the aid of physical coercion, but it has never been recognized that this chastisement or correction could go beyond what the child's reasonable welfare demands. It has never been recognized that a parent has the right or power to maim or disfigure or disable a child simply because he might be stubborn and not respond to correction in the manner the parent might think proper. It is true, in this case, no malice can be attributed to the defendant from the mere fact that he administered correction to this child, nor can any criminal intent be attributed to him from that fact alone; but when his conduct exceeds the bounds of chastisement, and goes to the extent of actually endangering the child's life or limb, then proof showing these facts is just as effectual to prove malice and criminal intent as proof of an unjustifiable assault is in any other criminal case. The doctrine that one intends to do that which is the natural and probable consequence of his acts is just as applicable in a case like this as in any other sort of a case. The proof of chastisement, however, in order that any presumption or inference may arise therefrom as to malice or intent, must show that such chastisement has been administered beyond any real or apparent necessity. A parent can no more commit a brutal attack upon his child, resulting in the infliction of serious injury upon it, than he can commit such injury upon a stranger; and when he does so, and the jury is satisfied that the punishment inflicted has resulted in such serious injury, such fact, when found, may be treated as proof of malice upon the part of such parent as well as of a guilty intent.

[9] The action of the court in admitting in evidence certain clothes and bandages which were offered by the state is also assigned as error; it being insisted that these articles were not sufficiently identified. The evidence in regard to them is that after the defendant and his wife were arrested and taken to jail the police officers went back to the room where they had found the boy, and there found a suit of underwear apparently belonging to the boy and some bandages which had upon them stains, whether from blood or salve which had been used on the wounds does not appear. These garments were ad-

mitted in evidence. It is contended by the defendant that, because they were not discovered when the officers were there on the first occasion and took the boy away, they are not sufficiently identified to permit their admission as evidence. It appears that the officers went back to the house within a very short time, not more than an hour or two, after the first occasion, and procured these articles. Why they did not see them and procure them when they were there before does not appear, nor is it material, so far as their admissibility as evidence is concerned. It may go to the question of their weight as evidence, but not to their admissibility. They bore all the earmarks of genuineness, and were introduced for the purpose of showing the stains upon them. Whether those stains were made by blood or by the salve which the defendant says was applied to the wounds, or both, was a question for the jury, and that tribunal was entitled to give to them such probative force as in their judgment they might be entitled to, after an examination of them.

We have carefully reviewed this case, and have considered maturely every objection raised by the defendant to the action of the court during the trial. There was no undue haste in forcing him to trial, and while the occurrence created strong feeling against him in the city of Huntington, where he lived, the officers of the state charged with the administration of justice, upon his application, removed his case for trial to another county, where the influence of this feeling would not be felt. His trial was had several months after the occurrence. The learned judge of the trial court was apparently solicitous to afford to the defendant every privilege to which he was entitled; he had the aid of eminent counsel in his defense; and the jury, after consideration, found him guilty of a very infamous crime, the like of which has not stained the criminal annals of this state, and, finding that he has been given this fair and impartial trial with this result, we must refuse to disturb the judgment and permit him to suffer the punishment to which his conduct, as interpreted by the verdict of the jury and the judgment of the trial court, has condemned him.

(89 W. Va. 600)

STATE ex rel. KEENEY et al. v. BLAND,
Judges. (No. 4467.)

(Supreme Court of Appeals of West Virginia.
Nov. 22, 1921.)

(Syllabus by the Court.)

1. Prohibition \Leftrightarrow 10(1)—Inferior court may be prevented from proceeding only for lack of jurisdiction.

The only ground of jurisdiction in a superior court, to prevent an inferior court from

proceeding in any cause or matter is lack of jurisdiction of such cause or matter in the inferior court, for some reason.

2. Criminal law \Leftrightarrow 100(1)—No lack of jurisdiction in either of two inferior courts of concurrent jurisdiction until plea of abatement in one.

If two inferior courts of concurrent jurisdiction are entertaining identical causes of action between the same parties at the same time, there is no lack of jurisdiction in either of them until after an application to one of them for abatement of the action pending in it, or relinquishment of its jurisdiction, has been made and sustained by proof.

3. Criminal law \Leftrightarrow 100(3)—Attachment of jurisdiction of first of concurrent courts does not of its own force preclude jurisdiction of the other.

In such cases, attachment of the jurisdiction of the court of first cognizance does not of its own force preclude jurisdiction of the court of second cognizance. It merely affords the parties concerned the means or ground for procuring abatement of the second action, or discharge of persons or property seized under the process of the court in which it is pending.

4. Prohibition \Leftrightarrow 3(1)—Will not lie to court of second cognizance before a hearing to determine its jurisdiction.

Upon the plea in abatement filed under such circumstances, or an application for discharge of the person or property seized, the court of second cognizance has jurisdiction, upon such pleas or application, to ascertain the facts necessary to determination of the question whether the same cause of action between the same parties is pending in the court of first cognizance, and previously came within its actual jurisdiction, or whether the same person or property is in the custody of such other court and was first seized under its process, as the case may be; wherefore the writ of prohibition cannot be awarded against the court taking subsequent jurisdiction of the cause of action or the person or property, before a hearing and determination as to its right to retain jurisdiction has been had, upon a proper application therefor, in the manner above indicated.

5. Prohibition \Leftrightarrow 10(1)—Court cannot be deprived of its right to determine jurisdictional facts, although evidence is absolutely conclusive.

If the question of a court's jurisdiction depends upon issues of fact, it has power and jurisdiction to decide them, even though the evidence relied upon to prove the jurisdictional facts is wholly uncontradicted and absolutely conclusive, and it cannot be deprived of its right to do so by prohibition or any other collateral proceeding.

6. Prohibition \Leftrightarrow 10(3)—Will not lie at instance of one indicted as accessory to murder in two counties to enjoin one court prior to its hearing on its jurisdiction.

Prohibition does not lie at the instance of a person indicted, as an accessory before the fact to the crime of murder, in courts of two

counties having concurrent jurisdiction of the offense, and held in custody under process issued by one of such courts, to prevent the other from proceeding against him, by process for his arrest or otherwise, in advance of a hearing in such other court as to facts upon which its supposed lack of jurisdiction depends, such as his identity, his arrest, and possibly other matters.

Original proceeding by the State, on the relation of C. F. Keeney and others, against Robert Bland, Judge, for writ of prohibition. Writ refused.

C. J. Van Fleet, H. W. Houston, and T. C. Townsend, all of Charleston, for relators.

Chafin & Estep, of Logan, and Osenton & Lee, of Fayetteville, for respondents.

POFFENBARGER, J. By the usual procedure, C. F. Keeney and Fred Mooney, under indictment in Kanawha county and in Logan county for the same offense, being charged in each as accessories before the fact to the crime of murder alleged to have been committed in said last-named county, and now in custody by virtue of process issued on the indictment in said first-named county, seek a writ of prohibition against the judge of the circuit court of Logan county, to prevent him from proceeding against them, on the indictment pending in his court, upon the theory of concurrent jurisdiction of the offense in both courts, and antecedent attachment of that of Kanawha county, the petitioners having been first arrested and incarcerated under its process, and no arrest having been effected under the Logan county process, although the Logan county indictment was first found. The immediate purpose of this proceeding is prevention of arrest of the petitioners on a capias issued by order of the circuit court of Logan county November 5, 1921, and now in the hands of the sheriff of Kanawha county, and the ultimate purpose, to prevent trial on the Logan county indictment, while the other is pending in Kanawha county.

[1] If, upon the admitted facts alleged and the law as claimed by the petitioners, the remedy sought is inappropriate or unavailing, it is unnecessary to inquire whether the legal propositions advanced in support of the application for it are sound or not. For the purposes of the case, the constitutionality of section 8, c. 152 (sec. 5465) Code, interpreted as authorizing indictment and trial of an accessory, in either county, when the accessory acts occur in one county and the crime is consummated in another, may be conceded. So may the correctness of that interpretation, the existence of concurrent jurisdiction and prior attachment of that of the intermediate court of Kanawha county. If, all of these propositions being so conceded, prohibition does not lie, there is no occasion for questioning their soundness. No inquiries as to

them properly arise. We proceed, therefore, to the inquiry as to the applicability of the remedy sought.

The position assumed by the petitioners admits jurisdiction of the circuit court of Logan county over the subject-matter. It also admits right and power in that court to obtain jurisdiction of themselves, by arrest or seizure, but for prior arrest under process of the intermediate court of Kanawha county. The act sought to be prohibited is invasion of the jurisdiction of the latter court, by exercise of the jurisdiction of the former, treated as an act in excess of the invading court's jurisdiction.

[2, 3] This argument assumes lack of jurisdiction in the second court, in every instance in which the same plaintiff institutes two suits against the same defendant, upon the same cause of action, in different courts. Viewed in the light of ordinary procedure not involving any seizure of person or property, its fallacy is apparent. Pendency of a former suit for the same cause of action, whether in the same court or another, is mere matter of abatement, and must be pleaded in abatement, and at the first opportunity, else the defense is lost. *Robrecht v. Marling*, 29 W. Va. 765, 775, 2 S. E. 827; *Delaplain v. Armstrong*, 21 W. Va. 211; *Bradley v. Welch*, 1 Munf. (Va.) 284; *Monroe v. Redman*, 2 Munf. (Va.) 240. If this defense were jurisdictional, in the sense of lack of power in one court to try an action identical with one pending in another, and render judgment, the rule respecting its interposition would not be so strict. The defense is a personal privilege allowed the defendant, rather than a lack of power in the court; wherefore, upon his waiver of it, by failure to set it up by plea, filed at rules, the court may proceed to hear and determine the case. The rule by which a plea of another suit pending abates the one in which it is filed and sustained has, for its object, mere prevention of unnecessary vexation of a party by two or more suits upon the same cause of action. *N. & W. R. Co. v. Nunnally's Adm'r*, 88 Va. 546, 14 S. E. 367; *Olmins v. Delaney*, 2 Str. 1216; *Richards v. Stuart*, 10 Bing. 322. The fact that it must be set up by a plea, brought to the attention of the court in a strictly formal manner, and without the slightest delay, proves its nonjurisdictional character.

Nor is there any precedent in our decisions for its availability in any other way. If it is lost by mere failure to set it up in the suit in a proper manner or in proper time, on account of its dilatory nature or nonrelation to the merits of the cause, it certainly cannot be made available outside of the case by collateral procedure of any kind. In other words, if a court may reject it, although brought to its attention, because of mere delay in its interposition or lack of formality, and proceed with the case, as undubitably it

may do, there can be no reason for permitting it to be made a ground or cause of prohibition to stop the case, or any other collateral proceeding.

It does not follow, however, that a defendant must submit to two judgments for the same cause of action. He may waive or lose his right to have the second suit abated by reason of the pendency of the first, and yet prevent two judgments, by pleading the judgment first rendered in bar of further prosecution of the other action, in which judgment has not been recovered. Both suits may be prosecuted and defended, each as if the other were not pending; but the moment judgment is rendered in one of them, for either plaintiff or defendant, it is a weapon in the hands of the defendant with which, by pleading it, he may defeat the other action. Here, again, is a demonstration of the unsoundness of the proposition that attachment of the jurisdiction of one of two courts of concurrent jurisdiction deprives the other of its jurisdiction. The jurisdiction of the other continues, subject to power in the defendant to defeat it by proper procedure in the case and at its bar, but not otherwise. In all such cases, there is complete jurisdiction of both subject-matter and person, in both courts, until that of one of them is ousted by a plea in abatement or a plea of res judicata. A cause of action concurrently cognizable by two courts belongs to the jurisdiction of the one in which it is first brought, and is excluded from that of the other, only in a potential sense, not actually. The law confers upon the parties the right to confine it to the former and exclude it from the latter by proper procedure. This is the sense in which the observation respecting this subject, so often found in the books, must be taken.

[4, 5] No jurisdictional distinction between cases involving seizure of the person or property and others not involving it is perceived. The court of concurrent jurisdiction, making the first seizure, is entitled to retain jurisdiction, and the legal presumption is that the other, upon a proper and timely application founded upon the fact of the previous seizure under process of the other court, will relinquish the person or property seized, just as, in the other class of cases, the second suit is abated upon a proper and timely plea of the pendency of the first. The court under whose process the second seizure was made has undoubted and clear jurisdiction, if that of the other court has not attached by previous seizure or otherwise. Whether it has or not is a mixed question of law and fact, which such second court has power and jurisdiction to pass upon. In most cases, the question is free from doubt and easy of solution, but, however clear it may be, the court has right to determine it, and no other court, in a collateral proceeding, be it prohibition or what not, has any power or authori-

ty to decide the question for it. To do so would be a plain and palpable trespass upon its jurisdiction, an usurpation of power. There may be no doubt about the identity of the person or thing, the fact of seizure or the validity of the process under which the first seizure was made; but that does not affect the question of jurisdiction. Many of the cases submitted to the courts for decision are so clear and plain that any layman could correctly decide them. But no man can obtain an adverse judgment in the clearest case, otherwise than by submission thereof to a court of competent jurisdiction and procurement of the exercise of its judicial powers. Until the court of second cognizance by seizure has passed upon the application for release, or vacation of its action, it cannot be deemed to have exceeded the limits of its jurisdiction. If it has not power to ascertain and determine the identity of the subject, whether person or property, the fact of seizure and the validity of the process under which it was made, which may depend upon the question of jurisdiction of the issuing court, it is perfectly obvious that it might be wrongfully deprived of its own clearly rightful jurisdiction of the subject. The other court may have no jurisdiction of the subject at all. Its process may be void on its face for some reason. The person or property seized may not be identical. The court of second cognizance cannot possibly satisfy itself as to any of these matters, otherwise than by a judicial inquiry and determination, nor can it safely act in the premises without having made them. To say the representations made to the superior court, upon which the application for restraining process is founded, put all such questions beyond the realm of doubt or debate, is not a sufficient response to this argument. It is the province, function, and right of the inferior court to pass upon them, however clear they may be. Even though the facts are agreed upon in such manner as to preclude jurisdiction, the agreement must be put into the record of the case in which it is relied upon. If it has been made out of court, it must be proved in the case, to be availing. And it is the duty of the party seeking release from the jurisdiction of a court to submit to it the issues of fact relied upon as ground of release, for decision. Neither he nor a superior court can assume either incapacity or unwillingness on its part to decide them correctly. Both are bound by the presumption of its capacity and willingness to do so.

These conclusions bring the procedure in cases involving seizure or custody of persons and property clearly within the principle governing cases in which it is not involved. On the plea of another suit pending, an issue is made as to the identity of the cause of action and parties in the two cases. And no doubt the jurisdiction of the court in which it is pending may be a proper subject

of inquiry. Even though the identity of the cause of action and parties and the jurisdiction of the court may be clear beyond question, the plea must be filed and the facts it avers established, else the court of second cognizance may proceed. In cases of seizure, the same principle applies, but the procedure may be different. In a criminal case of concurrent jurisdiction, the issues might be raised by a plea, or they might arise upon the return of the officer indorsed upon the process, or process against him or some other officer. The procedure need not be defined nor indicated. Nothing is involved here except the question of jurisdiction in the circuit court of Logan county, and that depends upon facts to be determined by it. If a court, in passing upon its own jurisdiction, decides only a question of law, the decision in its favor may be at its peril. But, if the question depends upon facts to be ascertained and determined, a wrong decision is mere error. *McConiha v. Guthrie*, 21 W. Va. 134; *Swinburn v. Smith*, 15 W. Va. 483; *Ex parte Ellyson*, 20 Grat. (Va.) 24.

[6] In the argument, the issue has been correctly treated as one of jurisdiction. Prohibition lies only in case of the inferior court's lack of jurisdiction in some form. Its lack of jurisdiction, if any, confers jurisdiction by prohibition upon this court. When it has jurisdiction, we do not. Our decisions uniformly hold that prohibition cannot be awarded upon any ground save lack of jurisdiction in the inferior court. No lack of jurisdiction in the circuit court of Logan county having been shown, the writ cannot be awarded consistently with law.

As a precaution against misapprehension of the scope and effect of this decision, we observe that it is limited to the facts upon which it is predicated. We are not to be understood as saying or intimating that a court of concurrent jurisdiction may not, in a case of this kind, overstep the limits of its jurisdiction by its decision upon an application for release, or by its subsequent action. The point at which its jurisdiction terminates in such cases is not a subject of inquiry here. It certainly extends to and includes a hearing and decision as to whether cognizance has attached. There are instances of action in excess of jurisdiction, by the judgment rendered upon a hearing properly entertained. *Bracey v. Robinson*, 83 W. Va. 9, 10, 97 S. E. 295; *In re Nielsen*, 181 U. S. 176, 9 Sup. Ct. 672, 33 L. Ed. 118; *Ex parte Milligan*, 4 Wall. (U. S.) 131, 18 L. Ed. 281; *Ex parte Lange*, 18 Wall. (U. S.) 163, 21 L. Ed. 872; *In re Snow*, 120 U. S. 274, 7 Sup. Ct. 556, 30 L. Ed. 658; *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89.

There are cases in which the writ of prohibition has been awarded by superior courts against inferior courts of concurrent jurisdiction, to prevent one from trespassing upon

the jurisdiction of the other, in instances of seizure of property, but in most, if not all, of them, the excess of jurisdiction was found or existed in their judgments or action with knowledge of facts making their lack of power to proceed perfectly apparent. *Dunbar v. Bourland*, 88 Ark. 153, 114 S. W. 467; *Maclean v. Speed*, 52 Mich. 257, 18 N. W. 396; *Wells v. Montcalm*, 141 Mich. 58, 104 N. W. 318, 118 Am. St. Rep. 520; *State v. Ross*, 122 Mo. 435, 25 S. W. 947, 23 L. R. A. 534; *State v. Wear*, 129 Mo. 619, 31 S. W. 608; *State v. Reynolds*, 209 Mo. 161, 107 S. W. 487, 15 L. R. A. (N. S.) 963, 123 Am. St. Rep. 468, 14 Ann. Cas. 198; *State v. Murphy*, 132 Mo. 382, 33 S. W. 1136, 53 Am. St. Rep. 491. In Kentucky and South Dakota, the jurisdiction of the courts of last resort, in prohibition, is deemed to have been so enlarged by constitutional provisions as to vest it in cases not dependent solely upon action by the inferior courts, without jurisdiction. *Clark County Ct. v. Warner*, 116 Ky. 801, 76 S. W. 828; *Hindman v. Toney*, 97 Ky. 413, 30 S. W. 1006; *Boone v. Riddle* (Ky.) 86 S. W. 978; *Gates v. McGee*, 15 S. D. 247, 88 N. W. 115. Under this broad power of regulation, some of the Kentucky cases seem to treat prohibition as allowable for mere guidance of courts of concurrent jurisdiction in criminal cases, by way of avoidance of probable conflict. We have no such latitude.

For the reasons stated, the writ prayed for will be refused and the rule dismissed.

LIVELY, J., absent.

(89 W. Va. 165)

JACKSON COUNTY BANK v. FIRST NAT. BANK OF REEDY et al.

FIRST NAT. BANK OF REEDY v. BROTON et al.

(No. 4225.)

(Supreme Court of Appeals of West Virginia.
Oct. 4, 1921. Rehearing Denied
Dec. 9, 1921.)

(Syllabus by the Court.)

1. Creditors' suit \Leftrightarrow 27—Decreeing lien priorities without making trustee under trust deeds parties is reversible error.

In a judgment creditor's suit, when deeds of trust with outstanding legal titles in trustees are involved, it is error for which the decree will be reversed to decree the amounts and priorities of the liens on the land of the judgment debtor proceeded against and his lands to be sold, without the presence as parties of the trustees holding the legal title.

2. Creditors' suit \Leftrightarrow 51—Court should set aside decree on notice of absence of necessary parties.

When the absence of such necessary parties is brought to the attention of the court, though

it be after such erroneous decree has been entered, the court should set aside the decree and require the bill to be amended and the absent parties and the legal title to the land to be brought before the court, and the parties affected by such erroneous decree given an opportunity to prove and have decreed to them their debts and liens in the order of priority to which they are entitled; and it is immaterial that one of the trust creditors was made a party to the suit and appeared before the commissioner and had audited a debt secured to him by a deed of trust on one of the tracts of land properly proceeded against.

Appeal from Circuit Court, Wirt County.

Suits by the Jackson County Bank against the First National Bank of Reedy and others and by the First National Bank of Reedy against C. C. Brotton and others, in which the Jackson County Bank and J. H. Smith, its trustee, intervened. The suits were consolidated, and from a decree therein the interveners appeal. Decree reversed, and cause remanded.

T. J. Sayre, K. K. Sayre, and J. L. Wolfe, all of Ripley, for appellants.

S. P. Bell, of Spencer, and James L. Smith, of Elizabeth, for appellees.

MILLER, J. The second of the above styled suits, a judgment creditor's suit, was the first to be brought, in Wirt County, in which the Jackson County Bank and J. H. Smith, Trustee, were made defendants. The only allegations against the Jackson County Bank and J. H. Smith, Trustee, were that the bank held a deed of trust executed by C. C. Brotton and wife to Smith, Trustee, covering certain lands in Wirt County. Neither the Jackson County Bank nor its trustee, Smith, answered the bill, but the bank by its cashier, Cole, appeared before the commissioner to whom the cause was referred and proved the bank's debt secured by the deed of trust on the lands of the trust debtor in Wirt County; but being ignorant of the fact that the bill also involved the lands of Brotton in Jackson County, on which the bank held another deed of trust, and in which one K. K. Hyre was the trustee, to secure another and different debt, and as to which no allegation was made in the bill, no proof was offered of the existence or amount of this debt, except that in his testimony before the commissioner, in referring to a payment made it by Archer, the trustee in a third deed of trust on the Jackson County land, Cole explained that that payment was upon a debt secured to it by a trust deed on land in Jackson County and not on the debt secured by the deed of trust to Smith, trustee on the Wirt County land. Wherefore, there being no exceptions to the commissioner's report, the court, in determining the liens and their

priorities on the lands of the debtor in Wirt County and Jackson County, and ordering the sale thereof, made no decree in favor of the Jackson County Bank for its trust lien on the land in Jackson County. This decree was pronounced on September 9th, 1919. Subsequently, on January 7th, 1920, the Jackson County Bank appeared in court and filed its plea, and Hyre, its trustee, on the same day also intervened by petition, each setting up their respective rights as lienor and trustee, explaining the bank's omission to prove its lien on the Jackson County land, and that Hyre, the trustee, had not been made a party to the suit, so as to bring before the court the outstanding legal title to the land covered by the deed of trust of May 25, 1918, and asking that the plaintiff be required to amend its bill.

Upon the filing of these pleadings, the circuit court, on January 7, 1920, suspended the sale of the 122½ acres covered by the deed of trust to Hyre, Trustee, decreed to be sold, and adjudged that the cause be remanded to rules, and that process be issued to the several parties thereto to answer said petition, and that the bill of complaint should be amended by making Hyre, Trustee, a party thereto, and by proper allegations set up the said deed of trust.

The first of the above styled suits—that of the Jackson County Bank against the First National Bank of Reedy et al.—shows that while it was still pending at rules, the bill in the original suit not having been amended nor process issued thereon as required, the Jackson County Bank, at the March rules, 1920, of said court, filed its answer to the original bill, in the nature of a cross-bill, making the parties to the former bill and Hyre, Trustee, parties thereto, and the papers and proceedings in the former suit parts thereof, and praying that the former decree made in the absence of the proper and necessary parties be set aside and held for naught, in so far as the same gave right and priority to the other creditors over the lien of respondent upon the 122½ acres of land in Jackson County, and that respondent's rights be fully protected.

As already stated, the plaintiff in the original suit never did amend its bill as required by the decree of January 7, 1920, but upon the filing of appellant's answer thereto, and making its trustee and others parties to the suit, the court, by the decree complained of, undertook to consolidate the two causes, namely, the original cause, and the one introduced by appellant's answer, without requiring plaintiff to amend its bill as formerly ordered, and to dismiss appellant's case made upon its answer, and to deny it any relief in respect to the deed of trust of May 25, 1918, and ordering the commissioner appointed in the original suit to proceed to execute the

decree of sale, thereby holding, according to the written opinion filed, that appellant, because of its failure to prove its debt secured by the deed of trust on the Jackson County land, had lost its right to participate in the proceeds of the sale thereof in the order of priority to which it would otherwise have been entitled.

[1] So the sole question presented, and which is comprehensive of all the specific errors assigned in the decree appealed from, is: Did the appellant, the Jackson County Bank, lose the priority of its debt and lien in the way indicated, on the 122½ acres of land in Jackson County? As already stated, the trustee, Hyre, in the deed of trust of May 25, 1918, had not at the time of the entry of the original decree of sale been made a party to the suit. Nor did the bill contain any allegation respecting appellant's lien on the 122½ acres. Nor did the court below, before reaffirming its prior decree of sale, require the plaintiff to amend its bill and bring in the necessary and proper parties. The theory of the circuit court seems to have been that as Hyre, Trustee, had filed his petition in the original suit and had been made a party defendant to appellant's cross-answer, which undertook to set up its rights, any defect of parties to, or subject matter of, the plaintiff's bill was cured thereby, justifying the decree dismissing appellant out of the cause and denying it the right on proper pleadings, and after the proper and necessary parties were before the court, to prove and have allowed and decreed to it its lien in the proper order of priority thereof on said Jackson County land. It seems to have been the opinion of the court that the statute, section 7 of chapter 139 of the Code (sec. 5099), made the decree of sale pronounced on the commissioner's report in the original cause a bar to the lien of the bank. That statute would undoubtedly be applicable if the court at the time of its decree of sale had had before it the necessary parties and subject matter. But in this case, as the court before the filing of appellant's answer determined that the bill was defective in point of necessary allegations and of parties, if correct in this, unless cured by the answer of appellant and process thereon, the error in the decree remains, and the order that plaintiff amend its bill and bring in the necessary parties has not been complied with.

At the time of the original decree of sale the legal title to the 122½ acres in Jackson County was outstanding in Hyre, Trustee, and the court had not before it that title to dispose of. The decree of sale as to the tract involved here remains unexecuted, and we

have no question presented as to the rights of a purchaser under such decree. The futility of undertaking to decree a sale of the land when there are existing liens thereon by deeds of trust, without the presence as parties of the trustees in such deeds, has been repeatedly adjudicated in former decisions. It was so decided in *Bilmyer v. Sherman*, 23 W. Va. 656; *McMillan v. Hickman*, 35 W. Va. 705, 14 S. E. 227; *Turk v. Skiles*, 38 W. Va. 404, 18 S. E. 561; *Farmers' Bank of Fairmont v. Watson*, 39 W. Va. 342, 19 S. E. 413; *First National Bank of Webster Springs v. McGraw*, 85 W. Va. 298, 307, 101 S. E. 474; *Bragg v. United Thacker Coal Co.*, 70 W. Va. 655, 74 S. E. 946.

It is unnecessary to repeat here the reasoning of the cases cited for this proposition. The rule is too well settled to depart from it in this case. In *Bilmyer v. Sherman*, supra, it was said a decree of sale in the absence of the trustee holding the legal title would be reversed although the trust creditor had had his debt audited in the suit. See, also, *Marshall's Ex'r v. Hall*, 42 W. Va. 641, 646, 26 S. E. 300. In *McMillan v. Hickman*, supra, the necessity of bringing as parties trustees holding the legal title before decreeing the sale of a debtor's land was declared and reinforced, and reference was made to the statute making it the duty of a plaintiff in a judgment creditor's suit to make all lien creditors disclosed by the record parties thereto. Counsel for plaintiff in this case excuses his omission to make Hyre, Trustee, a party by alleging in a reply to appellant's plea that in examining the records of Jackson County he overlooked the deed of trust to Hyre, Trustee, though it appears to have been duly recorded and might easily have been found.

[2] The absence of Hyre, Trustee, was, as we have already said, brought to the attention of the court, not only by the plea of the appellant, but also by the petition of Hyre, Trustee. When his absence was thus made to appear, it was the duty of the court to have set aside the prior decree, and that is what it undertook to do, and require the plaintiff to amend its bill and implead all necessary parties before undertaking to adjudicate the rights and priorities of any of the parties to the suit, and it could make no difference, as our decisions hold, how the absence of the necessary party was brought to the attention of the court. *Gallatin L. C. & O. Co. v. Davis*, 44 W. Va. 109, 28 S. E. 747.

Our conclusion is to reverse the decree and remand the cause for further proceedings to be had in accordance with the views herein expressed.

(89 W. Va. 622)

WEST VIRGINIA PULP & PAPER CO. v. WHITMORE et ux. (No. 4176.)

(Supreme Court of Appeals of West Virginia. Nov. 22, 1921.)

(Syllabus by the Court.)

1. **Set-off and counterclaim** \S 33(1)—Whether matter constitutes set-off depends on susceptibility of determination rather than its arising out of basic transaction.

Whether matter relied upon as an offset may properly be treated as such does not depend upon whether the same grows out of the transaction which is the basis of the plaintiff's suit, or arises out of a different transaction, but upon the character of the claim itself. If it is susceptible of accurate determination by calculation, it is proper matter for offset.

2. **Set-off and counterclaim** \S 33(1)—In assumpsit on note for advancements, held, that defendant might set off materials furnished to plaintiff.

In an action of assumpsit on a note given by the defendant to secure advancements made to him by the plaintiff in the performance of a contract between the parties by which the defendant furnished to the plaintiff certain material, and which contract the defendant is prevented from performing by the refusal of the plaintiff to make further advancements in accordance with the terms of the contract, defendant may set up as an offset the price or value of the material so received by the plaintiff from him under the contract, and recover over should the price or value of such material exceed the advancements made. Such a claim is not one for unliquidated damages.

3. **Trial** \S 343—Verdict in gross sum for defendant held to constitute determination that set-off exceeded plaintiff's claim.

Where, in an action of assumpsit, the defendant files a claim of set-off exceeding in amount the claim of the plaintiff, and the jury finds in favor of the defendant a gross sum, such verdict is a finding upon all of the matters submitted to the jury, and is a determination by it that the defendant's claim exceeds the plaintiff's claim by the amount of the jury's verdict.

4. **Trial** \S 343—Verdict interpreted as being in favor of defendant filing set-off.

In interpreting the verdict of a jury the court may look to the pleadings in the case, and where it appears therefrom that two defendants were sued, one of whom was simply surety for the other, and the principal defendant filed a claim of offsets which exceeded the amount of the plaintiff's claim, and the jury finds a verdict in favor of the defendant for a gross sum, it will be interpreted as a finding in favor of the defendant who filed the claims of set-off.

Error to Circuit Court, Berkeley County.

Action by the West Virginia Pulp & Paper Company against John L. Whitmore and wife. Judgment for the defendants, and plaintiff brings error. Affirmed.

H. H. Emmert, of Martinsburg, for plaintiff in error.

Luttrell & Rodgers, for defendants in error.

RITZ, P. This action of assumpsit was brought to recover on a negotiable promissory note for the sum of \$375, executed by the defendants to one T. C. Baker, and by him indorsed to the plaintiff. The defendant John L. Whitmore, the principal debtor, the other defendant, his wife, being only surety, filed a plea of offsets, and upon a trial of the matters involved before a jury a verdict was found in favor of the defendant for the sum of \$1,125, upon which judgment was duly rendered, to review which this writ of error is prosecuted.

There is no conflict in the evidence. The testimony offered by the plaintiff to establish the note sued upon is not questioned; neither is the evidence offered by the defendant John L. Whitmore to establish his offset. The facts disclosed by the record are that Whitmore entered into a contract with the plaintiff by which he agreed to cut for it certain pulpwood at certain prices; the agreement being that the plaintiff would furnish him from week to week advancements of money sufficient to meet his expenses, these advancements to be deducted from the amount due him when the wood was received by the plaintiff, and the quantities definitely ascertained. Under this arrangement advancements of considerable sums were made to Whitmore by Baker, the agent of the plaintiff. At the time of giving the note sued on in this case Whitmore applied for an advancement to take care of the wages due his men. Baker, representing the plaintiff, advised that he could not make any further advancements without security; that the wood all remained in the woods, and because of the severe weather the plaintiff had been unable to take the same up, for which reason no insurance could be obtained thereon, and should it be destroyed the loss would fall entirely on the plaintiff, without any means of protecting itself. Whitmore agreed to give his note evidencing the advancement, but Baker advised him that this would not be sufficient; that he must have security thereon; and suggested that Whitmore have his wife become his surety. Whitmore declined to ask his wife to become surety on the note, but Baker did ask her to become such surety, and explained to her the arrangement under which and the purpose for which the note was given, and advised her that she would never have any of it to pay. With the understanding that it was given to secure an advancement made to her husband upon the contract for getting out the pulpwood, she became surety on the note sued on in this case. Whitmore was unable to secure further funds to carry on his business. He had borrowed all he could at the

banks for the purpose, and the plaintiff declined to make him any further advancements, as it was required to do under its contract, so that he was compelled to discontinue the work of cutting the wood. When weather conditions improved, the plaintiff sent its men upon the ground and took up the wood already cut by Whitmore, and never accounted to him therefor. A witness who actually measured the wood taken up by the plaintiff says that there were 267 cords of pulpwood, for which Whitmore was to be paid under the contract \$15.50 a cord, 47½ cords of cordwood at the price of \$10 a cord, and 30 tons of bark at \$12 a cord, making a total of \$4,973.50. There is no attempt made to controvert these figures. Whitmore says that the plaintiff is entitled to a credit of \$2 a cord for hauling the pulpwood, which would reduce this amount to the extent of \$534; and, further, that it is entitled to a credit for all of the advancements made to him, amounting to the sum of \$3,146.78; and that, giving the plaintiff credit for these advancements and for hauling the pulpwood, he is entitled to recover the sum of \$1,282.72. The jury found in his favor only the sum of \$1,125. As above stated, there is no conflict in the evidence on any of these propositions, and a recovery by the defendant for an amount approximating that found by the jury must have been a foregone conclusion, and the judgment rendered thereon must be affirmed here, unless the propositions of law relied upon by the plaintiff compel its reversal.

[1, 2] The first contention of the plaintiff is that the defendant's claim of offset is for unliquidated damages, which, under our decisions, cannot be filed as an offset, but can only be treated as a recoupment, and then only allowed to the extent of extinguishing the plaintiff's claim, and the cases of *Monongahela Tie & Lumber Co. v. Flannigan*, 77 W. Va. 162, 87 S. E. 161, and *Van Raalte Co. v. Solof Bros. Co.*, 108 S. E. 438, are relied upon to support this contention. From what we have said it is apparent that the offset filed by Whitmore does not include any damages for the failure of the plaintiff to keep its contract with him. In other words, he has waived the damages sustained by him by reason of plaintiff's breach of its contract, and has simply filed his offset for the material actually furnished at the contract price, or at prices which it is admitted in this record are the actual value of the property taken. If Whitmore in this case was presenting a claim for profits which he would have made had he been allowed to complete the work under the contract, then the decisions cited would have some application. In the case of *Van Raalte Co. v. Solof Bros. Co.* the offset attempted to be filed was for damages which the defendants claimed by reason of the failure of the plaintiff to ship it certain goods which the plaintiff had contracted to furnish; and in the case of *Monongahela*

Tie & Lumber Co. v. Flannigan, the offset insisted upon was for damages which the defendant claimed because of being deprived of an opportunity to sell her property by the failure of the plaintiff to keep its contract. The distinction between an offset and a recoupment under our practice is that recoupment must, of necessity, in order to be available, grow out of the transaction upon which the plaintiff's suit is based, while offset, whether growing out of the same transaction or another transaction, must be for a claim readily ascertainable—in other words, in the nature of a liquidated claim. It is not material whether the offset arises out of the same transaction or a different transaction. The thing that characterizes it as an offset is not the transaction out of which it arises, but whether the items set up are of that certain character which makes the amount easily ascertainable by simple calculation. *Cook Pottery Co. v. Parker*, 86 W. Va. 580, 104 S. E. 51; *Tidewater Quarry Co. v. Scott*, 105 Va. 160, 52 S. E. 835, 115 Am. St. Rep. 864, 8 Ann. Cas. 736. In this case there is no uncertainty at all about the items claimed as an offset. They were of that character which might be recovered in an action for goods sold and delivered. The damages, if any, sustained by the defendant from the breach of the contract by the plaintiff are not claimed in this suit. The allowance of this offset in this case is strictly in accord with the practice in this jurisdiction.

[3, 4] The plaintiff further insists that the judgment should be reversed and the verdict set aside, for the reason that it does not respond to the issues in the case. The verdict was simply a finding in favor of the defendant for the sum of \$1,125. The argument is that this does not definitely determine the plaintiff's claim, which was set up and undenied, nor does it indicate which defendant the finding is in favor of. It is quite true the verdict does not in terms dispose of the plaintiff's claim, but the record discloses very clearly that the matter involved upon the trial was the balance due, if any, to the defendant J. L. Whitmore because of the material furnished by him to the plaintiff, and the verdict necessarily determined all of the matters submitted by the parties upon this question, including the note sued upon, which had been given to secure an advancement made by the plaintiff to the defendant Whitmore. In *Black's Adm'r v. Thomas*, 21 W. Va. 709, it is held that where, in an action of assumpsit, the defendant pleads payment and files with his plea a specification of set-off exceeding in amount the demand of the plaintiff, and the jury by its verdict finds for the defendant a gross sum, under the provisions of section 9, c. 126 of the Code (sec. 4829), such verdict is interpreted as a finding that the set-off exceeds the amount to which the plaintiff was entitled by the sum so found, and the verdict is not am-

biguous. This is bound to be the case, for the record discloses that the matter to be determined by the jury was the status of the accounts between the parties, and their verdict can be interpreted in no other light than as ascertaining that the plaintiff owed the defendant \$1,125 more than it had advanced to him. It means this and nothing else.

Nor is there any merit in the plaintiff's contention that the verdict is so ambiguous that judgment could not be rendered thereon because it simply finds in favor of the defendant, without stating which one of the defendants the finding is in favor of. In interpreting the verdict the court may look to the pleadings in the case. *Williams v. Ewart*, 29 W. Va. 659, 2 S. E. 881; *Adamson's Adm'r v. Traction Co.*, 111 Va. 556, 69 S. E. 1055. When we do this we find that there is only one substantial defendant in the case. There was only one defendant setting up any offset, and he was the principal in the note sued on. There could be no recovery in favor of the other defendant, for the very good reason that she filed no offset and made no counterclaim against the plaintiff. Looking at the pleadings, we are not left in doubt as to which defendant the jury found in favor of, and the court below properly rendered judgment in favor of the only defendant who had filed a claim of offsets.

There is no more merit in the plaintiff's contention that the evidence does not justify the verdict. The plaintiff insists that the verdict is excessive and cannot be justified. To reach this conclusion, however, he gives the plaintiff credit for all of the advancements which the defendant Whitmore says were made to him, and then gives the plaintiff additional credit for the \$375 note, without any evidence to justify treating the note in any other way than as a part of the advancements. In fact, the uncontradicted evidence is that it was made as an advancement, and presumably it was included in the amount shown as having been advanced by the company to Whitmore.

Finding no merit in any of the plaintiff's contentions, we affirm the judgment.

LIVELY, J., absent.

(59 W. Va. 571)

JACKSON v. JACKSON et al. (No. 4166.)

(Supreme Court of Appeals of West Virginia.
Nov. 22, 1921.)

(Syllabus by the Court.)

1. Infants \Leftrightarrow 39—Supreme Court of Appeals will protect interest of infant not complaining, though appeal was by another defendant.

If the circuit court, in a proceeding to sell or lease an infant's land, fails to properly pro-

tect his interest, this court will do so, though the decree or order is not complained of by such infant or his guardian, and the appeal was allowed on the petition of another defendant.

2. Guardian and ward \Leftrightarrow 86—Petition for sale of infant's land must show necessity or infant's advantage from sale.

To justify the sale or lease of an infant's land, under chapter 83 of the Code 1913 (secs. 3961-3978), the bill or petition must allege facts showing some necessity for so disposing of his land, or showing that it will really be to his advantage to do so.

Appeal from Circuit Court, Marion County.

Summary proceeding by Cora Jackson, guardian, against George Jackson, her infant son, and others for sale of infant's land. Decree for plaintiff, and the defendants appeal. Reversed and remanded, with leave to petitioner to amend, if so advised; if not, to dismiss the petition.

Frank O. Haymond and Clay D. Amos, both of Fairmont, for appellants.

MILLER, J. The decrees complained of by the Salvatore Coal Company were pronounced in a summary proceeding, begun by Cora Jackson, guardian, against George Jackson, her infant son, Cora Jackson, widow of Charles E. Jackson, deceased, Bulah Lee and Pearl M. Jackson, her adult daughters, and the Salvatore Coal Company.

The object of the petition was to obtain a decree to sell or lease the undivided interest of the infant George Jackson in a body of coal containing 50 acres, underlying a tract of 132.55 acres of land, of which the father of the infant and adult heirs and husband of petitioner died seized and possessed. Section 12 of chapter 83 of the Code (sec. 3972) authorizes such summary proceedings, and provides that the petition shall show all the estate, real and personal, belonging to the minor and set forth plainly all the facts calculated to show the propriety of the sale or lease; that it shall be verified by the plaintiff; and that ten days' notice shall be given to defendants before such petition shall be heard.

The petition avers that the interests of the infant will be promoted by a sale or lease of his interest in said coal; but the only facts alleged by way of compliance with the provisions of the statute are: That prior to the filing of said petition the Salvatore Coal Company had offered for a lease of the coal and mining rights seven cents per ton, and that petitioner with one of her daughters had been induced to sign a lease to the said company, conveying the coal and mining rights to it at seven cents per ton royalty, but as the husband of said daughter had not signed said lease, the lease was as to her void; that prior to the filing of the petition,

the petitioner in her individual capacity and the adult heirs had agreed to lease the coal with mining rights, at ten cents per ton; and that they had agreed to join in a lease to one George R. Roberts, trustee.

There is no allegation of any necessity to sell or lease the infant's interest in the coal, for his support or to provide for his education. It is alleged that his interest in the 132.55 acres of land under which the coal lay, is the only real estate owned by him, and that his personal property does not exceed in value \$800.00, leaving it for inference only, that because of the small personal estate, the proceeds from the sale of the coal, or royalties that might be derived therefrom, might be necessary for his support or maintenance. But these facts are not specifically alleged. For aught that appears in the petition, the infant, then being sixteen years of age, might have been employed and making his own living, with no necessity for selling his interest in the coal.

Apparently some evidence was taken to support the petition and justify the sale or lease; but this evidence, if taken down, is not contained in the record.

The infant, then being over sixteen years of age, filed his answer to the petition, alleging that he believed his interest would be promoted by the sale or lease of the coal, but because of his youth he was not qualified to fully comprehend the allegations of the petition, and on account of his infancy commended his interests to the protection of the court.

The only appellant is the Salvatore Coal Company, made defendant in the petition, and which answered the bill, alleging that it had acquired the interest of the widow in the coal by virtue of the lease previously executed by her and her daughter, not joined in by the husband of the daughter. The answer of the appellant and the report of sale or lease made by the guardian to George R. Roberts, trustee, shows that before sale, appellant had offered for a lease of the infant's interest in the coal his proportionate share of fifteen cents per ton, and in all other respects upon the same terms and conditions as sold by the guardian to said Roberts.

The principal grounds relied upon by appellant for reversing the decrees below are: First, that the court had no jurisdiction to direct a sale or lease of the infant's interest, because such lease would operate against its interest acquired from the widow; and, second, because it was error to ignore the upset bid for the interest of the infant, and for other errors apparent.

The conclusion we have reached in regard to the case does not require us to consider the supposed interests of appellant. We do

not think sufficient facts were alleged in the petition to justify the decree of sale of the infant's interest.

[1] While the guardian ad litem answered, by a formal answer, no special defenses were interposed by him; but infants are always the wards of a court of equity, and it is always the duty of the court where the interests of infants are involved, to protect those interests, and this duty extends to the court of appeals, as well as to the court of original jurisdiction. As we said in *Glade Mining Co. v. Harris*, 65 W. Va. 162, 63 S. E. 877:

"On appeal an infant will be given the benefit of every defense of which he could have availed himself, or which might have been interposed for him in the trial court; and * * * where the record shows error, as to a minor defendant, the judgment will be reversed, though there is no appeal on his part, it being the duty of the chancellor, as the guardian of infants, to protect their rights."

[2] Wherefore it becomes our duty to determine whether the petition in this case justified the decrees appealed from and whether a demurrer interposed thereto ought to have been sustained. In the recent case of *Balles, Guardian, v. Alderson*, 82 W. Va. 342, 95 S. E. 1039, a proceeding under section 12 of chapter 83 of the Code, the sufficiency of the petition was challenged. It undertook to set forth a number of reasons why the interests of the infants would be promoted by sale of the infants' lands: such as, that the lands of the infants were undeveloped, and were valuable largely for the minerals, and that it was uncertain when they would be developed; that the taxes on the lands amounted to a large sum, which had to be paid out of the personal estate of the infants; and that the price of thirty dollars per acre offered was a good price, and the proceeds of the sale might be invested, and the income therefrom would be of more benefit to the infants than any possible increase in the value of the lands. But as the petition in that case was lacking in any showing of necessity for the sale of the lands, it was regarded wanting in the necessary averments to justify the sale of the property. In this case as we have indicated, there is no showing of necessity for the sale of the infant's coal, and little alleged or proven to justify the sale of the property. On the contrary, we see from the answer of appellant and the report of sale and the decree confirming it, that a larger price was offered by way of an upset bid for the infant's interest.

Our conclusion is that the decrees of sale and confirmation should be reversed, and the cause remanded, with leave to petitioner to amend if so advised, if not, to dismiss the petition.

LIVELY, J., absent.

(89 W. Va. 344)

FIRST NAT. BANK OF WEST UNION v. FREEMAN. (No. 4208.)

(Supreme Court of Appeals of West Virginia.
Oct. 28, 1921. Rehearing Denied
Dec. 9, 1921.)

(Syllabus by the Court.)

1. Bills and notes ⚡465—Valuable consideration need not be averred or proved.

In a suit upon a promissory note it is unnecessary to aver or prove that a valuable consideration therefor passed to the maker. The note itself imports a valuable consideration.

2. Bills and notes ⚡95—Bank's assignment of past due notes to directors and stockholders responsible for their purchase or discount is sufficient consideration for their notes reimbursing the bank.

The assignment by a bank of past due notes to directors and stockholders thereof responsible for the purchase or discount thereof by the bank, constitutes a valuable and sufficient consideration for the individual notes of such directors and stockholders executed to the bank for their pro rata shares of the past due paper so assigned.

3. Banks and banking ⚡109(1)—Bank's transferring notes to directors and stockholders is valid and binding without minutes being kept.

The validity of such assignment by a bank to its directors and stockholders, made in good faith, does not depend upon whether or not any minute of the meeting of the directors at which such action or transaction took place was kept. If the directors were present and acted, their action was as valid and binding without a minute as if one was kept, for the fact of their action may be proved by any other competent evidence.

4. Banks and banking ⚡109(3)—Written assignment of paper by a bank's cashier to directors and stockholders pursuant to directors' order held assignment in due course.

Such an assignment in writing of a part of the paper of a bank by the cashier thereof pursuant to such action of the directors, should be regarded as an assignment in due course and binding on the corporation.

5. Banks and banking ⚡109(3)—Cashier has general authority to indorse negotiable paper.

The cashier of a bank has general authority to transfer by endorsement negotiable paper, and no special authority for this purpose is necessary.

6. Appeal and error ⚡302(3)—Party challenging correctness of judgment on motion to set aside demurrer to evidence may avail himself of all adverse rulings.

Whether a party demurring to the evidence of the other waives his exception to the rulings of the court excluding some of his competent and legal evidence on an important issue, is mooted but not decided. If, however, he challenges the correctness of the judgment by

a motion to set aside the demurrer and the verdict thereon as contrary to the law and the evidence, he may in this court avail himself of any errors in the adverse rulings of the court on the trial of the action.

Error to Circuit Court, Doddridge County.

Action by the First National Bank of West Union against William W. Freeman, and from a judgment in favor of the defendant, the plaintiff brings error. Reversed, demurrers to evidence set aside, and plaintiff awarded a new trial on all issues.

Showalter & Frame, of Fairmont, and J. Ramsey, of West Union, for plaintiff in error.

Law & McCue, of Clarksburg, for defendant in error.

MILLER, J. Freeman's defense to his note sued on, as shown by his special plea in writing, was that it was made without consideration and solely for the accommodation of plaintiff under the facts and circumstances set out in the plea. The sufficiency of this plea as a defense to the action was before trial certified to us and here held to be good in law, though the facts pleaded were provable under the general issue. First National Bank of West Union v. Freeman, 83 W. Va. 477, 98 S. E. 558. On the former hearing we reversed the judgment below striking out the special plea, and remanded the case to the circuit court for trial on the issues joined thereon.

On the trial of this issue in the circuit court, after the evidence on both sides was concluded, each of the parties interposed a motion to the court to strike out the other's evidence and direct a verdict for the mover, both of which motions were overruled. After this action of the court the defendant then moved the court to exclude all the evidence of J. E. Trainer, W. J. McElhiney, W. G. Hammond, U. G. Summers, W. M. Stout, A. C. Bland, and J. Ramsey, in so far as the same, or any part thereof, tended to show an assignment by plaintiff to defendant of certain notes aggregating \$23,068.74, and which purported to be represented by certain obligations of the directors to the bank, on the ground of want of record evidence thereof, and for the further reason that no such assignment of the assets of the bank could be made without official action of the board of directors legally assembled as directors and by resolution to that effect, which motion was sustained and the plaintiff excepted. And without waiving any exceptions theretofore interposed, the plaintiff by counsel then demurred to the evidence offered by defendant in support of his plea of want of consideration, which demurrer was joined in by defendant; and the defendant also demurred to plaintiff's evidence conflicting with his evidence as to his set-off filed, in which plain-

tiff joined; and the judgment of the court thereon, and on the special verdicts of the jury, was that the law thereon was for the defendant, and that plaintiff's demurrer be overruled, and that his demurrer to plaintiff's evidence be sustained, and that he recover of the plaintiff the sum of \$95.79, the damages assessed by the jury in his favor, with interest thereon and costs, from which judgment the plaintiff obtained the present writ of error.

[1] In order to test the correctness or incorrectness of the rulings of the court on the several demurrers to the evidence, we must determine the burden of proof on the issues joined, and the status of the evidence of the respective parties at the time these demurrers were interposed. Of course the plaintiff had the burden of proving the note sued on, and that it was the note of defendant. This it sustained by the evidence of the cashier of the bank and the production in evidence of the note. It was neither necessary to aver or prove that a valuable consideration had been received by the defendant therefor. The note *prima facie* imported a valuable consideration. 2 Enc. Dig. Va. & W. Va. Rep. 415, and the Virginia and West Virginia cases there digested.

[2] After the case of the plaintiff had been thus established by its evidence, the defendant to sustain his plea of want of consideration undertook to prove by his own testimony the circumstances of his execution of the original note, of which the one sued on was a remote renewal, and particularly that the original note had been executed by him for the accommodation of the bank with the distinct understanding with the cashier and the attorney for the bank that it along with like notes executed at or about the same time by other directors of the bank to take the place of certain past due notes of its customers then aggregating the sum of \$23,068.74, until those notes when collected and applied, as he was assured by those officers they would be, should pay off and discharge his note and the substituted notes of the other directors, and that he nor any of the makers of the substituted notes would ever have anything to pay thereon. He also introduced numerous duplicate deposit slips sent him by the bank from time to time showing credits to his account and applied from time to time to the reduction of his note, and reducing it at the time of the renewal sued on to the sum of \$1,061.16.

To rebut defendant's evidence the plaintiff then introduced as witnesses its cashier and all of the directors and its attorney in office at the time, who proved that defendant's note was executed along with like notes of the other directors for his pro rata share of the past due notes held by the bank, and pursuant to an agreement between them, either

in directors' meeting or immediately thereafter, and at the place of meeting of the directors, to the effect that each of the directors who were responsible for the discount of the past due notes should execute his note for his pro rata share thereof, and that the bank should assign to them the past due notes as collateral, and as collected, the sums collected should be applied pro rata on these notes, including that of plaintiff, and which had been done in accordance with such agreement; that some of the directors in place of executing notes had paid their shares in cash, and thus gave the bank the benefit of the cash in place of notes therefor as the defendant had done. Plaintiff in connection with the oral testimony of these witnesses introduced as evidence a written assignment executed by the cashier of the bank. The defendant objected to the testimony of these witnesses and also to the introduction of the assignment, on the ground mainly that the transaction was not done in directors' meeting; that what the other directors did in the way of executing their notes or paying their shares in cash was not binding on him and constituted no consideration for the note executed by him; that he was not a party to the assignment and was not bound thereby. After the introduction of this assignment, to which the defendant by counsel had no objection, the court on his motion struck it out and refused to allow it to be considered by the jury. And at the conclusion of the evidence, as already noted, the court, on defendant's motion, also excluded all of the testimony of the witnesses Trainer, McElhiney, Hammond, Summers, Stout, Bland and Ramsey, in so far as the same, or any part thereof, tended to show an assignment by plaintiff of the said past due notes, for the reasons already stated; and the case went to the jury and to the court on the several demurrers to the evidence, with that evidence excluded, resulting in the judgment of the court thereon in favor of the defendant.

In order to dispose of the several points of error relied on, it becomes necessary to determine the correctness of the rulings of the court on the exclusion of plaintiff's evidence. The defendant had the affirmative of the issue on his plea of want of consideration and the character of his note sued on. The court permitted him to testify as to the facts and circumstances of its execution. And contrary to defendant's contention Ramsey, attorney, testified that the written assignment was prepared by him on the night of the meeting of the directors, at which defendant was present, and at which meeting or at a meeting of the directors as individuals immediately afterwards, which we think unimportant, it was presented to and read by him in their presence and hearing, including Freeman, when it was agreed between

the directors and the cashier that they should pay or execute their notes to the bank for their respective shares of the past due notes and take in lieu thereof the collateral assignment of the old notes. And the evidence of the other directors was that this agreement had been fully executed on their part and that defendant alone had been delinquent therein; that the bank and its stockholders, including Freeman, had had the benefit of this transaction and the payments on account of the old notes.

The benefits thus accruing to the bank, to Freeman and the other stockholders and directors, and certainly the assignment of the past due notes, we think, constituted sufficient consideration accruing to Freeman for the execution of his original note and the renewal thereof sued on. A valuable consideration is the relinquishment by the promisee of some right which he may lawfully exercise or enforce, or the incurring of some risk or trouble at the instance of the promisor. *County Court v. Hall*, 51 W. Va. 269, 41 S. E. 119; *Hornbrooks v. Lucas*, 24 W. Va. 493, 49 Am. Rep. 277; *Jackson v. Hough*, 38 W. Va. 236, 18 S. E. 575. Freeman had a large interest as a stockholder and director of the bank and in saving the bank financial embarrassment growing out of the past due notes accumulated while he was a director of the bank. This interest made the contract between the bank and the individual directors a sufficient consideration for his promise. *Kittle's Modern Law of Assumpsit*, 174; *State Bank of Pittsburg v. Kirk*, 216 Pa. 452, 65 Atl. 932. In the Pennsylvania case just cited the Supreme Court of that state held that a transaction between the directors and a bank, very similar to the one involved here, constituted a sufficient consideration to support the notes given by the directors of a bank. Here Freeman proved that he had so far assented to the agreement as to execute his note and take the payments thereon derived from collections made on the assigned notes. If he had not done so, undoubtedly the other directors would not have carried out the contract on their part. Ramsey, in charge of the collection of the assigned notes and judgments thereon, testified to Freeman's frequent visits to his office to inquire how he was getting along with the collections, and whether he or the other directors were liable to sustain any loss. The law is that where one with actual or constructive knowledge of the facts induces another by his words or conduct to believe that he acquiesces in or ratifies a transaction, or that he will offer no opposition thereto, and that other, in reliance on such belief, alters his position, such person is estopped from repudiating the transaction to the other's prejudice. 21 C. J. 1216; 16 Cyc. 787.

[3, 4] A further argument to support the

ruling of the circuit court in rejecting the written assignment is that McElhiney, cashier, who signed it on behalf of the bank, was without authority in the premises. We think there is no merit in this proposition. Besides, the bank is not complaining of want of authority in the cashier. The directors were together when the agreement was made. It did not require a more formal meeting, or that some minute of the meeting should be kept, to bind the corporation and the directors. *C. & O. Ry. Co. v. Deepwater Ry. Co.*, 57 W. Va. 641, 50 S. E. 890. When the directors were so assembled, they could transact any lawful business, and the validity of their action would not depend on the fact that no minute thereof was preserved.

But it is contended that the assignment, signed, not in the corporate name, but by the cashier, describing himself as such officer, was not the act of the corporation, and for this reason the paper was properly stricken out by the circuit court; this also upon the theory that the assignment of the bank's assets was not done in due course, and required the corporate action of the board of directors. But if there was a meeting of the board of directors, his action was authorized. But whether so or not, was not his assignment of the past due notes and the taking of the individual notes of the directors to cover the same done in due course? We think the transaction was within the scope of his authority as cashier. This case presents a different proposition from that presented in the *Citizens' Bank v. Frederickson*, 83 Neb. 755, 120 N. W. 462. In that case Frederickson, who executed the notes with automobiles assigned to him as security, was in no way previously obligated to the payee, nor otherwise interested except as accommodation maker of his notes. The transaction was purely one for the accommodation of the corporation. He had no duty to the corporation as Freeman had in this case, nor was his promise supported thereby or by the consideration of the mutual promises between the bank and the other directors.

[5] As to the authority of the cashier of a bank, he has general authority to transfer by indorsement negotiable paper, and no special authority for this purpose is necessary to be proved. 1 *Michie on Banks and Banking*, 719-721; *Smith v. Lawson*, 18 W. Va. 212, 41 Am. Rep. 688; *Lamb, Trustee, v. Cecil*, 28 W. Va. 653.

[6] With all of the evidence of defendant in and all, or practically all, of that of the plaintiff on the issue presented by defendant's plea out by action of the court prior to the several demurrers of the parties to the evidence, the plaintiff was prejudiced in the eyes of the court and jury. What course the demurrants might have taken with all the competent and legal evidence in, we cannot say.

nor do we know what the judgment of the court upon the demurrers to the evidence would have been, if all the evidence had been before it, as it should have been. A question suggested in this connection is whether the plaintiff waived its objection to the rejection of its evidence by demurring to the evidence. In *Washburn v. Board of Commissioners of Shelby County*, 104 Ind. 821, 3 N. E. 757, 54 Am. Rep. 332, that court held that a defendant, by demurring to plaintiff's evidence, does not deprive plaintiff of the right to make available questions upon the rulings excluding evidence. Here the defendant had the affirmative of the issue on his plea, and with his evidence in, and the most or part of that of the plaintiff on that question out of the case by the adverse rulings of the court thereon, did plaintiff waive those adverse rulings on its evidence? It may be that it did. This was a risk it was not bound to sustain, but it voluntarily did so. Whether it did or not, we need not say in this case, for we find by the record that on the adverse action of the court on its demurrer to the evidence, it moved the court to set aside the verdict because contrary to the law and the evidence. This motion, we think, saved to plaintiff the right to insist on its exceptions to the rulings of the trial court respecting its competent and legal evidence. Thereby it challenged the correctness of the rulings of the court on its evidence, which points it saved on the record. In *Miller v. Holt*, 47 W. Va. 7, 34 S. E. 956, there was a demurrer by plaintiff to defendant's evidence, overruled by the trial court. There was also a motion by defendant to set aside the verdict and award him a new trial. This court reversed the judgment for the error in the verdict in failing to locate the line in the controversy, and awarded defendant a new trial. It is well settled here and in Virginia, that if a proper showing be made therefor, the court has jurisdiction to set aside a demurrer to the evidence and award the demurrant a new trial, and the rules applicable to new trials generally are applicable in such cases, and that the rules applicable to new trials are pertinent where the case has not been properly developed and the court can see that other evidence exists, and that through the misconception of law applicable to the case or through some surprise, accident or oversight justice demands a new trial that the party injured may be permitted fully to present his case. *Frymier v. Lorama Railroad Co.*, 76 W. Va. 96, 90, 85 S. E. 26, and decisions there cited.

Our conclusion in this case is that the judgment below should be reversed, the demurrers to the evidence set aside, and the plaintiff awarded a new trial on all the issues.

WALDRON v. GARLAND POCAHONTAS COAL CO. (No. 4331.)

(Supreme Court of Appeals of West Virginia.
Nov. 8, 1921. Rehearing Denied Dec. 12, 1921.)

(Syllabus by the Court.)

1. Death — 103(3)—Contributory negligence of father consenting to deceased son's employment in mine held question for jury.

If a father consents to the employment of his son, under 16 years of age, in a coal mine, or, after the son is employed therein, he acquiesces in and agrees to the continued employment, and, afterwards the son while so employed is killed by an accident arising from one of the ordinary risks of the employment, the contributory negligence of the father in consenting to the employment, or in acquiescing therein after the employment, will prevent recovery of damages for his sole benefit against the coal-mining company; but if there is a serious and substantial conflict in the evidence as to whether the father did in fact agree to or acquiesce in the unlawful employment, it becomes a question for the jury.

2. Master and servant — 318(1)—Relation of independent contractor held not created.

Whether a person performing work for another is an independent contractor depends upon a consideration of the contract of employment, the nature of the business, the circumstances under which the contract was made and the work was done. And if it appears that the owner of the business retains general control of the premises where the work is being performed, and has power to direct when it shall be performed, furnishes part of the equipment, does a portion of the work himself necessary for the continuance of the work to be done under the contract, pays the contractee a stipulated price per square yard of the work performed, and that there is no fixed time for the termination of the contract, the relation of independent contractor is not established, although the contractee under such contract employs and discharges his employees on the work, and pays them out of the money he derives from the contract.

3. Master and servant — 330(1)—Relation of independent contractor must be proved by mine owner.

To avoid liability for personal injuries to an employee in a coal mine, on the ground that the work therein at which the employee was injured was being done under contract by an independent contractor, and that therefore the relation of master and servant did not exist between the injured person and the mine owner and operator, it is incumbent on the mine owner to prove all the facts and circumstances necessary to establish that the work was being done by an independent contractor.

Error to Circuit Court, McDowell County.

Action by Guy F. Waldron, as administrator of his son, Philip Waldron, deceased, against the Garland Pocahontas Coal Com-

pany for damages for deceased's death. Verdict and judgment for the plaintiff, and the defendant brings error. Affirmed.

Sanders, Crockett, Fox & Sanders, of Bluefield, and Strother, Taylor & Taylor, of Welch, for plaintiff in error.

John Kee and Russell S. Ritz, both of Bluefield, for defendant in error.

LIVELY, J. From a verdict and judgment for \$10,000, rendered on the 17th day of February, 1921, defendant prosecutes this writ of error.

Plaintiff instituted this action for damages as administrator of Philip Waldron, alleging that the intestate, his son, a boy between the age of 13 and 14 years, was negligently killed while in the employ of defendant in its mine on September 11, 1919.

The defense relies on two grounds: (1) Contributory negligence on the part of the father and administrator, in that he consented to or acquiesced in the employment of the boy in the mines; and (2) that at the time the boy was killed he was not in the employ of defendant, but was working in the mine for an independent contractor, a Mr. Thompson, who was driving an entry for defendant.

[1] The boy had been in the habit of working away from home, and about three months before he was killed he, with his father's consent, went to the home of H. F. Short, his stepgrandfather, who lived about one mile from defendant's mines, and who promised to put the boy in school. In the early part of August, Short asked the manager of defendant coal company, if he could give the boy employment, and was answered in the affirmative, conditioned, however, on the boy's being 16 years of age or over, and Short replied that he would have the father to sign a statement about the boy's age. Such statement was afterwards brought to the manager and reads:

"Aug. 12, 1919. Garland Pocahontas Coal Co. Gentlemen Phil Waldron is my son. he is 16 years old. Guy Waldron."

The boy was employed as a trapper in the mine. About two weeks prior to the boy's death, Short was on a visit to the boy's father and mentioned to him that he had sent the boy to him prior to that time to have him sign a paper about his age, so that he could get employment from Mr. Baldwin, and the father replied that he had not seen the boy; that he had not come home; that he had not signed any such paper. Short then told the father that he would tell Baldwin not to work the boy and the father replied, "No, never mind, just leave the boy alone," and on being pressed he testified that the father might have added, "Maybe he will come home." The father's version of that conversation is that when Short told him that the boy was at the mine he told

him that he would suffer his right hand to be cut off before he would sign a permit; that the child was too young to work in the mines and that he wanted him to go to school. Then Short told him he would tell Mr. Baldwin not to work him, to which he replied:

"Maybe we had better let him alone. Maybe he will come home in a few days."

The Sunday before the boy was killed the father was on a visit to Short, who then told him that the boy had left his house and was staying at a boarding house, was doing no good, getting a dollar a day, and for him to go up there and take the boy home, and the father then told him he would have the boy sent to the reform school. The father said he was looking for the boy to get him on the train to take him home, but after the train passed the station he saw the boy standing on the porch of the company's store. Both the father and mother say they had heard that the boy was working for defendant, but did not know it to be true, and did not know what work he was doing. There was one question propounded to the father which indicated that he had heard that the boy was working in the mine. He was asked:

"How long was it before he was killed that you heard he had been working in the mine? Answer: I couldn't say positive, it might have been a week or two weeks."

It will be observed that the question related particularly to the time when he had received information, and not specially to whether the employment was in or out of the mine. After the boy had gone to his grandmother's house, he made one or two visits to his father's home, five or six miles away, when his father purchased for him a pair of shoes, but did not ask the boy if he was working or for whom; and it does not satisfactorily appear whether these visits were before or after the boy had gone to work for defendant. It is on this evidence that the claim of defendant is based, that the father, and administrator, consented and acquiesced in the employment of his boy in the mine, at a dangerous occupation, and therefore was guilty of such contributory negligence as to preclude recovery. Under this evidence, can we say that it is proven with sufficient conclusiveness that the father acquiesced in or consented to the employment in the mine, to impel us to hold as a conclusion of law that the father was guilty of contributory negligence? It does not appear with any reasonable degree of certainty that the father knew the boy was trapping in the mine or hauling slate out of the mine. He never saw the boy at any kind of work there; and it is clear that he refused to give any permit, and wanted the boy to go to school. There is no variance between the evidence of the grandfather and the father on the refusal to give a permit, or to make the written

statement that the boy was 16 years old. We pause here to say that much of the evidence relating to the permit or the apparent age of the boy is of no materiality. Under section 24, c. 15 H, Code, 1918 (Code Supp. 1918, § 495—32), making it unlawful to permit a boy under 14 years of age to work in a coal mine, an affidavit was required, before employment, from the parent or guardian that the boy's age is 14 years or more, and which affidavit as to the employer was conclusive as to the age of such boy. But by chapter 17, Acts 1919, passed February 11, 1919, and in effect 90 days from its passage (and in effect when this boy was employed) it is provided in section 2,

"No child under the age of sixteen years shall be employed, permitted, or suffered to work in any mine, quarry, tunnel or excavation"

—and there is no provision for affidavit as to age. This act expressly repeals section 24, c. 15 H, of the Code. The fact that the child is under 16 years of age makes the employment unlawful; and, if injury results, there is prima facie negligence on the part of the employer. See *Norman v. Coal Co.*, 68 W. Va. 406, 69 S. E. 857, 31 L. R. A. (N. S.) 504; *Daniel v. Big Sandy C. & C. Co.*, 68 W. Va. 491, 69 S. E. 903; *Blankenship v. Coal Co.*, 69 W. Va. 74, 70 S. E. 863; *Dickinson v. Stuart Colliery Co.*, 71 W. Va. 325, 76 S. E. 654, 43 L. R. A. (N. S.) 335; *Griffith v. American Coal Co.*, 75 W. Va. 686, 84 S. E. 621, L. R. A. 1915F, 803; *Mangus v. Coal Co.*, 87 W. Va. 718, 105 S. E. 909. Many modern decisions are that the failure to perform a statutory duty in such cases is negligence per se. See L. R. A. 1915E, p. 506, note to the case of *Conway v. Monidah Trust (Mont.)*. The prima facie presumption of negligence is not attempted to be overcome in this case. It is tacitly conceded that the employment was unlawful. Even under the old law an affidavit of the parent or guardian as to the child's age was required, and no affidavit was had, simply a written statement that the boy was the son of Guy Waldron and 16 years of age. The employment was unlawful even under chapter 15 H, Code of 1918, and the subsequent injury makes a prima facie case of negligence on the employer. But we recur to the question of contributory negligence of the father. Can we say that because the father permitted the child to work "here and there" at various occupations, not of a dangerous nature, that he permitted the boy to go to his grandparents three months before his death for the avowed object of giving him schooling, that, after he had heard that the boy was at work for defendant under an alleged permit from him (the father), he then neglected to go and take him home, and upon a suggestion that

the employer would be asked not to give the boy further work, he replied, "No; maybe we had better let him alone. Maybe he will come home in a few days"—constitutes such contributory negligence as to defeat recovery? It is not clearly shown that he knew the dangerous character of the employment. Surely there is no suggestion in the evidence that he knew the boy was trapping in the mine, or was hauling out slate or rocks. May he not have presumed that the employer would not and had not placed the boy in the mine in direct violation of the statute prohibiting the employment of boys under 16 years in a mine? As a conclusion of law, can we hold, as we are asked to do, that contributory negligence has been conclusively established, and therefore the jury should have been instructed to find for the defendant? In the case of *Daniels v. Fuel Co.*, 79 W. Va. 255, 90 S. E. 840, the evidence was conclusive that the father knew and consented to the employment of the boy, who lived with the father, worked with him outside of the mine, traveled to and from the mine with him, and knew that he went into the mine. In *Swope v. Coal & Coke Co.*, 78 W. Va. 517, 89 S. E. 284, L. R. A. 1917A, 1128, recovery was precluded because the father abandoned the wife and children, was divorced, and the custody of the children awarded to the wife, who exposed the child to a dangerous employment resulting in its death. In these cases there was no controversy on this question. It is well settled that when contributory negligence depends upon questions of fact it is for the jury to decide. *Foley v. Huntington*, 51 W. Va. 396, 41 S. E. 113; *McCreery v. Ohio R. R. Co.*, 48 W. Va. 110, 27 S. E. 327. Where there is evidence tending to prove contributory negligence, the jury should be left free to give such evidence the consideration to which it may appear to them to be entitled. *Webb v. Big Kanawha Packet Co.*, 43 W. Va. 800, 29 S. E. 519. But where the facts are uncontroverted the court may determine the question. *Phillips v. County Court*, 31 W. Va. 477, 7 S. E. 427. And the question of the estoppel of the plaintiff on this ground was submitted to the jury in defendant's instructions Nos. 8, 9, 13. These instructions were to the effect that if the jury believed that the father gave his consent to the employment, either expressly or impliedly, or acquiesced therein, he was guilty of contributory negligence, and recovery would be barred. We are now asked to say that defendant made a mistake in asking for these instructions; that it was the duty of the court to have held that contributory negligence had been clearly shown, and the jury instructed to find for defendant. We think these instructions were proper. It was a

jury question. On this conflicting evidence the jury found that the father did not do so. Can we disturb that finding? The evidence and circumstances point strongly to the father's knowledge of the employment, not necessarily employment in the mine; and it may be conceded that he should have exercised more strict parental care of his boy of so tender an age, and at all times should have known of his whereabouts and doings, but the jury has determined otherwise. *Young v. W. Va. P. R. R. Co.*, 44 W. Va. 218, 28 S. E. 932; *Poague v. Spriggs*, 21 Grat. (Va.) 220.

We now come to the other defense interposed, that at the time the boy was killed he was not in defendant's employ, but was working for one Thompson, stated to be an independent contractor in defendant's mine.

[2, 3] Short came to the general manager, Baldwin, on the 11th of September, and informed him that he had talked with the boy's father, and had advised that the boy ought to be in school, and the general manager immediately went to see his assistant mine foreman Riffe, and directed him to discharge the boy, giving as the reason therefor that he was apprehensive of the boy's age. Riffe went into the mine and discharged the boy about noon, stating to him that he would discharge him rather than let him work on the rock (the work at which he was killed that night). Riffe was under the impression that Baldwin directed the discharge of the boy because he understood that he was going to work on the rock. At least, that was the reason he gave to the boy for the discharge. It appears that Will Thompson had a verbal contract with defendant to drive an entry by blasting away the rock and slate and hauling it out of the mine to the slate dump, at \$4 per yard. Thompson furnished the explosives, hired and discharged the men engaged, defendant drilled the holes in the daytime, and Thompson shot them at night and hauled the rock out of the mine upon cars furnished by defendant and hauled by defendant's ponies. Thompson paid the men employed. It is not clear whether the men were paid by the company and the amount charged to Thompson and taken out of the \$4 per yard paid him, or whether Thompson drew all the money and paid the men therefrom. The only evidence on that point is from Baldwin's testimony, where he was asked:

"Who paid the men that he [Thompson] engaged on the work? Answer: Mr. Thompson. It came out of his pay."

When Thompson took this contract he had some trouble with a pony, and was told by Baldwin that he would send up Blaine to show the road. The first night the boy came to him to drive, followed by Blaine

about one hour afterwards, who made one trip and left, saying the boy knew the road and could get along all right. It does not appear what position or employment Blaine had with the defendant company. The following night the boy came back to drive, and drove the pony awhile, and at that time asked Thompson for employment as a driver, but Thompson did not hire him, and the next night, the 11th of September, the boy came back again, and said the boss had sent him up to drive, and was killed instantly about 11 o'clock that night by falling off of the loaded car, which ran over him. Thompson says the boy was not working for him, not in his employ. Defendant says the boy had been discharged and paid off that afternoon, and warned not to go about the mines. Thompson says that the first night the boy came up he brought the pony from the barn, hitched it to the car outside of the tippie, and drove into the mine. Several witnesses testify that in the afternoon of the 11th Riffe went out and brought the boy back to the mine to do trapping that afternoon in the place of Cyphers, whom he desired to do other work, and two or three witnesses saw the boy doing that work that afternoon. Riffe denies this. Baldwin paid the boy his wages about 5 o'clock that afternoon, and told him he was not to work for them any more; and later, near dark, saw the boy taking the pony to the mine, and again told him not to go into the mine, but was told by the boy that he would take the pony to Thompson and come right out again. He came out dead. Here we have both the company and Thompson denying the employment, and yet the boy was working. The original employment at the mine was unlawful. If the boy had not been employed, the unfortunate death would not have occurred. To avoid liability it is asserted that Thompson must have employed the boy to do the driving, and, Thompson being an independent contractor, defendant is absolved from any duty to his servants and employees.

Who is an independent contractor? This query raises many nice distinctions, and its answer depends upon a consideration of the contract, the nature of the business, and the circumstances. Generally where a defendant has contracted with a competent person, exercising an independent employment, to do work not in itself dangerous to others, according to the contractor's own method, and without his being subject to control in any important particular, except as to the result of his work, he will not be chargeable for the wrongs of such contractor committed in the prosecution of the work. *Carrico v. Railway Co.*, 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50. Here there are many factors which militate against the contention that

Thompson was an independent contractor. The heading was in the mine, and was being driven while the coal was taken out and the mining operations carried on. Defendant had general control of the mine and of all the work therein. An important part of the work on the heading was done by defendant. It drilled the holes in the daytime, and Thompson shot them by explosives at night. Its machinery and equipment were used in the work. Its cars and ponies were used to haul out the rock. It sent Blaine, its employee, into the mine to help with the pony; and the evidence points strongly to the fact that the boy was sent the first night by some one in authority for that purpose. No time was fixed for the termination of the contract, and the life of the contract evidently depended upon the co-operation of defendant. If the holes were not bored, the work would not proceed. The mining of coal was the controlling business; and the driving of the entry was subservient thereto, and subject to the convenience of the owner. It does not appear how many yards Thompson had contracted to remove, or when or for what cause his employment might have been dispensed with. It is conceded that the work was as dangerous as any other mining work. The stipulated price per yard contracted to be paid is of little significance. Thompson employed and discharged his help, a strong index of the relation of an independent contractor, but not conclusive. Thompson, when asked if he had absolute control over driving the entry, replied that he was under the mine foreman's instructions; but that he had absolute control of hauling the slate out of the mine, employing and discharging the men, buying the explosives, and everything of that kind, until "they" gave him further orders and "they didn't give me no further contrary orders about that." If a right of control is in the employer, it is immaterial whether he actually exercises it. 16 Am. & Eng. Ency. Law, p. 188. Why did Thompson permit the boy to work if he did not employ him? In response to his request of Baldwin for some one to drive the refractory pony, the boy came from the stables with the pony and hitched it to the car. The night he was killed, he appeared by order of the "boss." Thompson knew the boy was employed as a trapper. This indicates that Thompson recognized some authority in defendant in the selection of workmen. It has some probative value, and is one of the indices of the relation of the parties.

"The vital test in determining whether a person employed to do certain work is an independent contractor or a mere servant is the control over the work which is reserved by the employer. Stated as a general proposition, if the contractor is under the control

of the employer, he is a servant; if not under such control he is an independent contractor." 14 R. C. L. p. 67, and numerous authorities there cited.

As hereinbefore stated, it does not appear whether defendant paid the men and charged the sums against Thompson's \$4 per yard, or whether the contract price was paid in full to him, out of which he then paid them. When asked who paid the men, Baldwin answered:

"Mr. Thompson. It came out of his pay."

While payment direct to the men by defendant would have little weight, being possibly a matter of convenient arrangement, it would indicate that defendant was solicitous that the men who drove their entry should be paid—an indication of supervision, although slight. The burden is upon the defendant to prove all the facts necessary to constitute Thompson an independent contractor. *Kirkhart v. United Fuel Gas Co.*, 86 W. Va. 79, 102 S. E. 806. Payment "by the job," by the yard or by the ton, with power to employ and discharge employees in the performance of the work, is not alone sufficient to create the relation of an independent contractor, although it is a circumstance strongly indicative thereof. *Kniceley v. Railroad Co.*, 64 W. Va. 278, 61 S. E. 811, 17 L. R. A. (N. S.) 370. If a coal mining company could create this relationship by "letting out contract work" in mining its coal, at a stipulated price per ton or bushel, it could avoid liability to the miners engaged in the work for injuries received by them. By contracting with a financially irresponsible independent contractor, payment for personal injuries might be totally defeated. We do not think the verbal contract with Thompson as set up in this case, taken together with the facts concerning the operation of defendant's coal mine, is sufficient to warrant us in holding, as a conclusion of law, that Thompson was an independent contractor. Hence, if Thompson, in charge of the work and representing defendant, hired the boy (which he denies) defendant is liable; or if Thompson permitted the boy to work in the mine (which is not disputed), the liability is not changed. The statute says:

"No child under the age of 16 years shall be employed, permitted or suffered to work in any mine, quarry, tunnel or excavation."

This inhibition applies to the owner of the mine, as well as to all other persons. It is his duty to see that no such child is employed or permitted to work in his mine. He cannot avoid this duty by attempting to shift it upon another. This defendant had control of its mine as a whole, and was op-

erating it. The driving of the entry was a mere incident of the operation, a detail; and when it permitted, either advertently or inadvertently, this child to work therein, it became civilly responsible for injuries resulting to him therefrom. There is very persuasive evidence to show that defendant knew, or should have known, that the boy was driving the pony at night. He went the first night at the instance of some one, other than Thompson, to drive the pony. Blaine, who was sent by Baldwin on that mission, at that time saw the boy driving, and after making one trip with the pony, left the boy there for that purpose. Riffe, the assistant mine foreman, seemed to know something about it, for he discharged the boy, as he says, because he wanted or intended to "work on the rock." The boy brought the pony from defendant's barn, and hitched it to the mine car and drove into the mine. After discharging the boy at noon, Riffe again brought him back to do trapping in the afternoon, under what arrangement or understanding it does not appear. Riffe denies that he did so, but several witnesses make it certain that the boy came back and worked.

Error is assigned because plaintiff's instructions Nos. 1, 2, 3, and 4 do not incorporate therein the theory of contributory negligence on the part of the father in permitting, or acquiescing in, the employment of the boy in the mine. Defendant's instructions 8, 9, and 13 fully cover this theory. It is not necessary to insert in each instruction all the exceptions, limitations, conditions, and theories which are inserted in the instructions as a whole. The instructions must be taken and considered together. *State v. Dodds*, 54 W. Va. 289, 46 S. E. 228; *Normile v. Traction Co.*, 57 W. Va. 132, 49 S. E. 1030, 68 L. R. A. 901.

From what we have said, it follows that defendant's instruction No. 1, directing a verdict for defendant; instruction No. 2, charging that the burden was on plaintiff of showing that the boy was employed by defendant at the time of his death; instruction No. 4, charging that if the boy had been discharged by defendant and employed by Thompson at the time of the injury the verdict should be for defendant; and No. 5, instructing that if the boy had been discharged and told not to go in the mine, but afterwards went to work with Thompson, hauling slate—then the relation of master and servant did not exist between the boy and defendant, and the verdict should be for defendant; were all properly refused.

We affirm the judgment.

Affirmed.

RITZ, P., absent.

(89 W. Va. 356)

WENDELL v. PAYNE, Agent. (No. 4261.)

(Supreme Court of Appeals of West Virginia.
Nov. 1, 1921. Rehearing Denied
Dec. 9, 1921.)

(Syllabus by the Court.)

1. Railroads \S 358(1), 359(1)—Ordinary care required as to trespasser or licensee.

A pedestrian using a railroad track for his convenience, unless at a public crossing, is a trespasser or licensee, and in the operation of its trains the railroad company owes to him only ordinary care in avoiding injury to him.

2. Railroads \S 400(8)—Negligence as to pedestrian seen on track held jury question.

Where such pedestrian is injured by a light locomotive going at a rate of 15 to 20 miles per hour on a slight up grade, and there is a substantial conflict in the evidence whether the injury could have been avoided by slowing down or stopping the locomotive after the injured person had been seen by the trainmen at a distance of 350 feet, the whistle sounded, and no heed given to the danger signal or approach of the locomotive by him, then it becomes a question for the jury to determine whether ordinary care has been used to prevent the injury.

3. Release \S 58(3)—Question whether release for personal injuries constituted accord and satisfaction held one for jury.

Where such pedestrian, being a deaf mute, is thus injured, and while in the hospital a short time thereafter is approached by a claim agent of the railroad company, and he then executes a release or acquittance for personal injuries, in consideration of payment of hospital services, without being able to read the release, and relies upon the representation of the claim agent that the paper signed is for the purpose only of making provision for payment of hospital charges, in order that he may remain in the hospital, it is error for the court to hold that such release will sustain a plea of accord and satisfaction; whether such release so obtained will sustain such plea is likewise a question for jury determination.

(Additional Syllabus by Editorial Staff.)

4. Railroads \S 379—Duty to person seen stated.

After discovering a trespasser or licensee on the track, it is the duty of engineers to give timely warning, and, if there be no response to the warning, or anything indicating he has not heard, or suggesting that he is not in the use of his faculties and is making no effort to avoid danger, they must bring the train under control, if possible.

Error to Circuit Court, Mercer County.

Action by James Wendell against John Barton Payne, Agent, and from a judgment therein, the plaintiff brings error. Reversed, and judgment rendered for plaintiff on the demurrer to the evidence.

John R. Pendleton and A. M. Sutton, both of Princeton, for plaintiff in error.

Williams, Loyall & Tunstall, of Norfolk, Va., McNutt, Ellett & McNutt, of Princeton, and Hall, Wingfield & Apperson, of Roanoke, Va., for defendant in error.

LIVELY, J. After all the evidence had been introduced defendant demurred thereto, the jury found a conditional verdict of \$6,250 in favor of plaintiff, the court sustained the demurrer, and entered judgment of nil capiat, and plaintiff brings error.

The action is for personal injuries sustained by plaintiff in March, 1919, while walking upon the track of defendant between the towns of Mullens and Corrinne, in Wyoming county, by being struck by a locomotive.

Plaintiff was a deaf mute, 64 years of age, a painter by trade, and was on his way up the track to Corrinne, where he was engaged in painting dwelling houses. The track seems to have been used generally by pedestrians; the county road running parallel thereto being out of repair at that time and for about one year prior thereto. He was alone, walking at a brisk pace between the rails when struck, at about 7:30 o'clock in the morning. Witness Saxton was also going to Corrinne, and was about 800 or 900 feet behind plaintiff, when the locomotive with tender attached (no cars) came from a Y track which connected with another track across the river (a small stream at that place) and onto the track on which plaintiff was walking. Saxton, perceiving the approach of the engine from the Y, ran to the intersection of the Y track with the main line, called the switch, and attempted to attract the attention of the man in the fireman's cab by motioning to him and then pointing ahead to plaintiff on the track, then 800 feet ahead, but was not sure that he attracted attention, stating that the man in the cab looked at him, the witness, and then looked up the track in the direction of plaintiff. The locomotive was going at about 25 miles per hour, according to this witness, and from 15 to 20 miles per hour according to those on the engine, the fireman, engineman, and an engine watchman who was "deadheading" to his work, and who was not a member of the engine crew. Witness Saxton testified that the engine proceeded to within about 350 feet of plaintiff when the whistle gave the danger signal of four or five short blasts in quick succession; that plaintiff paid no attention to the signal, being unable to hear, and proceeded as before and oblivious to the approach of the train, which did not decrease its speed. At the place where witness stood he could see the deaf man until the engine hit him, because the track curved slightly to the left with a slight up grade. He states that the engine did not slacken speed until a very short distance from plaintiff, when the brakes were applied, but too late. He hurried forward and arrived just as the unfortunate man was being picked up. This

witness afterwards went upon the ground with an engineer in employ of defendant and pointed out and helped measure the distance from the switch where he was standing when he attempted to attract the attention of the man in the cab to the point where the danger signal was given, measured at 450 feet, and from that point to the place of accident, a distance of 350 feet, and a map of the track and surroundings is made a part of the record, showing these measurements and points. The man in the fireman's cab, McGuire, who was a watchman, "deadheading" to his work, states that he did not see Saxton at the switch, and of course did not see him motioning and pointing to the track ahead, but that after the engine had left the switch and had come to a curve of the track, a short distance therefrom, he saw plaintiff walking ahead between the rails, and, as soon as he "glimpsed" him, told the engineman that there was a man on the track. He first stated that the man was then about 400 or 500 feet ahead, afterwards about 350 feet, and afterwards four or five car lengths ahead, stating that railroad men usually estimate such distances by car lengths and not by feet, and explaining that cars varied in length from 47 to 50 feet. The engineman immediately blew the danger signals, and, he thought, checked the speed of the engine a little. The fireman then came from where he was shoveling coal into the engine, and told the engineman that there was a man on the track; and then, as he remembered, the engineman put on the emergency brake and stopped as soon as possible. The fireman, Long, stated that he was at the fire box putting in coal when he heard McGuire say there was a man on the track, and immediately stepped up on the engine where he could see ahead and saw a man, about 100 feet ahead, as he guessed, and then he, the witness, told the engineman "that would do (referring to sounding the whistle) he would hit the man," and then the engineman put on the brakes, but he was not sure that he reversed the engine. He said that when he looked out the window the man was about 100 feet ahead, and that the engineer stopped the engine as quickly as he could. The engineer, Stull, stated that he did not see the man until after he had been hit, could not see him on account of the curve, but as soon as the watchman told him a man was on the track he blew the whistle, and "eased the brake up a little," and then when the fireman, Long, looked out of the window and said, "I believe you will hit him," he put on the emergency brake, reversed the engine, and put on sand, but by that time he hit the man and saw him fall to the right side. He said it was only a few seconds after the watchman had told him that there was a man on the track that Long looked out of the window and said the man would be hit. He estimated that at that time he was

from 90 to 100 feet away from the man, but would "hate to say" how far away he was; that he ran the engine about 50 or 60 feet past the place where the man was hit; that he could stop the engine in from 90 to 110 feet by the emergency and reversal of the engine when going at that speed, which the three men on the engine said was from 15 to 20 miles per hour. He gives no reason why he did not see the man when he came to the switch, when he was about 800 feet away. He was not asked that question, and possibly some obstruction was in the way to prevent. Both the watchman and the fireman knew plaintiff as a deaf mute, having frequently seen him at Mullens, but did not recognize him until he was hit by the engine. The engineman said he stopped his engine as quickly as possible after the fireman told him he would hit the man. Plaintiff stated that he had been on the track only a few minutes before he was hit, and sensed the approach of the engine just before it hit him, was surprised to see the engine near him and tried to get off, and had time to get off, "but train run faster when I tried to get off." Plaintiff's leg was broken above the ankle, two toes were mangled and were cut off by the surgeon, and the back of his head was severely cut. This latter wound was not of a permanent nature, but it appears that the injury to the leg is permanent, and plaintiff will always be a cripple. The witness Saxton stated that the engine could have been stopped two or three times in the distance from where the whistle was sounded to the place of the accident, basing his conclusion upon long observation of the starting and stopping of engines on the road and shifting cars on the yard. He had never worked on the railroad.

The defense is that the servants of the railroad company had discharged all the duties it owed to plaintiff, and under this evidence was not liable, and further that plaintiff had, by a writing sealed and witnessed, released all claim for damages in consideration of payment of the hospital and medical bills incurred by plaintiff. Plaintiff was first placed in the hospital at Mullens, and a short time thereafter removed to a hospital at Beckley, and the release was signed about two weeks after the injuries were received, while plaintiff was in the hospital. He remained there until in July, when he was discharged.

There are two controlling questions presented: (1) Did the train crew use reasonable care to avoid the accident? (2) Did plaintiff release the railroad company from his claim of damages? Either of these questions answered in the affirmative will sustain the lower court.

[1] First, we consider the evidence of the accident, and principles applicable thereto. A pedestrian, not an employee of a railroad company in the discharge of his duties, who

uses the company's tracks for his convenience at any other place than at a public crossing, is a trespasser or a licensee, and cannot recover for injuries received by being struck by a locomotive unless the employees of the company operating the locomotive have failed to use reasonable care in the avoidance of injury to him after he is discovered. *Kelley v. Railway Co.*, 58 W. Va. 218, 52 S. E. 520, 2 L. R. A. (N. S.) 898; *Blagg v. Railway Co.*, 83 W. Va. 449, 98 S. E. 528. While it was gross negligence of this plaintiff to walk upon a railroad track where trains were likely to pass, and especially so because he had been cautioned not to use them, yet it was still the duty of the servants of the company to use the ordinary care. His great carelessness will not excuse theirs, if they failed to exercise reasonable care after discovering him. His carelessness or infirmity does not change the rule of ordinary care on the part of the company, now well settled in this state.

[4] It is also well settled that, after discovering a trespasser or licensee on the track, it is the duty of those operating the locomotive to give warning of its approach in ample time, and if there be no response to the warning, or anything about the licensee's actions indicating that he has not heard, or anything unusual in his demeanor reasonably suggesting that he is not in use of his faculties, and that he is making no effort to avoid the approaching danger, then they must bring the train under control, if possible, and avoid the injury. It would serve no useful purpose to review our numerous cases announcing these principles. The eyewitnesses do not wholly agree upon these facts, as will be noted from the summary of their evidence hereinbefore set out; and the pertinent inquiry is whether those in control of the engine exercised ordinary care to prevent the injury.

[2] What is the "ordinary care" to be used by the trainmen in cases of this character. It is said to be "such care as a prudent man of requisite skill will take under the circumstances of a particular case." But who is to decide that, under particular circumstances and conflicting testimony, ordinary care has been exercised? Where there is no conflict of testimony, buttressed by the physical facts, it may be proper for the court to determine the question; but such care is not to be laid down by a fixed rule and is not always easy to measure and ascertain, but, from its variable nature, depends upon the varying circumstances peculiar to each particular case, and it cannot always be determined as a matter of law. Especially is this true where there is a conflict of evidence in the decision of which men might reasonably differ. Hence the peculiar propriety of not withdrawing questions of this character from the jury. Is there a substantial conflict as to the reasonable care exercised in

this case? Saxton says defendant was easily discernible from the switch, where he stood, at a distance of 800 feet, but does not know if the men on the engine could have seen him. He says, however, that when the whistle sounded the alarm the engine was 350 feet from defendant, who plainly indicated that he was paying no heed to the approach of the engine, that the speed did not slacken, and that the engine could have been stopped two or three times before it reached the deaf mute. The witness McGuire partially corroborates Saxton as to distance when the whistle first sounded. The engineman and fireman state they were much nearer when he was discovered. The fireman says they were about 100 feet away when he saw the man and told the engineer they were going to hit him. The engineer says he could stop within 90 to 120 feet; but, after the fireman told him he would hit the man, he actually went from 50 to 60 feet beyond the place the engine struck him, making a distance the engine ran of 150 or 160 feet before it was stopped, after the fireman had so warned him. While the watchman was a "deadhead," and his negligence in not discovering plaintiff and giving the warning sooner cannot bind the company, as he had no duty to perform, under our holding in *Bess v. Railway*, 35 W. Va. 492, 14 S. E. 234, 29 Am. St. Rep. 820, yet he did notify the engineer that there was a man on the track, while they were yet 350 feet away, and as the engineer could not see because of the curve and boiler head, and had no responsible person to see for him, the fireman then being engaged at the firebox, it was his duty to bring his engine under control. He could not see if the man was apparently in possession of his ordinary faculties and was aware of the approach of the engine. The engineer was proceeding blindly—that is, without being able to see the track ahead—and this fact called for caution. He was permitting this irresponsible passenger or "deadhead" to see for him. He says he "eased the brakes a little," but Saxton says there was no diminution in the speed. Under this evidence, can we say there is no substantial conflict? Had an unconditional verdict been rendered on this evidence in favor of plaintiff would it have been set aside as contrary to the evidence? Is not here a serious question of the exercise of "ordinary care" which should have been submitted to the jury? The principles governing here are tersely stated in *Raines v. Railway Co.*, 39 W. Va. 50, 19 S. E. 565, 24 L. R. A. 226, where it is said:

"When a given state of facts is such that reasonable men may differ upon the question whether there was negligence or not, the determination of the matter is for the jury. But when the facts are such that all reasonable men must draw from them the same conclusion—when there is no room for two rea-

sonable opinions about it—then it becomes a question of law for the court."

The facts here place this case in a different class from those of *Huff v. Railway Co.*, 48 W. Va. 45, 35 S. E. 866, *Blagg v. Railway Co.*, 83 W. Va. 449, 98 S. E. 526, and other similar cases cited by counsel for both plaintiff and defendants. In the *Huff Case* plaintiff was using the tracks in the yard as a footway at night, and stepped out of the way of a passing freight train onto a track leading into the roundhouse where he was struck by a yard engine backing into the roundhouse. He was not seen by the engine crew, no headlight was on the tender, and consequently no warning given. In the *Blagg Case* there was no evidence of when deceased came upon the track, whether he was seen by the trainmen before he was hit or what effort was made, if any, to avoid the injury, no evidence whatever to show whether the engineer, by the exercise of ordinary care, could have avoided the injury after discovering the deceased on the track. In the *Robertson Case*, 104 S. E. 615, the deceased was walking on the track and was killed by a backing train on the rear of which there was no watchman at the time of the injury, and consequently he was not discovered, and no one knew the exact details of the immediate accident, a case similar in principle to the *Blagg Case*. In the *Bralley Case*, 66 W. Va. 462, 66 S. E. 653, the deceased was on the track and drunk, and there was evidence tending to prove that he came on the track and was seen by the fireman in ample time to have given the engineer warning of the danger. The fireman testified that the man staggered suddenly upon the track about 200 feet ahead of the engine, and that he then gave warning but too late to avoid the injury. The engineer stated that he immediately applied the brakes and did all in his power to stop after seeing the man. Other evidence was to the effect that deceased was staggering from side to side and plainly indicated his drunkenness, and hence that ordinary care was not exercised. This court held that under such evidence the motion to exclude and the instruction to find for defendant were properly overruled, and the questions presented were properly jury questions, but reversed because of an erroneous instruction.

We are of the opinion that the evidence in the case now under consideration is of such conflict that the ordinary care required on the part of the engineman and fireman to avoid injury to plaintiff cannot be presumed to have been exercised as a conclusion of law and that it was a question for jury determination.

[3] We now come to the release of damages. Plaintiff was in bed in the hospital at Beckley, where the claim agent came to

see him on the 19th of March, 1919, 15 days after the accident, and the attending surgeon introduced the claim agent as such to plaintiff. The conversation carried on relative to the "company release" was by writing, the only way by which the deaf mute could communicate except by the use of signs. The notes of this transaction in writing were preserved by the claim agent and are in evidence, and it may be well to here incorporate the claim agent's testimony:

"When I first went there, Dr. Coleman took me up and introduced me with this, he says: 'Mr. Counts wants to talk to you. He is claim agent for the Virginian Railroad.' Then I told him: 'I have been to the place you were hurt. Am sorry to find you this way. How did it happen, anyway.' I don't think he made any reply to that only the motions of his hands, and I said, 'Train came around curve on you before you knew it?' and he said 'Yes,' and I said, 'How old are you?' and he said 'Sixty-two.' Then I said, 'Where were you going that morning?' 'I was contracting for Corrinne Company. Twenty houses to paint. I had three men for me.' I said, 'We will take the best care of you we can and pay your bill here,' and at that time I went down stairs, left him just for a minute, and went downstairs to Dr. Coleman's office, and I said, 'I will be back in a few minutes,' and I went down stairs and came back, and I asked him, 'Where do you live, and have you any relatives?' and he said, 'I was raised in Philadelphia, Pa., and left home for Florida in 1896; didn't hear from them; I left Florida three years ago and come to Mullens,' and I said 'Well, you stay here until you get well; we will take care of you the best we can.' He said, 'Dr. Logan cut two toes off Mullens Hospital five days.' I said, 'We will take care of your medical bill as long as you need any attention, and I want you to sign release for it, so our company will pay it for you,' and he said, 'I am going—I don't know just what's out there; I can't read it—and I said to him, 'You must stay in the hospital until you get well; will you sign the release now?' and he said, 'Yes; I will stay until I get well,' and I said, 'We have a piece of paper, company release, to be signed; do you want to sign it now?' and he said, 'Yes,' and I said, 'I have this paper for you to sign; then I told Dr. Coleman and Logan to take good care of you and we would pay them,' and he says, 'I have been walking from Mullens to Bud, Itman, and all to Maben and all on Gulf; I always watch,' and he asked me, 'Do you live at Elmore?' and I said, 'No; at Princeton,' and I asked him, 'Where do you stay at Mullens?' and he said, 'Mr. A. Smiley, White Kitchen.'"

Plaintiff says he did not read the printed part of the paper because he did not have his spectacles and could not read the fine print. He could only read and did only read the part written in by the claim agent. He says that he signed it in order to be permitted to

stay in the hospital. That was all that was talked about, and, when we refer to the written statements above set out, we find that nothing was said about the release of damages for the injury; they refer to payment of the medical bill. The claim agent's evidence on that point is:

"I said, 'We will take care of your medical bill as long as you need any attention, and I want you to sign a release for it, so our company will pay it for you.'"

Nowhere is there any mention made of a release for damages. No suggestion of that character in the conversation leading up to the signing of the release. The agent presumed that plaintiff read the release before signing, as he had it long enough for that purpose. The injured man was 64 years old and without his spectacles, and states that he did not and could not read the printed portion, and signed in reliance upon the agent's statement of the purpose of the execution of the paper. The release has no more force or solemnity than any other contract in writing; and whether the minds of the contracting parties met under these circumstances is a question for the jury. The presumption is that plaintiff read the release and knew its contents when he signed. This presumption can be rebutted. Whether the facts here are sufficient to do so, we need not say. The evidence is very persuasive that the old man did not know what was in the release, and relied upon the information given him by the claim agent as to its contents. His future actions bear this out. We do not say that the agent fraudulently obtained his signature. The agent may have been under the impression that plaintiff read and fully understood the contents. We do say, however, that, under all these circumstances, the introduction of the agent as such by the surgeon, the writings concerning the medical bills, the interest of the parties, the pain and mental anxiety of the signer, his infirmity of hearing and speech, his age, and deprivation of spectacles, a jury question clearly arose, and the demurrer to this evidence should have been overruled. *Norvell v. Railway Co.*, 87 W. Va. 467, 68 S. E. 288, 29 L. R. A. (N. S.) 325.

Both of the controlling questions here presented, namely, that of the use of ordinary care by the servants of defendant to prevent injury to plaintiff, and that of the validity of the release, we conclude, should have gone to the jury.

We therefore reverse the judgment, and render judgment for the plaintiff on the demurrer to the evidence.

Reversed, and judgment here.

(89 W. Va. 615)

ALLEN v. BURDETT et al.
(No. 4253.)(Supreme Court of Appeals of West Virginia.
Nov. 22, 1921.)*(Syllabus by the Court.)*

1. Limitation of actions §55(4)—Malicious prosecution suit must be begun within one year after judgment for defendant.

The right to sue for malicious prosecution of a civil action accrues upon the rendition in the trial court of a judgment for the defendant in the action complained of, and is barred by the statute of limitations if not asserted within one year after such judgment, although the plaintiff in the suit which it is claimed was maliciously prosecuted may have a right to apply for an appeal or a rehearing, of which he does not avail himself.

2. Limitation of actions §130(10)—Suit, begun and dismissed for failure to file declaration will not save from bar of limitation of statute.

A suit, begun by the issuance and service of process, and dismissed at rules for the failure of the plaintiff to file his declaration, will not save a second suit for the same cause of action, brought within one year after such dismissal, from the bar of the statute of limitations.

Error to Circuit Court, Kanawha County.

Action by P. B. Allen against Charles D. Burdette and others. Judgment for the defendants, and the plaintiff brings error. Affirmed.

Morgan Owen, of Charleston, for plaintiff in error.

Byrne, Littlepage & Linn, S. B. Avis, Ivory C. Jordan and Price, Smith, Spilman & Clay, all of Charleston, for defendants in error.

RITZ, P. In this suit for malicious prosecution, or what is sometimes called a malicious abuse of civil process, the defendants interposed a plea of the statute of limitations of one year, to which plea plaintiff tendered a special replication in writing, which the lower court held was insufficient, and, the plaintiff making no other reply to the plea filed, judgment was rendered for the defendants, and this writ of error is prosecuted to review the same.

According to the allegations of the declaration, on the 24th of February, 1917, defendants instituted an involuntary proceeding in bankruptcy against the plaintiff in the District Court of the United States for the Southern District of West Virginia, to which petition the plaintiff filed a demurrer, which being overruled on the 12th of December, 1917, the cause was referred to a special master to ascertain and report upon the facts set

up in said petition. The special master took the testimony and reported to the court that the plaintiff had not committed the acts of bankruptcy charged in said petition, and on the 1st day of October, 1918, the report of the special master was confirmed, and the said plaintiff adjudged not to be a bankrupt. This action was brought on the 17th of December, 1919, seeking to recover damages sustained by him by reason of that bankruptcy proceeding prosecuted against him. The defendants filed a plea of the statute of limitations, in which they aver that the plaintiff's cause of action did not accrue within one year before the commencement of this suit. Plaintiff demurred to this plea of the statute of limitations, which demurrer being overruled, he filed a special replication thereto, in which he averred that on the 15th day of October, 1918, he brought an action against the defendants in this suit upon the same cause of action herein set up, returnable to November rules, 1918; that a few days after the issuance of the summons in said cause he sought to secure the papers in the bankruptcy case for the purpose of preparing his declaration; that upon making application for said papers he was informed that they were in the hands of the attorney for the petitioners in the bankruptcy proceeding; that plaintiff, through his counsel, then called on said attorney and inquired if petitioners in the bankruptcy suit intended to prosecute an appeal from the judgment of the District Court, and was informed that they had not then decided what they would do; that knowing that it was necessary to aver in his declaration that the proceeding upon which the malicious prosecution suit was based was finally determined, and realizing that petitioners had until the 19th of November, 1918, in which to file a petition for rehearing in said bankruptcy proceeding, which would suspend the order entered therein on the 1st of October until disposition was made of the petition for rehearing, he, plaintiff's counsel, believed that the suit brought by him on the 15th of October was premature, and for that reason did not file a declaration therein; that this conclusion was arrived at after diligent examination of the authorities and consultation with other reputable attorneys in regard to the right of the petitioners in the bankruptcy proceeding to appeal or file a petition for rehearing, and the time within which the same could be filed; that, coming to this conclusion, he did not file his declaration in said suit brought on the 15th of October, but allowed the same to be dismissed at February rules, 1919, for failure to file such declaration, and that this suit for the same cause of action was instituted within one year from the dismissal of said first suit at February rules, 1919; that by reason of the institution of said first suit

and its dismissal at rules for failure to file the declaration as aforesaid, plaintiff, by virtue of section 19 of chapter 104 of the Code (sec. 4432), might maintain this suit brought within one year after the dismissal of such first suit. Defendants demurred to this replication, and the court sustained their demurrer. The plaintiff declined to make any other replication to the plea of the statute of limitations, and the court rendered judgment in favor of the defendants thereon.

The plaintiff on this hearing insists that he is entitled to maintain this suit for two reasons: First, that having brought a suit which was dismissed within one year before the bringing of the present suit, the bar of the statute of limitations does not apply by reason of the provisions of section 19 of chapter 104 of the Code; and, second, that, inasmuch as petitioners in the bankruptcy proceeding had a right to appeal from the judgment of the District Court holding that the plaintiff was not a bankrupt, or to file a petition to rehear that judgment, his right to institute his suit for malicious prosecution did not accrue to him until the expiration of the time within which an appeal might be taken or a petition to rehear filed, which was less than one year prior to the institution of the present suit.

[1] When does the right to institute suit for a malicious prosecution accrue? If it accrues upon the rendition of a final judgment by the court in which the alleged malicious prosecution was conducted, then the statute begins to run from the entry of such final judgment. If, however, it does not accrue until the right to appeal or to apply for a rehearing of such final judgment is barred, then, of course, the statute of limitations would not begin to run until the expiration of the time fixed by law for taking an appeal, or presenting a petition for rehearing. That there must be a determination of the suit which it is alleged is maliciously prosecuted is uniformly held, and the plaintiff here contends that there is no such final determination of that proceeding until the right to appeal is barred, as well as the right to file a petition to review or rehear; and especially is this true, according to his contention, where the plaintiff in the suit alleged to be maliciously prosecuted may appeal as matter of right from the judgment therein. Under our authorities a proceeding to review a final judgment by appeal or writ of error is treated as a new suit, and not as a continuation of a suit in which the judgment or decree appealed from was rendered. Plaintiff insists, however, that this doctrine does not apply in proceedings in bankruptcy; that an appeal in such a proceeding is a continuation of the former proceeding, and that that proceeding is not concluded until the determination of such appeal, if the same be taken, or until the right to take the same is

barred. We do not think the determination of this question is of any importance in this case. Whether appellate process be treated as a new suit or simply a continuation of the old suit can make little difference, unless such appellate process has in fact been taken advantage of by the party adversely affected by the judgment or decree. When the court in which the suit alleged to be maliciously prosecuted is pending has complete jurisdiction and renders a judgment finally disposing of the matters, that judgment is final and conclusive upon the parties to the suit until it is gotten rid of by some appropriate process, and certainly, so long as it stands without any proceeding being taken to review it, it constitutes a termination of the suit in which it is rendered. There may be some question as to the right to maintain a malicious prosecution suit in a case where appellate process has actually been taken advantage of, and where an appeal or writ of error is pending in a superior court. Upon this question we find the authorities very much divided. Many courts hold that, even though an appeal or writ of error is being prosecuted, and is pending, a suit for malicious prosecution may be instituted and prosecuted, and the judgment of the court in which the alleged malicious prosecution was conducted will be considered a final determination of the questions involved until it has actually been reversed or set aside by a competent tribunal. There are other courts which hold that in such case the proper procedure is to stay the trial of the suit for malicious prosecution until the determination of the writ of error or appeal in the appellate court, while still others hold that where an appeal or writ of error is actually pending and being prosecuted in an appellate court, no suit for malicious prosecution may be maintained until such appeal or writ of error has been actually determined favorably to the party seeking to bring the malicious prosecution suit.

We find no authorities, however, which hold that simply because the plaintiff in a suit which it is alleged was maliciously prosecuted may have a right to prosecute an appeal from a judgment adverse to him, the party claiming to be injured by such malicious prosecution may not maintain a suit to recover the damages sustained by him thereby until such right is barred by lapse of time. The following authorities indicate the views of the courts upon this question: 18 R. C. L., title, Malicious Prosecution, § 14; *Levering v. National Bank of Morrow County*, 87 Ohio St. 117, 100 N. E. 322, 43 L. R. A. (N. S.) 611, Ann. Cas. 1913E, 917, and note; *Luby v. Bennett*, 111 Wis. 613, 87 N. W. 804, 56 L. R. A. 261, 87 Am. St. Rep. 897; *Graves v. Scott*, 104 Va. 372, 51 S. E. 821, 2 L. R. A. (N. S.) 927, and note, 113 Am. St. Rep. 1043, 7 Ann. Cas. 480; *McCormick Harvesting Machine Co. v. William*, 63 Neb. 391, 88 N. W.

497, 56 L. R. A. 338, 93 Am. St. Rep. 449, and note at page 470; *Foster v. Denison*, 19 R. I. 351, 36 Atl. 93; *Marks v. Townsend*, 97 N. Y. 590; *Carter v. Paige*, 80 Cal. 390, 22 Pac. 188. There is no dissent among these authorities from the view that the right to bring such a suit for malicious prosecution accrues upon the rendition of a final judgment by the court in which the suit complained of is tried, notwithstanding there may be a right of appeal not exercised. Nor do we see any good reason for a different holding. Upon the rendition of a final judgment in a case the suit is just as much terminated before the time expires within which an appeal may be taken as it is afterward, provided no appeal is ever in fact taken therefrom.

What effect the actual pendency of an appeal may have upon the right to maintain a suit for malicious prosecution we need not determine in this case, for the question does not arise. There is no averment that an appeal was ever taken, or any other means used by the defendants here to secure a reversal of the judgment of the District Court in the bankruptcy case. It may be that if the defendants in this suit had actually prosecuted an appeal or filed a petition to rehear the judgment rendered by the bankruptcy court, the right to institute and prosecute a suit for malicious prosecution would not accrue until the determination of the questions arising upon such appeal, or petition to rehear; or it may be, as has been held by some other courts, that in such case the right to institute the suit exists, but the prosecution of it would be suspended until after the determination of the questions arising upon the proceeding taken to reverse the judgment. We express no opinion as to the correct holding upon this question. We only find that where a judgment has been rendered by a court in which a suit has been instituted which finally disposes of that suit adversely to the plaintiff, the defendant may maintain a suit for the malicious prosecution of such suit without waiting for the time to expire within which appellate proceedings may be instituted, and, this being true, of course, it follows that the statute of limitations begins to run against him from the entry of the judgment finally disposing of the suit alleged to be maliciously prosecuted by the court in which it was tried.

[2] But is the plaintiff in this case entitled

to the benefit of section 19 of chapter 104 of the Code? He claims that because he instituted a suit within the statutory period, but allowed the same to be dismissed for his failure to file a declaration for the reason that he considered it prematurely brought, he is entitled to maintain this suit, brought within one year from the dismissal of his first suit for the same cause of action. This statute has been construed by this court in several cases, and our uniform holding has been that it has no application to a case in which the plaintiff voluntarily abandons his first suit. *Lawrence v. Winifrede Coal Co.*, 48 W. Va. 139, 35 S. E. 925; *Tompkins v. Ins. Co.*, 53 W. Va. 479-484, 44 S. E. 439, 62 L. R. A. 489, 97 Am. St. Rep. 1006; *Hevener v. Hannah*, 59 W. Va. 476, 53 S. E. 635; *Ryan v. Piney Coal & Coke Co.*, 69 W. Va. 692, 73 S. E. 330; *Bent v. Read*, 82 W. Va. 880, 97 S. E. 286. The plaintiff in this case admits the force of the decisions above cited, but says that he should be given the benefit of the statute, for the reason that he abandoned his first suit in good faith, believing that he did not have a right to institute it at the time he did. Our decisions all hold that section 19 of chapter 104 of the Code will have the effect of tolling the statute of limitations only when the plaintiff has been forced by the court in which his first suit was pending to dismiss it or abandon it because of lack of jurisdiction in the court, or for some other reason. He cannot substitute his own judgment for that of the court in which the suit is pending, and claim the benefit of the statute upon a voluntary abandonment or dismissal of his suit. Such a holding would in effect give a plaintiff the right to keep a cause of action alive forever simply by bringing successive suits, each within one year from the time he dismissed the last preceding one. The construction placed upon this statute by this court has been concurred in by the legislative authorities for many years, and we are warranted in the belief that, if it was not in accord with the legislative intent, it would not have been allowed to stand unquestioned, and without some attempt being made to declare a different legislative intent.

Our conclusion is that the plaintiff's special replication made no defense to the plea of the statute of limitations relied upon, and the judgment of the circuit court so holding is affirmed.

(89 W. Va. 608)

HANLY et al. v. HARMISON. (No. 4295.)(Supreme Court of Appeals of West Virginia.
Nov. 22, 1921.)*(Syllabus by the Court.)***1. Reformation of Instruments** ¶45(1)—**Relief granted only where evidence of mutual mistake is clear, positive, and direct.**

Reformation of a written instrument because of a mutual mistake is one of the well-recognized grounds of equity jurisdiction, but such relief will only be granted when the evidence offered to establish the mistake is clear, positive, and direct, and so preponderates as to convince that there is error in the contract sought to be reformed.

2. Reformation of Instruments ¶45(2)—**Reformation granted where supported by direct, positive testimony and parties' contemporaneous construction.**

Where the evidence offered in support of a bill to reform a contract consists of direct, positive, and unequivocal statements of two of the parties who conducted the preliminary negotiations, as to what the agreements arrived at were, which are supported by receipts given by the other party showing a contemporaneous construction by all of the parties to the contract in accordance with the evidence offered in support of the bill to reform it, relief will be granted, notwithstanding the other party to the negotiations testifies that the contract as executed contains the agreement arrived at, but on cross-examination states, when his attention is directed to the negotiations in regard to the particular matter in respect to which reformation is sought, that he does not recollect whether there was any agreement in regard thereto or not. Such an equivocal denial of the positive testimony of the other parties, supported by the contemporary construction of the contract by the parties, will not be effective to defeat reformation.

Appeal from Circuit Court, Hampshire County.

Suit by W. W. Hanly and others against Frank L. Harmison. Decree in favor of the defendant, and the plaintiffs appeal. Reversed, temporary injunction reinstated and perpetuated, decree for the plaintiffs, and cause remanded for execution of part of decree if necessary.

G. W. McCauley, of Moorefield, and Geo. E. Price, of Charleston, for appellants.

J. Sloan Kuykendall, of Romney, for appellee.

RITZ, P. In this suit to enjoin an action of unlawful entry and detainer, and to have reformation of a contract of lease, and relief from an alleged forfeiture thereunder, the circuit court denied the plaintiffs any relief, dissolved the temporary injunction granted them, and dismissed their bill, and this appeal is prosecuted to review that decree.

The plaintiffs W. W. Hanly and John C. Shoupe, together with one George R. Wheeler, entered into a contract of lease with the defendant, dated the 14th of August, 1907, by the terms of which Harmison leased to them a small tract of about one-half acre of land situate on the South Branch of the Potomac river together with the right to hunt and fish on the farm of the defendant, as well as some other rights not material to be considered in connection with the controversy here involved. The purpose of the plaintiffs and their associates in leasing the land was to secure a place upon which they might erect a bungalow or cottage for the purpose of retiring thereto during the summer months. The term provided for in the lease was 10 years, with the privilege of renewing it for an additional 10 years. It is further provided that the lessees shall pay the lessor an annual rental of \$25 on or before the 1st of September in each year. It is also stipulated that the lessees shall purchase provisions and produce from the lessor, and use his services in hauling from the railroad to the cottage when such provisions and produce are supplied, and such services rendered upon reasonable terms. Immediately after the execution of the lease the lessees began the erection of a cottage or bungalow upon the premises, and completed it in a very short time. They claim that the amount expended by them in the erection of this cottage, and in improving the premises was some \$500 or \$600, but that it would cost a very much larger sum at the time the testimony was taken, because of the increased cost of labor and material. The three lessees, at the time of making the lease, were associated in business together at Cumberland, Md. Some time thereafter Wheeler severed his connection with his associates and moved to the West, at which time he assigned all of his interest in the lease to the plaintiffs Hanly and Shoupe. The lessees have occupied the premises ever since the construction of the cottage thereon. The rentals, it seems, were regularly paid. Harmison makes some complaint that during the continuance of the lease the plaintiffs did not purchase their produce and supplies from him, and did not permit him to do their hauling. They admit that such was the case, but say that the reason they purchased their supplies elsewhere and procured their hauling to be done by others was that they could secure the supplies very much cheaper from other sources, and procure their hauling to be done in a very much more satisfactory manner, and for less money, by others. Complaint is also made by Harmison that the plaintiffs permitted hunting and fishing to be done on Sunday on his premises, and indulged in the immo-

derate use of alcoholic liquors. These charges are denied by the plaintiffs. They are not material to the determination of the controversy now before us, and are introduced in the record evidently for the purpose of furnishing a basis for the strained relations which existed between the parties during the latter years of the lease.

About the 19th of August, 1917, the defendant Harmison gave notice to the plaintiffs that the lease under which they were holding the premises had expired on the 14th of that month, and requiring them to at once vacate. They declined to do so, but insisted that they were entitled to keep the property for 10 additional years under the renewal provision, and insisted that their original contract did not expire until the 1st of September of that year, instead of the 14th of August, and demanded a renewal of the lease for an additional 10 years. Some correspondence passed between the parties without result, when the defendant Harmison instituted an action of unlawful entry and detainer against the plaintiffs in this suit. This bill was thereupon filed, in which the plaintiffs allege that there was a mutual mistake in the original lease, in this, that the agreement of the parties was that the term should commence on the 1st of September, 1907, and continue for 10 years, making it expire with the 31st of August, 1917; while the language of the lease is that it is for a term of 10 years from the date thereof, said date being the 14th of August; and averring that during the whole period all of the parties had treated the term as beginning on said 1st day of September, and had treated the annual rental period as extending from September 1st to September 1st; and praying that the plaintiff in the unlawful entry and detainer suit be enjoined from further prosecuting the same; that the lease be reformed so as to make the term therein provided begin on the 1st day of September, 1907, and the said Harmison be required to execute a renewal of said lease for an additional term of 10 years from the 1st of September, 1917; or, if the evidence should turn out to be insufficient to justify relief by reformation, that the plaintiffs be relieved from the forfeiture of their right of renewal for an additional 10 years by reason of their failure to demand such renewal before the expiration of the original term, on the ground that such failure was due to inadvertence and mistake, and that Harmison well knew for some time that they desired and would demand a renewal, and would not in any wise be injured thereby, while the plaintiffs, if they were denied the renewal, would lose the property which they had upon the premises without receiving the benefits which all of the parties expected they would receive therefrom at the time the contract was entered into. The court

below granted a temporary injunction by which Harmison was restrained from prosecuting the unlawful entry and detainer suit. In answer to the bill he denied that there was any mistake in the contract, but asserted that it expresses the true understanding of the parties, and denied the right of the plaintiffs to have a renewal of the lease for an additional 10 years. Evidence was taken by both parties, and upon a hearing the circuit court found that the plaintiffs were not entitled to relief upon either of the grounds set up in their bill, dissolved the temporary injunction granted, and dismissed the suit.

Should the court have reformed this contract upon the evidence offered for that purpose? It appears from this evidence that the parties who negotiated the contract were Shoupe and Wheeler on the one hand and Harmison on the other; Hanly not being present at the time. Wheeler and Shoupe both testify that negotiations were conducted some time in the month of August, and that they resulted in an agreement for the lease upon the terms expressed therein, except that it was definitely and positively agreed and understood that the rental period should begin on the 1st of September, 1907, which was only a few days after the negotiations. There is no equivocation or doubt in their testimony about this being the understanding as between them and Harmison. Wheeler says that he then wrote the contract when he returned to his home at Cumberland, Md., and by inadvertence omitted to state therein that the term should begin on September 1, 1907, and that he never noticed this omission until the controversy arose. In addition to this oral testimony there is introduced in evidence two receipts from Harmison for the rental for 2 years, which it is argued show an understanding of the contract by all of the parties consistent only with the contention of the plaintiffs. One of these receipts is for the sum of \$25, and recites in it that it is for ground rent from September 1, 1911, to September 1, 1912, as per agreement. The other recites that it is for ground rent from September 1, 1909, to September 1, 1910. The receipts for the rent for other years, if any were taken, are not accounted for, but some checks for the sum of \$25 which it is shown were sent to Harmison for the annual rental, are introduced, which indicate, because of the dates therein, that the rent was paid as of the 1st of September, but there is no statement in them as to when the rental year began. When Harmison testified, he in general terms swore that the contract correctly expressed the agreement had between him and Wheeler and Shoupe, and he attempts to explain the two receipts introduced in evidence and above referred to by saying that the rental years therein refer-

red to should have commenced on the 14th of August instead of on the 1st of September. It is significant that while both Shoupe and Wheeler testify that there was a positive understanding and agreement, after negotiations, as to the date at which the lease should commence, Harmison on cross-examination says he does not think there was any definite time agreed upon; that there might have been, but he will not be positive about it.

[1, 2] That equity has jurisdiction to reform a contract because of a mutual mistake is not questioned, nor can there be any question that when such reformation is resisted the evidence to justify the same must be clear, convincing and satisfactory. When, however, the evidence is of that character a court of equity will not hesitate to reform a contract and make it speak the real agreement of the parties. The fact that one of the parties denies the right of reformation will not defeat relief, for it may be said as a general rule that if all of the parties were agreed upon this question there would be no litigation. Such a controversy arises as a rule upon the refusal of one of the parties to submit to any change in the contract as written. As above indicated, the oral evidence of Shoupe and Wheeler is clear, positive, and direct that the term was to begin on the 1st of September, 1907, while the testimony of Harmison, when directed to their negotiations upon this particular question, is simply that he does not recollect. If the case depended solely upon the oral testimony, it seems to us that it meets the requirements of the law, but in addition to this oral testimony there is another element which in our judgment is conclusive in favor of the plaintiffs. The receipts introduced in evidence show upon their face that the parties treated the rental years as beginning on the 1st of September, and ending upon the 1st day of the following September. Why would Harmison have put such language in a receipt for the rents if that was not the agreement of the parties? And it is significant that even after this controversy arose Harmison's counsel, in a letter dated August 21, 1917, in referring to a check sent by the plaintiffs to Harmison, uses this significant language:

"I presume you mean this check to pay for the lease of F. L. Harmison to W. W. Hanly, J. C. Shoupe and George R. Wheeler for the years 1916-17, viz., to September 1, 1917."

It seems that the parties were so impressed with the fact that the lease began on the 1st of September that even after the controversy arose Harmison's counsel expressed this view as above indicated. The evidence in this case upon the part of the plaintiffs is of that clear, positive, and direct character

required for the reformation of a contract, and it is met only by the equivocal statements of the defendant. Of course, the written contract is presumably correct. The parties have executed it, and there is a very strong presumption that all of their pertinent prior negotiations are correctly embodied in it. This presumption, however, as before stated, may be rebutted, but because of the peculiar weight to which written contracts are entitled between the parties, the evidence to do so must satisfy the court that a mistake has been made. When this character of evidence is produced and the court is fully satisfied that one of the parties is being deprived of a substantial right because of such a mistake, it will not hesitate to grant relief by way of reformation. *Melott v. West*, 76 W. Va. 739, 86 S. E. 759.

In this case the evidence convinces us that the plaintiffs are right in their contention, and we will therefore reverse the decree of the court below, reinstate and perpetuate the temporary injunction, and enter a decree here, reforming the contract of lease so as to make the term begin on the 1st of September, 1907, and requiring the defendant Harmison to execute a renewal of said lease for an additional term of 10 years, beginning on the 1st of September, 1917, and remand the cause for the purpose of executing this part of the decree by a commissioner of the court, should the defendant fail or refuse to execute and deliver such renewal, with costs to the plaintiffs in this court and in the court below.

LIVELY, J., absent.

(89 W. Va. 7)

COOK POTTERY CO. v. J. H. PARKER & SON.

(Supreme Court of Appeals of West Virginia.
Sept. 13, 1921. Rehearing Denied
Dec. 9, 1921.)

(Syllabus by the Court.)

1. Patents §182—Party may license use of invention pending application for letters patent.

A license to use an invention, for which proper application for letters patent has been filed, may be given before the patent has been granted, and, if acted upon by applying the invention in the manufacture of articles, will avail to protect the licensee in its use afterwards.

2. Patents §182—Applicant may license use of invention under contract which will protect licensee after issue of patent.

One who has applied for letters patent on a useful invention has an inchoate right of

property in such invention on which he can base a contract with another person for license to that other person to use the invention in the manufacture of articles of commerce pending the application for letters patent, and whereby the licensee will be protected in such manufacture after the patent is formally granted.

3. Patents §216—Protection of licensee to use of invention after patent forms a part of consideration for license issued prior to patent.

A license to use an invention, pending the application for letters patent thereon, is sufficient consideration for a contract between the inventor and the licensee whereby articles of commerce may be manufactured by the licensee and placed upon the market on a royalty basis to the inventor. The protection of the licensee in the use of the invention when patented enters into and forms a part of the consideration for such contract. Benefits to be derived by each party to a contract furnish a sufficient consideration for it.

4. Patents §216—Contract held valid and to support plea of set-off.

A special plea of set-off embodying such contract should be permitted to be filed in a case in which the damages accruing by a breach of such contract is a proper set-off to the obligation sued upon; the objection to the plea being that the contract is void for want of consideration.

(Additional Syllabus by Editorial Staff.)

5. Contracts §67—Insolvents' agreement that claim should not be discharged through bankruptcy held a consideration for contract.

Where defendants were about to pass through bankruptcy when creditors would receive nothing, the saving of plaintiff's claim was a sufficient consideration for the continuation of an agreement between the parties.

6. Appeal and error §1099(1)—Matters which are or might have been passed on are concluded.

Whatever is contained in the record on appeal is supposed to have been passed on, and whatever is passed on or might have been passed on in consideration of the record is concluded and settled, and is the law of the case.

7. Contracts §176(10), 213(1)—Where time not fixed a reasonable time is understood, and may be fixed by the court and jury.

Where a contract under which one-half of commissions to be paid by plaintiffs should be applied on debts owing from the defendant contained no definite agreement as to its termination, it was not invalid for such reason, a reasonable time being contemplated, and what would be a reasonable time was for the court and jury under the circumstances.

Case Certified from Circuit Court, Wood County.

Action by the Cook Pottery Company against J. H. Parker & Son. Demurrers to special pleadings of set-off and objections to

notice of recoupment filed by defendants overruled by the court, which refused to strike out the same, and certified the case for review. Affirmed.

C. D. Merrick, of Parkersburg, for plaintiff.

H. P. Camden and Marshall & Forrer, all of Parkersburg, for defendant.

LIVELY, J. The action of the circuit court in overruling demurrers to two special pleas of set-off, and in overruling objections of the plaintiff to the notice of recoupment filed by the defendants, and in refusing to strike the same out, has been certified to this court for review. The case was before this court on somewhat similar questions raised by this record, and is reported as Pottery Co. v. Parker, 86 W. Va. 580, 104 S. E. 51.

Plaintiff sued defendants on certain notes aggregating \$5,170, and defendants tendered two special pleas of set-off designated as special plea No. 1 and special plea No. 2, and a notice of recoupment. The circuit court refused to permit either of the special pleas or the notice of recoupment to be filed, and that action and holding was formerly certified to this court, and it was held here that special plea No. 1 and the notice of recoupment should have been permitted to be filed, thus reversing the circuit court; but the action of the lower court in rejecting special plea No. 2 was affirmed, as will be seen from an inspection of the reported case above referred to.

Now defendants have tendered two more special pleas of set-off designated as special pleas No. 3 and No. 4, respectively, and also another notice of recoupment marked No. 2, both of which special pleas and the notice of recoupment No. 2 were permitted to be filed, and demurrers of the plaintiff thereto and motion to strike out overruled and refused. It is this disposition of the pleas and notice by the circuit court which is now here for review. In plea No. 1, heretofore held to be proper and directed to be filed, the defendants relied on a contract between them and plaintiff, made the 8th of October, 1915, whereby, in consideration of the defendants agreeing to permit plaintiffs to manufacture the "Wedge knob," with the use, in the manufacture thereof, of the "Nailit knob," a device then "owned and controlled" by defendants, the plaintiff agreed to manufacture and sell exclusively to defendants the "Wedge knob" at the price of \$5.65 per 1,000, plus a stipulated price for tenpenny nails and leather washers used in the manufacture; and that the plaintiff was to add to the price aforesaid 24 cents per 1,000 to be credited on the books of the plaintiff in reduction of indebtedness of the defendants to plaintiff; and that said agreement was to continue for 5 years, and as long thereafter

as either party did not violate the provisions of the contract, and then to be canceled at the option of the party who did not violate it.

The breach averred and set-off relied upon is that plaintiff violated this contract by manufacturing and selling directly to other persons large quantities of said manufactured article, which, at the rate of 24 cents per 1,000, the sum per 1,000 to which defendants were entitled by virtue of said contract, amounted to the sum of \$7,200, and which they were entitled to receive from plaintiff, and claimed set-off to that amount against the notes sued on. Plea No. 3, now in controversy, is substantially the same as plea No. 1. It avers the same matter, but goes more into detail. It alleges at length how it "owned and controlled" the device known as the "Naillit knob." It also alleges that the contract of October 8, 1915, on which the pleas are based, was in writing, under seal, and makes profert thereof. This contract is brought into the record by the craving of oyer thereof by the plaintiff. The amount claimed as and for the breach of the contract is stated at the sum of \$10,000, whereas plea No. 1 alleges it to be \$7,200. This additional sum is evidently intended to cover the period between the dates of the filing of the two pleas. The only other difference is that plea No. 3 alleges that the indebtedness of the defendants to plaintiff on which the 24 cents per 1,000 for the manufactured knobs was to be credited is the same indebtedness on which plaintiff is now suing. The controlling ownership of the "Naillit knob" device alleged in plea No. 1 is described in extenso by plea No. 3. It is averred, substantially, that William Morrill Parker, one of the defendants, in January, 1915, filed application for letters patent in the United States Patent Office for the device known as the "Naillit knob," and thereafter it was controlled by the defendants; that in May, 1915, the plaintiff, learning of this device, entered into negotiations with defendants culminating in the contract for the use of this device in the manufacture of the "Wedge knob," then being manufactured by plaintiff, on a royalty basis; that defendants ascertained, after said contract had been made, that one A. H. Fargo had also applied for letters patent on a device similar to that of the "Naillit knob," and, in order to protect the plaintiff in the license granted it by defendant in the contract of October 8, 1915, acquired by writing under seal from Fargo sole and exclusive license to use said invention, said sole and exclusive license being taken by J. H. Parker & Son, Incorporated, but that defendants J. H. Parker & Son should have the benefit of the same in order to protect the plaintiff in the license granted to it by the contract of October 8, 1915; that afterwards on February 3, 1920, letters patent for said invention were duly

issued to an assignee of Fargo, who afterwards, on April 28, 1920, granted to J. H. Parker & Son, Inc., the exclusive right and license to make, use, and sell devices embodying the invention, throughout the United States and territories thereof, for the full life of the patent; and that defendants, by virtue thereof, and by the application filed by W. M. Parker for letters patent, have always controlled the right to manufacture and sell the "Naillit knob," a name used to designate any two-piece knob for electrical work assembled with a nail and fastened together by means of a washer or swedge or other projection on the lower part of the knob.

[1, 2] Plaintiff strenuously contends that the plea is bad, and demurrer thereto should have been sustained, because, as counsel avers, this extended description of the ownership and control of the "Naillit knob" device in fact shows that defendants did not have ownership and control thereof; and that therefore they had no right to make the use of the "Naillit knob" device the basis or consideration of the contract of October 8, 1915, and that said contract was therefore without consideration, and void; in other words, that, pending an application for letters patent, the applicant has no such ownership or control of the device sought to be patented as would give him the right to license or permit another to use it. It is claimed that plaintiff already had full power and right to use this device in the manufacture of its "Wedge knob," pending defendants' application for patent thereon, and that, when it signed this contract, although under seal, there was no basis for its so doing—no consideration therefor. An inventor has an inchoate right of property in an invention pending his application for patent, with which he may deal as an article of property. *Gayler v. Wilder*, 10 How. 477, 13 L. Ed. 504; *Richardson v. Essex Machine Co.*, 207 Mass. 219, 93 N. E. 650. A license to use a device for which application for letters patent is pending may be given, and if acted upon and the device used by the licensee in the manufacture of articles in which the invention is used, it will avail to protect the licensee in the use thereof after the invention is patented. *Burton v. Burton Stock-Car Co.*, 171 Mass. 437, 50 N. E. 1029.

[3] While it may be true that pending an application for a patent the applicant has no exclusive right to its use, which doctrine is laid down in *Gayler v. Wilder*, supra, and *Marsh v. Nichols*, 128 U. S. 612, 9 Sup. Ct. 168, 32 L. Ed. 538, yet the use by another of the device sought to be patented, pending the application, ceases when the patent has been granted. *Evans v. Jordan*, 9 Cranch, 199, 3 L. Ed. 704. If the allegation of this plea be true, then the inducement and consideration to the Cook Pottery Company for the contract of October 8, 1915, was to obtain the right to use this device not only pending the applica-

tion, but to be protected in its use after the device had been invented. The contract is a sealed instrument, and implies consideration. Moreover, it may be that the payment of the indebtedness mentioned in the plea as that sued on is consideration moving the plaintiff to enter into the contract by which the royalty to Parker of 24 cents per 1,000 on the articles manufactured and sold was to be credited on its books against said indebtedness. If there be consideration, however small, especially where the agreement is under seal, and the parties have operated thereunder, it will be sufficient to relieve the contract against a failure for want of consideration. It is not for the courts to control the amount of consideration in contracts. The parties must agree upon that.

It is alleged that the contract does not in terms grant a license or permit the plaintiff to manufacture the assembled knob by using the "Nailit knob," and therefore is at variance with the plea. The contract must be considered in the light of the allegations of the plea. If there be a difference in the construction of the contract on this point, and it be necessary to construe the contract upon its introduction on the trial, presuming its true intent and meaning cannot be ascertained from the instrument itself, possibly evidence allunde would be permitted to show the intention of the parties. That question does not properly arise here.

It is asserted that the contract is void because in restraint of trade. Without reviewing the authorities on the question of the right of a patentee to put on the market articles manufactured under his invention with restrictions as to price and the like, or whether he, having a monopoly in his invention and complete property right therein, can refuse to permit the use of his invention except under stringent and monopolistic restrictions, it is sufficient to say that the same objection of restraint of trade would apply to plea No. 1 which this court on the former certification held to be good and permitted to be filed. It is a closed question so far as this case is now concerned. *Campbell's Ex'rs v. Campbell's Ex'rs*, 22 Grat. (63 Va.) 649.

The substance of the objection to plea No. 3 in relation to the allegations therein concerning the application and issuance of the Fargo patent, and the purchase by J. M. Parker & Son, Incorporated, of the exclusive right and license to make, use, and sell devices embodying the invention throughout the states and territories of the United States, is that the plaintiff is not protected thereby in the manufacture of the particular article set out in the contract. The plea in substance alleges that defendants have caused the purchase of the Fargo invention with the express intention and purpose of protecting the right given by them to plaintiff in the contract for the manufacture of the two-piece

assembled knob, and to fully protect that contract and all the rights of the plaintiff thereunder and that by virtue of an understanding and agreement with J. M. Parker & Son, Incorporated, a corporation owned and controlled by defendants, they have fully assured and conserved to plaintiff the integrity of the contract. Whether or not this can be supported by the evidence is a question for jury determination. It does not render the plea bad on demurrer.

Plea No. 4 is similar to plea No. 3 and is objected to for the same reasons urged against plea No. 3. The only material difference is that it alleges an additional sum of \$5,000 accruing to defendants by virtue of the breach between time of the institution of the suit and the 8th day of October, 1920, the time of the expiration of the contract. We can see no objection to this plea because it covers a period of the breach possibly not covered by pleas Nos. 1 or 3.

[5, 6] Notice of recoupment No. 2 is the same as notice of recoupment No. 1 heretofore held to be good, and directed to be filed by this court. The only difference therein is the additional allegation that defendants had, prior to March 14, 1916, built up a large and profitable business in selling the electrical porcelain products manufactured by the plaintiff, which had become permanent, fixed, and established, and brought about by great expense in time, labor, and money, and was then resulting in sales averaging \$25,000 per year on which defendants, by reason of their selling agreement with plaintiff, were receiving commissions of 10 per cent, amounting to an average of \$2,500 a year, of all of which plaintiff had notice. The loss and damage claimed in this notice, occasioned by the breach, is alleged at \$12,500, whereas in recoupment No. 1 filed, it is alleged to be \$10,000. It would serve no useful purpose (except convenience) to set out fully notice of recoupment No. 1, heretofore filed. It can be seen by inspection of the reported case in 86 W. Va., at page 580, 104 S. E., 51. The first objection to notice of recoupment No. 2 is that the alleged agreement is without consideration; that the agreement to pay the debts owing by defendants to plaintiff, there in set out, was no consideration, because defendants were already bound to pay them. The notice avers that the consideration for continuing the selling agreement was that defendants would not be discharged from paying them by passing through bankruptcy proceedings, which they were then about to invoke. They had no assets, and, if forced into bankruptcy, could pay their creditors nothing. It was to save plaintiff's claims now sued on that the agreement was made, as alleged in the notice. We think this a sufficient consideration. It was tacitly so determined upon the former hearing. Whatever is contained in the record on appeal is sup-

posed to have been passed on, and whatever is passed on by this court or might have been passed upon on consideration of the record is concluded and settled. It is the law of the case. *Krise v. Ryan*, 90 Va. 711, 19 S. E. 783.

[7] Another objection is that the notice of recoupment alleges no time in which the contract would run, no date for its termination, and therefore plaintiff could terminate the agreement at any time, and that it did on March 14, 1916, after the agreement had continued for two years. The notice says that the time for the payment of the debts was to be extended and the debts carried by plaintiff until they could be fully paid by the application of one-half the commissions provided for in the agreement, to the payment thereof, which debts were and are the debts now sued on. This would make the time for the running of the contract indefinite, depending upon when the debts would be paid under that arrangement. A part performance of this contract is alleged to have been made by which about \$1,500 had been actually paid. It is apparent that a reasonable time for the running of the contract was contemplated by the parties, and what would be a reasonable time is for the court and jury to determine under all the facts and circumstances. We do not think the notice is bad for that reason.

No objection is urged by counsel for plaintiff against the new matter set out in notice of recoupment No. 2 relating to the termination of defendants' established trade in the porcelain products manufactured by plaintiff, by reason of the breach of the alleged agreement by plaintiff; and it will not be considered and passed upon.

[4] We affirm the action of the circuit court in permitting special pleas of set-off Nos. 3 and 4, and notice of recoupment No. 2 to be filed, and in overruling the demurrers to said pleas, and in refusing to strike out the notice of recoupment No. 2.

Affirmed.

(59 W. Va. 286)

BENNETT et al. v. INTERSTATE COOPERAGE CO. et al. and seven other cases.
(Nos. 4236-4243.)

(Supreme Court of Appeals of West Virginia.
Oct. 18, 1921. Rehearing Denied
Dec. 9, 1921.)

(Syllabus by the Court.)

1. Logs and logging §3(7)—Grant of timber with right to remove held to vest irrevocable right in grantees.

A deed granting the timber upon a tract of land, with the right to cut and remove the same within a definite time, upon a substantial pecuniary consideration, vests in the grantee and

his assigns an irrevocable right to do the acts contemplated in such deed.

2. Logs and logging §3(14)—Cessation of operations by grantees of timber on land held not an abandonment.

A right so conferred is not lost or terminated by cessation of timber operations upon the land for a few months, and by the removal therefrom of the mills and tramroads used for such timber operations, nor by the failure of the owner of such timber to have it entered upon the land books and charged with taxes for one year. In order to work an abandonment of such right, the facts and circumstances relied upon for that purpose must show a clear, intent on the part of the owner of such timber to permanently forego any further right or interest therein.

3. Logs and logging §3(14)—Provision in deed of timber that purchaser shall surrender certain acreage each year may be waived by grantor's failure to enforce.

A provision in a deed conveying the timber upon a large tract of land that the purchaser shall surrender back each year a certain acreage of said land, together with the timber remaining thereon, may be waived by the grantor in such deed, and such a waiver may arise from such grantor not enforcing such provision in consideration of which he is relieved of an obligation which he is under to the grantee to provide rights of way for removing the timber.

Appeal from Circuit Court, Calhoun County.

A suit by Sallie M. Bennett and others against the Interstate Cooperage Company, and suits by Ursley J. Offutt, by E. L. J. Smith, by Elliott Chenoweth, by H. E. Crawford, by Charles Laughlin, by R. B. Elisman, and by W. T. Crawford, against C. N. Snodgrass and others, in each of which there was a decree for the plaintiffs, and the defendants appealed. The suits were considered together. The first case is reversed, injunction dissolved, and remanded, with directions, while in the remaining seven cases the decrees are reversed, injunctions dissolved, and bills dismissed.

R. F. Kidd, of Glenville, L. H. Barnett, of Weston, and Blue & McCabe, of Charleston, for appellants.

A. C. Mathews, of Grantsville, for appellees.

RITZ, P. By these suits the plaintiffs seek to enjoin the defendants from cutting and removing any of the timber from a tract of 27,000 acres of land situate in Braxton, Gilmer and Calhoun counties. They are controlled by the same legal principles, for which reason they will be considered together.

On the 11th of July, 1906, Louis Bennett, W. G. Bennett, Gertrude B. Howell, and Mary B. Bowle conveyed to the defendant Interstate Cooperage Company all the timber

on a tract of a little more than 27,000 acres of land situate in Braxton, Gilmer, and Calhoun counties. This deed included by its terms all the timber on said land that the purchaser might desire to remove except fruit trees and shade trees in the yards or curtilages of the houses thereon. The conveyance then contained conditions and provisions in regard to the removal of the timber as follows:

"It is, however, expressly understood and agreed that second party is to examine such land as may heretofore have been improved, or from which the timber may have been wholly or partly removed, and on or before January 1, 1909, by metes and bounds, surrender such timber as then remains upon the same as it may in fairness regard to be without merchantable value. And in addition thereto said second party shall by said January 1, 1909, remove the timber from at least two thousand acres, in addition to that surrendered as improved or timberless land, and surrender back to first parties, their heirs or assigns, all timber remaining on said two thousand acres, which is to be designated by metes and bounds if first parties desire it. First parties are to pay the cost of surveying all land surrendered to them.

"And second party is also each year after January 1, 1909, to remove the timber from at least fifteen hundred additional acres of said land, to be removed from reasonably compact parcels thereof, though they need not adjoin each other, and the timber then remaining on said parcels is yearly from said January 1, 1909, to be surrendered back to first parties, their heirs or assigns, by metes and bounds as aforesaid, as though it had never been sold by them. And it is also expressly understood and agreed that all timber that may remain on said boundaries from which it is hereby conveyed after January 1, 1925, shall without further notice or motion and by force and effect hereof revert back and belong to said first parties, their heirs or assigns, as though it had never been sold; and all rights, interests, and privileges of second party, its successors, or assigns, in any timber thereon not then removed shall totally cease thereafter."

[1] The primary purpose of the defendant cooperage company in acquiring the timber on this tract of land was to secure so much thereof as was fit to be manufactured into barrel staves and headings. Immediately after the conveyance aforesaid the cooperage company began its operations on the land. It went over it and cut the oak timber in large quantities, constructed railroads so as to remove said timber to its various mills erected on the lands, and the manufactured product from the mills to the point of shipment. It also during the time sold considerable quantities of timber besides that suitable for staves and headings. It will be observed that the deed provides that by the 1st of January, 1909, the said cooperage company shall surrender by metes and bounds to the grantors the timber on such of the lands as it may in fairness regard to be without marketable value, and also 2,000

acres of the land in addition to this, and on the 1st of January of each year thereafter 1,500 acres of such lands, and that the right of the cooperage company to cut and remove the timber from said land will expire on the 1st of January, 1925, and all timber then remaining uncut upon said land at that time revert to and become the property of the grantors. The cooperage company did not on the 1st of January, 1909, execute any deed of surrender for such of the lands as it found were improved, and the timber thereon not of marketable quality. It is shown that at the time the transaction was made it was estimated that there were about 2,000 acres of land which had been cleared and improved, and that there was a deduction made from the purchase price of \$30,000 to cover this 2,000 acres at \$15 per acre, the price at which the timber was purchased. Nor did the said cooperage company surrender 2,000 additional acres of the land from which it had cut the timber at that time, nor did it surrender 1,500 acres on the 1st of January of each year thereafter.

The cooperage company's operations upon the land commenced in Braxton county, and, as the timber was removed from the land in that county, extended into Gilmer county, and thence into Calhoun county. In 1913 Louis Bennett, who, it appears, conducted all of the transactions for the grantors in the deed, took up with the cooperage company the matter of surrendering some of the lands, the timber upon which had been conveyed to it. It was the desire of the parties, if possible, to make such surrender without being put to the expense of making additional surveys. While the large tract of more than 27,000 acres of land was in a comparatively compact body, it was made up of many smaller tracts, and the deed to the cooperage company conveyed the timber by the metes and bounds of these smaller tracts, and the parties desired to surrender as many of these smaller tracts described in the deed of conveyance as were ready to be turned back. It was found at that time that the cooperage company had cut the timber off of all the lands lying in Braxton county except a small tract of about 40 acres. These lands lying in Braxton county were made up of much smaller tracts than the tracts making up the lands in Gilmer and Calhoun counties. The cooperage company advised Bennett that it could surrender back practically all of the lands in Braxton county, and he prepared a surrender deed to be executed by the cooperage company releasing unto the Bennetts certain tracts of land, describing them by the metes and bounds given in the deed made by him and his associates to the cooperage company. This deed, as prepared by Bennett, included between 5,000 and 6,000 acres. He sent it to the cooperage company for execution, and upon examination it was found that it did not contain all of the tracts

which the cooperage company desired to surrender. It was rewritten and made to include more than 7,000 acres. A provision was put in this deed, as prepared by Bennett, not waiving any of the rights of the grantors for failure of the cooperage company to make the surrenders as required by the terms of the deed, or to comply with any other provisions of the conveyance, and this provision was carried into the deed as rewritten, but in a little different form. No further surrenders of the land, or any part thereof, had been made at the time of the institution of these suits.

It appears that in the year 1916 Bennett took up with the cooperage company the matter of making further surrenders, and it advised him that it was ready to surrender a very large part of the area, but that it could not do so from the descriptions contained in the deed of conveyance to it, for the reason that the proper conduct of its operations did not permit cutting the timber clean on any one of the tracts of land, but involved large parts of a number of the tracts. It will be remembered that these boundaries in Gilmer and Calhoun counties were much larger than the boundaries in Braxton county, one of them containing something like 10,000 acres. Prior to this time Bennett had had most of the land cut up into smaller lots or tracts, with a view of selling the same for small farms. These tracts ranged in size from 15 to 200 acres. A map had been made showing these small farms by metes and bounds; and, with a view to securing the surrender by the cooperage company of some of the lands without being required to make surveys, Bennett sent one of these maps to that company, and asked it if it could therefrom pick out the lands from which it had cut the timber, and surrender the same according to the metes and bounds of the farms as shown by this map. After making an examination of the map the cooperage company's officers were able to point out but a very few of the small tracts which could be surrendered in accordance with the descriptions shown on the map. Bennett was advised of their inability to make the surrenders from the descriptions contained on the map, and of the necessity for making additional surveys to that end. He made no answer to this communication, and no further negotiations were had so far as is shown by the record in regard to the surrenders of the land, or any part of it, until after the death of Louis Bennett. In the year 1917 there was some correspondence between Bennett and the cooperage company and its lawyer in regard to securing rights of way for the purpose of removing the timber from certain parts of the land. There was a collateral contract at the time the deed was made by which the Bennetts agreed that they would furnish certain rights of way for the removal of the timber. Bennett's

contention was that his contract did not require him to secure the rights of way demanded, while the cooperage company contended that he was under obligation to secure the same. This controversy seems to have been terminated in August, 1917, by a letter written by Bennett to the cooperage company, in which, among other things, he said:

"But I am disposed to think that in the final adjustment of all matters my leniency toward you in not enforcing the surrender of timber territory, and your fairness and accommodation to me, would, perhaps, offset each other and settle all such matters."

It appears that no further demands were made for the rights of way in question, and the matter was there allowed to rest.

In the spring of 1918 the cooperage company had removed from the land all of the timber suitable for making staves and headings that was accessible to its tramroads and railroads. It had theretofore cut large quantities of the other timber and sold it to other parties, and had also sold considerable of the other timber upon the stump to other parties who cut and manufactured the same, but at this time there was still remaining on the land a considerable amount of valuable timber which the cooperage company determined to sell as a whole. At that time it was under a contract with Vansant Kitchen & Co. to cut and deliver all of certain kinds of timber upon the lands at certain prices. Because of the increased cost of cutting the timber and putting it in the streams, this contract had become very burdensome, resulting in considerable loss to the cooperage company. Before, however, it could dispose of the remaining timber, it was necessary to secure a cancellation of this contract. In March or April, 1918, the cooperage company agreed with the defendant Snodgrass to sell the remaining timber upon the land to him for the sum of \$6,500, conditioned, however, upon it being able to secure a cancellation of the Vansant Kitchen & Company contract. Negotiations were entered into with that company, which resulted, in September, 1918, in a cancellation of that contract upon the payment to that company by the cooperage company of the sum of \$10,000, and on the same day the cooperage company executed the contract selling the remaining timber to Snodgrass.

In the spring of 1918 the cooperage company removed all of its mills from the land, took up its steel railroads, and had determined to discontinue its operations thereon. In the fall of 1918, after the transfer of the remaining timber to the defendant Snodgrass, the defendant Turner acquired from Snodgrass a one-half interest therein, and they began operations with a view to the removal of this timber. The plaintiffs in the seven last above-named suits had purchased

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from Louis Bennett and his associates small tracts of the lands included in the 27,000 acres, all of the deeds to them being made subject to the rights of the cooperage company in the deed of July, 1906. When Snodgrass and Turner began their operations, the same extended upon the lands of these plaintiffs, and they, beginning in January, 1919, brought suits in equity for the purpose of enjoining Snodgrass and Turner from removing any of the timber from the tracts of land purchased by them, asserting that the cooperage company had lost its title to any of said timber because it had abandoned the same, and that when it made the deed to Snodgrass it had nothing to convey to him. A little later in the same year the plaintiffs in the first above entitled suit, being the grantors in the deed of July, 1906, and the successors to such of them as had in the meantime died, brought suit seeking to enjoin the timber operations. The basis of this suit is that the cooperage company had abandoned its timber rights, for which reason the deed to Snodgrass was ineffective to pass any title to the timber, or any part thereof, and further that, by the terms of the deed granting the timber to the cooperage company, it was required to make surrenders each year of 1,500 acres, as well as of the improved land, and 2,000 acres on the 1st of January, 1909, and that under this provision there should have been surrendered at the time of the institution of the suit at least 19,000 acres of land, whereas there had only been surrendered some 7,000 acres; that Snodgrass and Turner were attempting to cut over all of the land not actually surrendered by deed, whereas, if they had any rights at all, it would only be to so much of the land as would remain after taking out the total acreage which should have been surrendered up to that time.

Upon a hearing of the case the court below found that the cooperage company had not abandoned its timber rights, but that it still had title to some part of the timber upon said 27,000-acre tract of land at the time it made the conveyance to Snodgrass. He, however, perpetuated the temporary injunctions granted in the seven last above-named cases, and held in the first above-named case that Snodgrass and Turner would be entitled to cut timber from no more than about 8,000 acres of land; that, as they had gone upon the land and had cut timber from several of the tracts, as described in the original deed of conveyance to the cooperage company, in the aggregate amounting to more than 12,000 acres, they had exceeded their rights. In arriving at this conclusion that Snodgrass and Turner had cut over more territory than they were entitled to, the court charged them with the entire acreage of every tract of land as described in the original deed upon which

they had carried on any operations, no matter how inconsiderable. To illustrate, there was one tract of land containing about 9,000 acres. The timber remaining on about 3,000 acres of this land was sold by Snodgrass and Turner to another party, and this other party was also given the privilege of cutting some trees which remained along the bank of a stream dividing the part sold from the part reserved for the purpose of surrender, and the court, because of the cutting of these few trees, held that Snodgrass and Turner had elected to take the whole 9,000-acre tract as a part of the lands they were entitled to cut over.

It appears that, when the plaintiffs in the seven last above-named suits began to question the right of Snodgrass and Turner to cut the timber remaining on the lands sold to the company by the Bennetts, Snodgrass took up with the Bennetts the matter of making surrenders of such parts of the land as should have been surrendered up to that time. It appears that there was ample acreage from which the timber had been entirely removed to make up all of the lands which, by the terms of the deed, should have been surrendered, but that, in order to make surrender deeds with any degree of accuracy, considerable surveying would necessarily have to be done. These tracts of land which were laid off into farms were divided upon the theory of making them convenient for farming purposes, and it was not practicable to conduct the timber operations so as to entirely remove the timber from any such tract as the work progressed. Snodgrass asked the Bennetts to have their surveyor go with him upon the ground, with a view of determining the boundaries of such lands as could be surrendered. They directed a surveyor to go upon the ground, but instructed him that, in accepting any surrenders from Snodgrass, he must be required to keep as the part of the lands upon which he was still entitled to cut the timber the whole area of any tract upon which he had theretofore carried on any operations, regardless of the extent of these operations, or of the area of the tract. Of course these instructions did not consist with the terms of the deed, and Snodgrass did not accede thereto. The surveyor, however, with Snodgrass, was engaged at the time the suits were brought in endeavoring to ascertain the boundaries of such lands as could be surrendered.

After the Bennett suit was instituted the Bennett surveyor discontinued his activities, and Snodgrass and Turner continued to make such investigations as would enable them to surrender a considerable part of the land. As a result thereof a deed was prepared surrendering to the Bennetts what Snodgrass and Turner and their surveyor claim is over 12,000 acres, and what the Bennett surveyor

claims is a little more than 9,000 acres. This surrender deed was filed by Snodgrass and Turner with their answer in this case, and is tendered as a full compliance with the requirements of the deed of July, 1906, by which the timber was conveyed by the Bennetts to the cooperage company. From the decrees of the circuit court above indicated, Snodgrass and Turner prosecute these appeals.

The appellants contend that the conclusion of the circuit court that there had been no abandonment of its rights by the Interstate Cooperage Company at the time of the transfer of the remaining timber by it to Snodgrass is well supported by the evidence, while the plaintiffs contend that this conclusion of the circuit court is wrong; that it should have held that the Interstate Cooperage Company had lost, by abandonment, its rights prior to the time it made the deed to Snodgrass, and should not only have perpetuated the injunctions in the seven last above-named cases, but in the first above styled case as well. This contention that the cooperage company had abandoned its rights under the timber deed is based upon the fact that it had taken up its tramroads and steel railroad tracks, and had removed its mills from the land in the spring of 1918, before the conveyance to Snodgrass, and that for that year it had directed the assessor of Calhoun county to omit from the tax books of that county any charge against it on account of standing timber, the representation being that the same had been removed, and, further, upon certain statements made by various employees of the cooperage company that the company had completed its operations upon the tract of land, and was moving out, or similar statements of like import. It is quite true that the cooperage company did remove its mills and its railroads from these lands in the spring of 1918. The mills upon the land were for the purpose of cutting staves and headings, and when it had completed the cutting of this class of material, of course it had no further use for these mills. The tramroads and railroad tracks built upon the land were also largely for the purpose of hauling this stave timber to the mills, and from the mills to the railroad station for loading. The timber remaining upon the land was such timber as it was expected to remove by hauling the same to floatable streams, by means of which it could be carried to its destination. It appears that a large part of this class of timber which had been theretofore cut had been carried to market in this way.

It must be borne in mind that the deed from the Bennetts to the cooperage company conveyed the timber on this 27,000 acres of land. It vested the title to this timber in the cooperage company. Of course, in order to have

the benefit of that title, it was necessary that the timber be all cut before the 1st of January, 1925, because the deed provides that after that date all timber remaining upon the land shall revert to and become the property of the grantors. Are the facts shown in this case sufficient to prove an abandonment by the cooperage company? That there is a large amount of valuable timber still remaining upon the land is unquestioned; that the cooperage company, in the spring of 1918, had negotiated the sale of this timber to Snodgrass, and only waited to consummate this sale until it could relieve itself of the Vansant Kitchen & Company contract, is undisputed. The taking up of the tracks and the moving of the mills do not necessarily indicate that the cooperage company had disclaimed any title to the remaining timber. It is contended that the request to the assessor not to carry the timber upon the land books for the year 1918 in the name of the cooperage company, because it had already been removed, conclusively shows that it had abandoned whatever rights it had upon the land. The officers of the cooperage company say that they did not know that the tax return contained any such notation. It was made upon the return of personal property made by the company in a place where no one would have reason to expect such a notation to be made, and the officers of the company say that if they had known that any such return had been made they would have disapproved it and disallowed it. Whether this is true or not, we do not think is material. The failure of an owner of property to return it for taxation is not of itself sufficient evidence to show that he has disclaimed title to the property. It is common knowledge that many citizens successfully escape the payment of the taxes which they should pay, but this fact has never been held sufficient to divest them of the title to the property upon which they had not paid taxes, and vest it in some one else who might be fortunate enough to secure the temporary possession of it.

[2] Another ground relied upon by the plaintiffs to show abandonment by the cooperage company is that it cut over all of this land, sometimes more than once. This is quite true. The cooperage company had cut over practically all of the land so far as the stave and heading timber was concerned. The evidence shows that its method of removing the timber was to go over a tract of land first and cut out the stave and heading timber; then it frequently went over it again and cut out the poplar timber, and still again and cut out the hickory suitable for spokes and handles, and frequently again, and cut out telegraph and telephone poles and other classes of timber. This process was carried on during all of the time it was en-

gaged in its operations, and no objections to conducting the operations in this manner were ever made by any of the interested parties, nor could any objection be made upon that account. There was nothing in the deed which required the cooperage company to remove all of the timber from a particular tract of land as its operations progressed. The case of *Kunst v. Mabie*, 72 W. Va. 202, 77 S. E. 987, is relied upon to support this contention of the plaintiffs. The contract in that case required the purchaser to cut the timber off clean as he went over it, and, as construed by the court, did not permit him to go back over the land and cut further timber after it had once been cut over and operations discontinued thereon. There is no such requirement as that in the contract in this case, and the conduct of the parties in carrying on their operations shows that they did not so construe it. We are of the opinion that the court below was right in his holding that there was no abandonment by the cooperage company of its rights under the timber deed, and that whatever timber it had the right to cut thereunder was transferred to and became vested in Snodgrass.

[3] The plaintiffs, however, insist that the decree of the lower court is right, for the reason that, according to their construction of the timber deed, it must be considered that the lands required to be surrendered each year were automatically surrendered, and, this being so, there would only remain a little over 8,000 acres of the land to be cut over by Snodgrass at the time of the transfer to him. It might be pertinent to inquire what 1,500 acres were surrendered each year. There are no particular 1,500 acres of land described in the deed to be surrendered each and every year, nor is there any way pointed out by which the court could ascertain which 1,500 acres the purchaser of the timber was required to surrender. It may be doubted whether, if Bennett had attempted to compel the specific execution of the contract in this regard, he could have been successful, for the reason that the subject-matter of the surrender each year is not determined by the contract itself, nor is there any method pointed out for the determination of this acreage except the action of the parties. It may be that this provision in the deed is no more than a condition for the violation of which an action at law might be maintained. Our view of the case, however, renders it unnecessary for us to pass upon this question. The defendants insist that Bennett waived this provision of the contract: First, by accepting the surrender in 1913 of the 7,000 acres under the circumstances existing at that time; and, second, by his subsequent conduct in not asking for further surrenders, but in virtually foregoing this provision of the contract in consideration that he be not

required to furnish certain rights of way which the company was insisting he was under obligation to furnish.

As before stated, Bennett never demanded performance of this part of the contract until the year 1913, when the deed surrendering a little over 7,000 acres was delivered. In this deed a provision was inserted that it should not prejudice the rights of either of the parties to rely upon any provision of the contract which had not been complied with, and in a letter from Bennett in regard to this provision he advised the company that he did not expect to have any occasion to rely thereon, but simply put it in so that, in case the company undertook to be harsh or unreasonable with him in the final settlement, he might use it against it. After this time he made no further requests for surrenders of any of the property until 1916, when, as above indicated, he attempted to have further acreage relieved from the burden of the timber deed without being required to make additional surveys. When the conclusion was finally reached that this could not be done without such additional surveys, it appears that Bennett did not require the same. In fact, the cooperage company advised him that it was ready to have the surveying done if he desired it, so that it could surrender the acreage in accordance with the terms of the deed. The cost of such surveying was to be borne by the Bennetts, and it was but reasonable that the cooperage company, before incurring this expense, should get the consent of the Bennetts thereto. When the cooperage company in effect applied for this, Bennett remained silent, and further, in the next year, when the contention between the parties arose over the rights of way, Bennett put his own construction upon his conduct when he said that his leniency in not enforcing the surrenders, and the fairness and accommodation of the company to him, should offset each other and settle all such matters. This was in effect saying to the company: I had a right to demand of you that you surrender 1,500 acres of this land each year free from the burden of the timber deed. You have a right to require of me that I procure certain rights of way. I have relieved you of the requirement to surrender the 1,500 acres each year, and in consideration of this you should relieve me of the duty of procuring these rights of way. The company by its acquiescence accepted the proposition and that was the end of the matter.

There is no doubt but that the Bennetts might waive this requirement if they desired, and that they did waive it there seems to us no doubt. In addition to the correspondence which culminated in the letter above referred to, there is much proof here of conversations had by Louis Bennett with various people in which he stated that the

rights of the cooperage company would not be extinguished until 1925. It was testified by some witnesses that when they talked with Bennett about these surrenders he expressed a preference that the matter be allowed to remain as it was until the expiration of the time provided in the deed for removing the timber. We do not think, therefore, that either the Bennetts, or any of those claiming under them, had any right to demand the surrender of the timber upon any of this land at the time of Louis Bennett's death. Whether such a right once waived can again be restored as to the future by making demand, we need not say. The surrender deed tendered by Snodgrass and Turner, admitting that it only covers the acreage claimed by the Bennetts, is sufficient to fully meet any requirements for surrender of territory up to that time. At the time the Bennett suit was brought it may be said that there was no right to demand the surrender of any of the territory. The conditions which the Bennetts required of Snodgrass and Turner they had no right to demand; that is, that they retain only 8,000 acres of the land, and that in this 8,000 acres the whole of any tract must be included upon which they had cut any timber, however insignificant the extent of such cutting might be. The plaintiffs in the seven last above-named suits can, of course, stand on no higher ground than their grantors. They took deeds to the land conveyed to them containing a provision that the same was subject to all of the rights of the Interstate Cooperage Company under its deed of July, 1906, and they cannot complain that their land has not been relieved of the burden cast thereon by this deed in advance of the time indicated therein for the expiration of the cooperage company's rights.

Our conclusion is to reverse all of the decrees complained of, dissolve the injunctions, and dismiss the bills in the seven last above-named causes, with costs to the appellants in this court, and in the court below; and as to the first above-named cause, it is remanded for the purpose of having the special receiver therein appointed make settlement of his accounts, with directions to thereupon discharge such special receiver and dismiss the suit.

(89 W. Va. 170)

FOGGIN v. FURBEE et al. (No. 4272.)

(Supreme Court of Appeals of West Virginia.
Oct. 4, 1921. Rehearing Denied
Dec. 9, 1921.)

(Syllabus by the Court.)

1. Injunction \S 26(9)—Defendant may not enjoin ejectment because plaintiff's muniments of title cloud his.

A defendant in an action of ejectment, claiming good title to the property in contro-

versy and having possession thereof, cannot maintain a bill to enjoin the action solely on the ground that the muniments of title of the plaintiff therein constitute a cloud upon his title.

2. Equity \S 44—Jurisdiction on fact issue being concurrent, defendant in ejectment cannot enjoin proceeding because plaintiff's title clouds his.

In a case of concurrent jurisdiction on an issue of fact on which a question of title depends, such as fraud, the court whose jurisdiction first attaches is entitled to retain it, and the defendant in an action of ejectment, relying upon a defense fully admissible in the law court, cannot transfer the controversy into a court of equity, by a bill to cancel the plaintiff's title papers, as constituting a cloud upon his title, and to enjoin prosecution of the action.

3. Injunction \S 26(9)—Ejectment action may be enjoined where plaintiff holds legal title as trustee for defendant with merely equitable title.

If, however, the title of the defendant in such an action is merely equitable, and the plaintiff holds the legal title under circumstances making the latter a trustee for the former, by reason of legal or actual fraud in the acquisition thereof, a bill to get in the legal title and enjoin prosecution of the action can be maintained.

4. Judicial sales \S 58—Grantee's purchaser under erroneous decree retains legal title after decree is set aside, though his title may be voidable for knowledge.

If, after a purchase of land sold under an erroneous decree of sale, by a party to the suit in which it was entered and confirmation of the sale, and before any steps have been taken to correct the error, the purchaser conveys the property to a stranger for value, the legal title passes by his deed; and if, on subsequent reversal of the decree, such stranger is not made a party, nor restitution of the title in any way effected, the legal title remains in him, even though it may be affected with an equity in favor of other persons, by reason of his having purchased with knowledge of facts rendering his title voidable.

5. Lis pendens \S 25(4)—Purchaser from party who had purchased under void decree held not purchaser pendente lite.

A stranger to the cause, purchasing under such circumstances, is not a pendente lite purchaser, even though he purchased from a party to the suit, because there was no pending suit at the time; the suit having terminated with the decree of sale and confirmation of the sale.

6. Lis pendens \S 25(4)—Remote purchaser under erroneous decree held not purchaser pendente lite.

Nor is a second stranger purchasing from the first a pendente lite purchaser.

7. Judicial sales \S 58—Title held voidable in the hands of remote purchaser with knowledge.

Nevertheless, if the purchase of such first stranger was fraudulent or voidable for any reason, and the second took the title from him with knowledge of the infirmity therein, or of facts

sufficient in law to put him upon inquiry as to it, the title is voidable in the hands of the latter.

8. Judicial sales ¶58—Where remote purchaser took land in good faith not knowing infirmity of grantor's title, the title is good.

But, if such first stranger paid a valuable and substantial consideration for the property and took the title, in good faith and without knowledge of such infirmity and of such facts, the title in the hands of his grantee is unimpeachable, even though he had knowledge of facts or circumstances rendering voidable the title of the original purchaser under the decree.

9. Fraudulent conveyances ¶104(1)—Relationship of parties to conveyance, while not proper evidence of fraud, requires scrutinizing of the transaction.

Relationship of the parties to a conveyance of property, contractual and affinitive, assailed on the ground of fraud, is not, strictly and properly, evidence of fraud, but only a circumstance requiring more than ordinary care and scrutiny in the consideration of the evidence and facts and circumstances tending to prove fraud, and according to them more than ordinary probative force.

10. Fraudulent conveyances ¶76(1)—Inadequacy of price alone is insufficient to vitiate conveyance.

Upon an inquiry as to good faith on the part of the parties to a conveyance alleged to have been fraudulent, inadequacy of the price for the property does not alone vitiate it, unless it be so great as to raise a presumption of fraud, or as to make it a circumstance sufficient to have put the purchaser upon inquiry as to the good faith of the vendor.

11. Judicial sales ¶9—In county other than locus does not render sale void.

A sale of real estate made in a county other than that in which it is situated, in conformity with the terms of the decree ordering it, and requiring it to be sold in the county in which the court entering it sat, and afterwards confirmed, in the absence of a statute requiring it to be made in the county of the locus of the property, is not void by reason of the place of sale; the decree being merely erroneous in respect thereof.

12. Divorce ¶244—Court may decree sale of land in another county to enforce wife's right to alimony and suit money.

A court of equity has jurisdiction and power, in a suit for divorce, to decree its allowance of alimony and suit money to be a lien upon the real estate of the defendant and subject the same to sale for satisfaction thereof; and, it may properly do so, in the absence of other means of enforcement of the wife's right to such relief against him, even though the property is situated in a county other than that in which the suit is pending.

13. Taxation ¶848—Title to property sold under decree, taxed to and taxes paid by former owner, is not forfeited for nontaxation as such to purchaser.

The title to property sold under a decree of a court having jurisdiction, occupied after sale

and deed by the former owner, and persons claiming under him, taxed in their names and the taxes paid, and not taxed in the name of the purchaser at the judicial sale, is not forfeited for nontaxation as to such purchaser, only one title being involved in the conflicting claims of right, and the taxes having been paid on it.

Appeal from Circuit Court, Wood County.

Suit by I. Earl Foggin against H. R. Furbee revived upon his death against Sarah J. Furbee, his executrix, and others. From a decree of perpetual injunction, defendants appeal. Decree reversed, injunction dissolved, and bill and amended bill dismissed.

Reese Blizzard, R. E. Bills, and C. M. Hanna, all of Parkersburg, for appellants.

William Beard, of Parkersburg, for appellee.

POFFENBARGER, J. The subject of complaint on this appeal is a decree perpetually enjoining the prosecution of an action of ejectment, commenced in the circuit court of Wood county, against the plaintiff and appellee herein, by H. R. Furbee in his lifetime. While this suit was pending, Furbee died, and it was revived against the executrix of his will and his legatees and devisees.

The subject-matter of the litigation is lot No. 64 of Stewart's Second addition to the city of Parkersburg, together with the dwelling house and other improvements thereon. In a divorce suit instituted and prosecuted to a final decree in the intermediate court of Marion county this property was twice judicially sold and conveyed, and Furbee claims the title mediately under the first of the two sales. Under the second, made after the first had been set aside by proceedings in the same cause, the plaintiff in this suit, I. Earl Foggin, became the purchaser and obtained a deed for the property.

The theory of the decree complained of is that Furbee was a pendente lite purchaser of the property, and, though not made a party to the cause in which it was sold, he was not entitled to a judicial hearing respecting his claim of title. It also proceeds upon the theory of loss of such title as he had by forfeiture for nonentry of the property for taxation and nonpayment of taxes thereon for a period of more than five years, occurring within the pendency of this suit. During that period the plaintiff in this cause was in the actual possession of the property and paid the taxes thereon, and upon these facts he bases his claim of transfer to himself, by virtue of the statute, of such title as Furbee had.

As has been suggested, this controversy has grown out of proceedings in a divorce suit in the intermediate court of Marion county. Within a month or two after his marriage Ernest M. Foggin, residing in Mari-

red to should have commenced on the 14th of August instead of on the 1st of September. It is significant that while both Shoupe and Wheeler testify that there was a positive understanding and agreement, after negotiations, as to the date at which the lease should commence, Harmison on cross-examination says he does not think there was any definite time agreed upon; that there might have been, but he will not be positive about it.

[1, 2] That equity has jurisdiction to reform a contract because of a mutual mistake is not questioned, nor can there be any question that when such reformation is resisted the evidence to justify the same must be clear, convincing and satisfactory. When, however, the evidence is of that character a court of equity will not hesitate to reform a contract and make it speak the real agreement of the parties. The fact that one of the parties denies the right of reformation will not defeat relief, for it may be said as a general rule that if all of the parties were agreed upon this question there would be no litigation. Such a controversy arises as a rule upon the refusal of one of the parties to submit to any change in the contract as written. As above indicated, the oral evidence of Shoupe and Wheeler is clear, positive, and direct that the term was to begin on the 1st of September, 1907, while the testimony of Harmison, when directed to their negotiations upon this particular question, is simply that he does not recollect. If the case depended solely upon the oral testimony, it seems to us that it meets the requirements of the law, but in addition to this oral testimony there is another element which in our judgment is conclusive in favor of the plaintiffs. The receipts introduced in evidence show upon their face that the parties treated the rental years as beginning on the 1st of September, and ending upon the 1st day of the following September. Why would Harmison have put such language in a receipt for the rents if that was not the agreement of the parties? And it is significant that even after this controversy arose Harmison's counsel, in a letter dated August 21, 1917, in referring to a check sent by the plaintiffs to Harmison, uses this significant language:

"I presume you mean this check to pay for the lease of F. L. Harmison to W. W. Hanly, J. C. Shoupe and George R. Wheeler for the years 1916-17, viz., to September 1, 1917."

It seems that the parties were so impressed with the fact that the lease began on the 1st of September that even after the controversy arose Harmison's counsel expressed this view as above indicated. The evidence in this case upon the part of the plaintiffs is of that clear, positive, and direct character

required for the reformation of a contract, and it is met only by the equivocal statements of the defendant. Of course, the written contract is presumably correct. The parties have executed it, and there is a very strong presumption that all of their pertinent prior negotiations are correctly embodied in it. This presumption, however, as before stated, may be rebutted, but because of the peculiar weight to which written contracts are entitled between the parties, the evidence to do so must satisfy the court that a mistake has been made. When this character of evidence is produced and the court is fully satisfied that one of the parties is being deprived of a substantial right because of such a mistake, it will not hesitate to grant relief by way of reformation. *Melott v. West*, 76 W. Va. 739, 86 S. E. 759.

In this case the evidence convinces us that the plaintiffs are right in their contention, and we will therefore reverse the decree of the court below, reinstate and perpetuate the temporary injunction, and enter a decree here, reforming the contract of lease so as to make the term begin on the 1st of September, 1907, and requiring the defendant Harmison to execute a renewal of said lease for an additional term of 10 years, beginning on the 1st of September, 1917, and remand the cause for the purpose of executing this part of the decree by a commissioner of the court, should the defendant fail or refuse to execute and deliver such renewal, with costs to the plaintiffs in this court and in the court below.

LIVELY, J., absent.

(89 W. Va. 7)

COOK POTTERY CO. v. J. H. PARKER & SON.

(Supreme Court of Appeals of West Virginia.
Sept. 13, 1921. Rehearing Denied
Dec. 9, 1921.)

(Syllabus by the Court.)

1. Patents ⇐182—Party may license use of invention pending application for letters patent.

A license to use an invention, for which proper application for letters patent has been filed, may be given before the patent has been granted, and, if acted upon by applying the invention in the manufacture of articles, will avail to protect the licensee in its use afterwards.

2. Patents ⇐182—Applicant may license use of invention under contract which will protect licensee after issue of patent.

One who has applied for letters patent on a useful invention has an inchoate right of

property in such invention on which he can base a contract with another person for license to that other person to use the invention in the manufacture of articles of commerce pending the application for letters patent, and whereby the licensee will be protected in such manufacture after the patent is formally granted.

3. Patents §216—Protection of licensee to use of invention after patent forms a part of consideration for license issued prior to patent.

A license to use an invention, pending the application for letters patent thereon, is sufficient consideration for a contract between the inventor and the licensee whereby articles of commerce may be manufactured by the licensee and placed upon the market on a royalty basis to the inventor. The protection of the licensee in the use of the invention when patented enters into and forms a part of the consideration for such contract. Benefits to be derived by each party to a contract furnish a sufficient consideration for it.

4. Patents §216—Contract held valid and to support plea of set-off.

A special plea of set-off embodying such contract should be permitted to be filed in a case in which the damages accruing by a breach of such contract is a proper set-off to the obligation sued upon; the objection to the plea being that the contract is void for want of consideration.

(Additional Syllabus by Editorial Staff.)

5. Contracts §67—Insolvents' agreement that claim should not be discharged through bankruptcy held a consideration for contract.

Where defendants were about to pass through bankruptcy when creditors would receive nothing, the saving of plaintiff's claim was a sufficient consideration for the continuation of an agreement between the parties.

6. Appeal and error §1099(1)—Matters which are or might have been passed on are concluded.

Whatever is contained in the record on appeal is supposed to have been passed on, and whatever is passed on or might have been passed on in consideration of the record is concluded and settled, and is the law of the case.

7. Contracts §176(10), 213(1)—Where time not fixed a reasonable time is understood, and may be fixed by the court and jury.

Where a contract under which one-half of commissions to be paid by plaintiffs should be applied on debts owing from the defendant contained no definite agreement as to its termination, it was not invalid for such reason, a reasonable time being contemplated, and what would be a reasonable time was for the court and jury under the circumstances.

Case Certified from Circuit Court, Wood County.

Action by the Cook Pottery Company against J. H. Parker & Son. Demurrers to special pleadings of set-off and objections to

notice of recoupment filed by defendants overruled by the court, which refused to strike out the same, and certified the case for review. Affirmed.

C. D. Merrick, of Parkersburg, for plaintiff.

H. P. Camden and Marshall & Forrer, all of Parkersburg, for defendant.

LIVELY, J. The action of the circuit court in overruling demurrers to two special pleas of set-off, and in overruling objections of the plaintiff to the notice of recoupment filed by the defendants, and in refusing to strike the same out, has been certified to this court for review. The case was before this court on somewhat similar questions raised by this record, and is reported as Pottery Co. v. Parker, 86 W. Va. 580, 104 S. E. 51.

Plaintiff sued defendants on certain notes aggregating \$5,170, and defendants tendered two special pleas of set-off designated as special plea No. 1 and special plea No. 2, and a notice of recoupment. The circuit court refused to permit either of the special pleas or the notice of recoupment to be filed, and that action and holding was formerly certified to this court, and it was held here that special plea No. 1 and the notice of recoupment should have been permitted to be filed, thus reversing the circuit court; but the action of the lower court in rejecting special plea No. 2 was affirmed, as will be seen from an inspection of the reported case above referred to.

Now defendants have tendered two more special pleas of set-off designated as special pleas No. 3 and No. 4, respectively, and also another notice of recoupment marked No. 2, both of which special pleas and the notice of recoupment No. 2 were permitted to be filed, and demurrers of the plaintiff thereto and motion to strike out overruled and refused. It is this disposition of the pleas and notice by the circuit court which is now here for review. In plea No. 1, heretofore held to be proper and directed to be filed, the defendants relied on a contract between them and plaintiff, made the 8th of October, 1915, whereby, in consideration of the defendants agreeing to permit plaintiffs to manufacture the "Wedge knob," with the use, in the manufacture thereof, of the "Nailit knob," a device then "owned and controlled" by defendants, the plaintiff agreed to manufacture and sell exclusively to defendants the "Wedge knob" at the price of \$5.65 per 1,000, plus a stipulated price for tennypenny nails and leather washers used in the manufacture; and that the plaintiff was to add to the price aforesaid 24 cents per 1,000 to be credited on the books of the plaintiff in reduction of indebtedness of the defendants to plaintiff; and that said agreement was to continue for 5 years, and as long thereafter

title depends upon issues of fact, and they are found in favor of the plaintiff in the law action, the defendant therein has no title to be cleared.

As the original bill in this cause disclosed nothing more than clouds on the plaintiff's alleged title, by its allegations and claims, the demurrers to it were improperly overruled. But there is a replication to the answer of the defendants, in which there are allegations of collusion and fraud on the part of the special commissioner, Marie E. Foggin, Shriver, and Furbee, which if true, made the conveyance fraudulent in law if not in fact. These matters were brought into the cause in a very irregular and unusual way. They should have been set up by an amendment to the bill. However in our practice form is generally disregarded and pleadings treated and dealt with according to their substance. As these matters are in the pleadings under an erroneous designation and in bad form, they may be deemed, nevertheless, to have been brought in by way of amendment, and they were evidently so regarded by the trial court. In part the decree stands on them, and the evidence was taken as if they were part of the plaintiff's bill. The defect in the bill has thus been cured, if these allegations, taken in connection with the original bill, make out a good cause of action.

[3, 6-7] In our opinion, the bill, treated as having been so amended, discloses only an equity in the plaintiff of which he could not avail himself in the action at law. Although the decree under which the first sale was made was reversed and vacated in so far as it ordered the sale and the sale set aside, the legal title had been conveyed to Marie E. Foggin and then passed successively from her to Shriver and Furbee. Shriver was not a pendente lite purchaser, because he bought after final decree and before the proceeding for reversal was commenced in any way. *Perkins v. Pfalzgraff*, 60 W. Va. 137, 53 S. E. 913; *Dunfee v. Ohlids*, 59 W. Va. 226, 53 S. E. 209. Though having had the legal title and having passed it to Furbee before the decree was reversed neither of them was made a party to the procedure for reversal. No matter whether Shriver acquired the title in good faith or not, he had the legal title, and Furbee acquired it from him, not from any party to the suit. In correcting its errors, on the motion for reversal, the court did not attempt to effect any restitution of title or rights, nor was it asked to do so. The notice to reverse was not served on either Shriver or Furbee to whom the legal title had passed, however much it may have been affected with equities in favor of Ernest Foggin and others claiming under him. The purchaser under the second sale obviously did not acquire the legal title. He acquired only a semblance of such title togeth-

er with an equity against Furbee, if the allegations of the bill and informal amendment are true. Having no defense to the action of ejectment, available in a court of law, but having superior right in equity, the plaintiff herein could resort to equity to acquire the legal title and enjoin the action at law.

[4] Obviously Furbee's purchase is not within the rule of lis pendens. That rule is very rigid and harsh when it applies. Being so, its limitations are equally rigid and sometimes arbitrary. One of them is that the purchase must have been made from a party to the litigation. *French v. Successors of Loyal Co.*, 5 Leigh. 680; *Carr v. Callaghan*, 3 Litt. (Ky.) 365; *Macey v. Fenwick's Adm'r*, 9 Dana (Ky.) 198. Shriver was in no sense a party to any suit at the time of his conveyance to Furbee, nor, having purchased after final decree, was he a purchaser from a party to a pending suit.

It does not follow, however, that the title he acquired may not be affected with an equity in favor of the plaintiff, arising out of actual knowledge of facts creating such an equity. If Marie E. Foggin's purchase was merely pretended and fraudulent and Shriver took her title with knowledge of the fraud and Furbee took it from him with knowledge of its infirmity, the plaintiff, succeeding to the right of Ernest Foggin, is no doubt entitled to have both deeds set aside. There are few, if any, exceptions to the rule that one who purchases property with notice of an equitable right of another in it cannot sustain his purchase as against the claims of such other person. To prevail he must have purchased for value, in good faith, and without notice of the outstanding legal or equitable right.

[9, 10] There is no direct proof of knowledge on the part of Shriver, at the time of his purchase, that Marie E. Foggin had not paid the purchase money, nor that she was not a purchaser in good faith. She had no money with which to buy the property and in fact did not pay the purchase price in money. As she was the sole creditor represented in the suit and her lien exceeded the sum she agreed to pay, the commissioner reported it as having been paid and brought into court. It may have been treated as having been paid and disbursed to her, though the report does not say so. Then her attorney, after having conveyed the property to her as special commissioner, and procured recognition of her title by the Foggins and their agreement to pay her rent as her tenants, found a purchaser of it for her in the person of his brother-in-law, Shriver, whose check in payment of the contract price, \$310, payable to her attorney, has been produced and filed as evidence. The price thus paid, as well as the amount of her bid, \$210, was inadequate, but this fact as well as the relations of the parties, contractual and otherwise, are mere cir-

cumstances to be considered. The relations subsisting among them are not evidence of fraud. They merely call for more careful and scrupulous consideration of facts and circumstances tending to prove fraud, and give unusual probative force to such facts and circumstances. *Farmers' Transportation Co. v. Swaney*, 48 W. Va. 272, 37 S. E. 592; *Lively v. Winton*, 30 W. Va. 554, 4 S. E. 451; *Knight v. Capito*, 23 W. Va. 639; *Moore v. Tearney*, 62 W. Va. 72, 82, 57 S. E. 263. Looking to the other circumstances, it is found that the purchaser at the judicial sale had no money with which to buy, but had a decreed lien on the property for more than twice the amount of her bid; that the report of the sale inaccurately or falsely stated she had paid the purchase money, and it was in the hands of the commissioner; that she owed the commissioner a fee she could only pay by a sale of the land; that the price she had agreed to pay was much less than the value of the property; that, as soon as she obtained her deed and recognition of her title by the occupants of the property, she conveyed it to Shriver, in consideration of a sum less than its value; that the check of the purchaser was made payable to her attorney; and that the attorney induced the purchaser to buy the property. But there is no proof that Shriver knew any of these facts, except the last three. They fall far short of proof that the commissioner purchased the property from himself, merely using his client and his brother-in-law as trustees, and, in their names, concealing his real transaction. It cannot be inferred from the mere circumstances of relationship and procurement of the sale that he furnished Shriver the money he paid to Marie E. Fogg, nor that Shriver had any knowledge of the true state of the title. Nor is there any proof that Shriver knew the price paid for the property at the judicial sale. We express no opinion as to whether, upon the facts admitted, the commissioner was the real purchaser of the property, or whether Marie E. Fogg acted in good faith. It suffices for our purpose to say Shriver is not shown to have known what had occurred between those parties.

The bill charging fraud was taken for confessed as to Shriver; he not having appeared to it or made any defense. His admission thus made, however, cannot affect the title of Furbee, whose answer denied, for Shriver as well as himself, all charges of collusion, fraud, and knowledge of facts sufficient to put them, or either of them, upon inquiry as to any equities against Marie E. Fogg and her attorney. Subsequent declarations or admissions of a grantor in a conveyance assailed on the ground of fraud are generally inadmissible. *Colston v. Miller*, 55 W. Va. 490, 494, 47 S. E. 268. Nothing exceptional is perceived in this case upon which it can

be excluded from the operation of the general rule.

To acquire and maintain the status of bona fide purchaser, one must pay a valuable consideration. This Shriver did. What he paid, however, evidently was not the full value of the property. It is sometimes said the price paid must be a fair one. *Lohr v. George*, 65 W. Va. 241, 248, 64 S. E. 609; *Speidel Grocery Co. v. Stark & Co.*, 62 W. Va. 512, 59 S. E. 498. This expression found in these and other cases can hardly be considered as anything more than a dictum since in none of them was sufficiency of the amount of the consideration involved or passed upon. By the great weight of authority it suffices that the payment is substantial, and not so inadequate as to shock the conscience and thus raise an inference of fraud. *27 R. C. L. p. 659*; *Beebe Stave Co. v. Austin*, 92 Ark. 248, 122 S. W. 482, 135 Am. St. Rep. 172; *Booker v. Booker*, 208 Ill. 529, 70 N. E. 709, 100 Am. St. Rep. 250; *Koch v. West*, 118 Iowa, 468, 92 N. W. 663, 96 Am. St. Rep. 394; *Ennis v. Tucker*, 78 Kan. 55, 96 Pac. 140, 130 Am. St. Rep. 352; *Strong v. Whybark*, 204 Mo. 341, 102 S. W. 968, 12 L. R. A. (N. S.) 240, 120 Am. St. Rep. 710; *Easthan v. Hunter*, 102 Tex. 145, 114 S. W. 97, 132 Am. St. Rep. 854; *Bassett v. Nosworthy*, 2 White & T. Leading Cases (7th Ed.) 130. In the case last cited Lord Keeper Finch said:

"The question is not whether the consideration be adequate, but whether it be valuable."

If it is so inadequate, however, as to suggest fraud, the inadequacy is evidence of lack of good faith. The offer to take a grossly inadequate price suffices to put the purchaser upon inquiry as to whether the title is perfect. *27 R. C. L. p. 712*. Under our decisions, inadequacy of price does not prove fraud, unless it is very gross. Half the estimated value of property is not such inadequacy. *Lallance v. Fisher*, 29 W. Va. 512, 521, 2 S. E. 775; *Bradford v. McConihay*, 15 W. Va. 732. Shriver is not shown to have known anything about the property in question beyond what he may have been told by the seller and what was indicated by the lease. He resided at a great distance from it and likely had never seen it. Under these circumstances, it cannot be said that the price he paid suggests fraud in his purchase.

[8] It is unnecessary to inquire whether knowledge on Shriver's part of the error for which the first sale was set aside would have precluded right in him to purchase, for there is no proof of such knowledge. Having purchased after final decree in the cause, sale of the property and confirmation of the sale without notice of any fraud or any equity affecting the title of his vendor, and paid a valuable and substantial consideration, he was a bona fide purchaser, and acquired indefeasible title, unless for some reason the sale was *coram non judice*.

[11, 12] Barring invalidity for lack of jurisdiction in the court, he could pass such title to Furbee, even though the latter may have known Marie E. Foggin's purchase was not made in good faith. *King v. Porter*, 69 W. Va. 80, 84, 71 S. E. 202; *Curtis v. Lunn*, 6 Munf. (Va.) 42.

The error for which the decree of sale was reversed in part was not an act in excess of the court's jurisdiction. Of course, the sale should have been made in the county in which the property was, to the end that it might bring as nearly its true value as possible, and authorization of a sale thereof in another county was a palpable error. But jurisdiction is not in all cases limited to the county in which the court sits. In a proper manner and in proper cases, it can sell land in another county, and nothing in the statute expressly inhibits the making of a sale of land situated in one county in another county in which the court sits. Such a sale is not like that of land situated beyond the territorial limits of the state, to which the court's jurisdiction could not extend under any circumstances. Authorization of the making of the sale in Marion county was therefore a mere error in the exercise of jurisdiction. 16 R. C. L. p. 47; 24 Cyc. p. 23.

Nor was it beyond the power of the intermediate court of Marion county, in the divorce suit, to charge the alimony and suit money allowed the plaintiff therein, upon the property of the defendant, situated in Wood county, as a lien, and decree a sale thereof to satisfy it. The jurisdiction is vested by section 11, c. 64, of the Code (sec. 3846), empowering the court, on decreeing a divorce, to make "such further decree as it shall deem expedient, concerning the estate and maintenance of the parties." *Goff v. Goff*, 60 W. Va. 9, 53 S. E. 769, 9 Ann. Cas. 1083; *Reynolds v. Reynolds*, 68 W. Va. 15, 69 S. E. 381, Ann. Cas. 1912A, 889; *Crowder v. Crowder*, 125 Va. 80, 99 S. E. 748. If it were not so provided, it would often be within the power of a faithless husband wholly to defeat the wife's right to alimony.

[13] There is nothing in the contention that the Furbee title has been forfeited by reason of nontaxation and transferred to the plaintiff. Both parties claim the same title, the Ernest Foggin title, and the property has been taxed every year in the name of one of the claimants. *State v. West Branch Lumber Co.*, 64 W. Va. 673, 677, 63 S. E. 372; *Lynch v. Andrews*, 25 W. Va. 751; *Sturm v. Fleming*, 26 W. Va. 54; *Bradley v. Ewart*, 18 W. Va. 598; *Lohrs v. Miller*, 12 Grat. (Va.) 452.

From these principles and conclusions it results that the decree complained of must be reversed, the injunction dissolved, and the bill and amended bill dismissed.

(89 W. Va. 585)

DONNALLY v. PAYNE, Director General of Railroads. (No. 4354.)*

(Supreme Court of Appeals of West Virginia. Nov. 8, 1921.)

(Syllabus by the Court.)

1. Carriers §325—Passenger's doing act ordinarily constituting contributory negligence may not bar recovery where induced by carrier.

A passenger may take a position or do an act resulting in injury to him, upon invitation or inducement of the carrier, or in consequence of constraining influence imposed upon him by it, however effected or evidenced, which, if done in the absence of such circumstances, would make him guilty of negligence or contributory negligence barring right of recovery, without incurring such negligence or contributory negligence, provided the position so taken or act so done involves no greater risk or hazard than an ordinarily prudent man would assume under the circumstances.

2. Carriers §347(1)—Where passenger assumed reasonable risk at carrier's invitation, negligence or contributory negligence is for jury.

If, upon the trial of a case involving such an issue, the evidence tends to prove such invitation, inducement, or constraint and reasonableness of the risk, the passenger is not guilty of negligence or contributory negligence as matter of law, and the issue as to such guilt properly goes to the jury for determination.

3. Carriers §347(9)—Passenger held not contributorily negligent as matter of law in the way he attempted to leave train.

A passenger on a train consisting of several vestibule coaches, carrying workmen as passengers and so crowded as to render progress through the aisles slow and difficult, does not, as matter of law, incur such guilt by reason of his having endeavored to leave the train at his destination, through the arch of the vestibule and the space between the coach and the tender, using the endsill of the tender, constituting a footing or ledge about eight or ten inches wide, on finding the vestibule door closed, if the evidence tends to prove that passengers were accustomed to use all the doors of the coaches as exits, that, on entering the car by the door next to the engine, he took the nearest seat to it, with intent to use it in alighting, that no rule regulating the method of leaving the train was promulgated, that the allowance of time for alighting was customarily insufficient to enable passengers to leave the train in an orderly and careful manner, that the door giving access to the vestibule from the car was open or unlocked and the vestibule arch unobstructed, that other passengers on previous occasions had safely left the train in the way in which he attempted to do so, and that he would have succeeded but for the starting of the train while he was so engaged, and before all other passengers had alighted; and the issue as to right of recovery for an injury sustained in such an attempt properly goes to the jury for determination.

Miller, J., dissenting.

☛For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied January 12, 1922.

Error to Circuit Court, Kanawha County.

Action by Wirt W. Donnally, administrator of the estate of Joel H. Meadors, deceased, against John Barton Payne, Director General of Railroads of the United States, for damages for wrongful death of plaintiff's intestate. A verdict for plaintiff was set aside, and judgment rendered for the defendant, and the plaintiff brings error. Reversed, verdict reinstated, and judgment on the verdict for the plaintiff.

A. A. Lilly and J. E. Brown, both of Charleston, for plaintiff in error.

Leroy Allebach, of Charleston, and W. N. King, of Columbus, Ohio, for defendant in error.

POFFENBARGER, J. Joel H. Meadors, in alighting from a train of the Kanawha & Michigan Railway Company at Sattes station on the night of October 25, 1918, as a passenger and in an unusual manner, fell between the first coach of the train and the tender, and was killed, after having been dragged or carried along for a distance of 40 to 80 feet. In this action by his administrator against the Director General of Railroads for recovery of damages for alleged wrongful death, the jury found a verdict in his favor for \$10,000, which the trial court set aside, as being unsustained by the evidence, and then entered a judgment of nil capiat. Of that judgment and the setting aside of the verdict complaint is made on this writ of error. The case went to the jury, upon admittedly correct instructions given at the request of the defendant, and without instructions on behalf of the plaintiff; and no rulings upon the admission and rejection of evidence are complained of. The sole inquiry, therefore, is whether the verdict is contrary to the law and the evidence.

The train by which the fatal injury was inflicted carried officials and employees from Charleston, Dunbar, St. Albans, and other places along the line of the road to the government munitions plant at Nitro. There is no disclosure in the record of the number of trains employed in such service, but great crowds of people were transported to and from that point daily. This train was known as No. 8, and evidently made several trips a day. On this occasion it consisted of four vestibuled coaches, left Nitro at 12:20 a. m., and carried 252 passengers, a sufficient number, according to the evidence, to fill all seats and practically all of the standing room. The cars were so badly crowded that progress through the aisles was slow and difficult.

The train carried no mail, baggage, nor express cars. The passenger coaches extended to the tender. Meadors was in the first coach, and had entered it at the front door thereof and taken the first seat at that end of the car. When the train stopped at Sat-

tes, a station two or three miles from Nitro, he attempted to leave the car by the door through which he had entered it. Finding it closed, and either not knowing how to open it or being unwilling to lose the time required in the opening of it, he stepped from the vestibule on the bumper of the tender, or ledge formed by the endsill of the tender, about eight or ten inches wide, and endeavored to follow it out to the side of the tender and alight from it. While standing in this narrow space, with his left hand on the top of the tender, he called for a light. A friend on the platform turned an electric flash light on him, and apparently he would have attained a safe position by another step, had not the engine then started with a lurch which caused him to fall. As soon as he fell, he gave expression to his distress at the top of his voice and continued to do so, until he had been carried or dragged to a public road crossing, distant about 75 feet from the point at which he fell. There it seems he was crushed by contact with the boards of which the crossing was constructed. At that point blood was found and beyond it parts of his clothing. His mangled body was found up the track about a quarter of a mile.

Although other passengers who had gotten off made frantic efforts to attract the attention of the engineer and other train men and get the train stopped, by yelling and signaling with flash lights and otherwise, they were unable to do so, and all of the train crew deny all knowledge of the tragedy until they reached Charleston, and some of them say they knew nothing about it until the next day. The circumstances strongly tend to prove he would have escaped death and serious injury if the engineer had understood and heeded the cries and signals; and some of the witnesses say the alarms were of such character and so close that he must or should have understood them. They admit, however, that yelling and cheering from passengers alighting at that point and racing to the ferry to get to their homes and lodgings at St. Albans was usual and customary. But, as insisted by the witnesses and in the argument, the alarms on this occasion were different from the noises and confusion ordinarily incident to the detraining at that point.

[1] Under our decisions, the failure, if any, of the train to stop long enough to permit the decedent to leave it by the usual exits did not justify the hazardous attempt he made to do so by means of the space between the coach and the tender, unless peculiar circumstances take the case out of the general rule. It amounts in law to contributory negligence barring recovery. *Hoylman v. Kanawha & Michigan Railway Co.*, 65 W. Va. 264, 64 S. E. 536, 22 L. R. A. (N. S.) 741, 17 Ann. Cas. 1149; *Booth v. Camden Int. Railway Co.*, 68 W. Va. 674, 70 S. E. 559; *Farley*

v. N. & W. Ry. Co., 67 W. Va. 350, 67 S. E. 1116, 27 L. R. A. (N. S.) 1111. This rule is predicated upon normal conditions. It by no means precludes right of recovery in all cases of injury sustained in alighting from moving trains or choice of unusual means of exit. It applies in the absence of circumstances compelling, inducing, or sanctioning the act ordinarily held to be negligent. The general principles of the law of negligence are not dependent upon particular facts or situations. They are just as applicable to the relation of the parties in debarkation as in that of carriage. A passenger may assume risks made necessary or induced by the conduct of the carrier. Ordinarily, a passenger riding on the platform of a car is negligent and cannot recover, if injury proximately results from such act. But he may recover in such case, if the crowded condition of the train rendered the act reasonably necessary. *Norvell v. Kanawha & Michigan Ry. Co.*, 67 W. Va. 467, 68 S. E. 288, 29 L. R. A. (N. S.) 325. There are many instances in which the overloading or overcrowding of cars, trains, and other vehicles has been held to be sufficient evidence of negligence on the part of the carrier to carry the issue to the jury as to whether the passenger was excusable in the assumption of a position or resort to conduct that, under ordinary conditions, would have constituted negligence as matter of law, barring right of recovery. 4 R. C. L. §§ 635, 636. The same doctrine applies to conduct on the part of a carrier, inducing a passenger to attempt to alight from the car in a dangerous place. *Cartwright v. Chicago, etc., R. Co.*, 52 Mich. 606, 18 N. W. 380, 50 Am. Rep. 274. In that case the learned Judge Cooley said:

"But we think a woman is excusable for not desiring to pass through the smoking car, and she has a right to assume it is not expected of her. We also think that passengers, where not notified to the contrary, may rightfully assume that it is safe to alight from the car wherever it is stopped for passengers to leave it. And if no light is given them to leave the car by, they are not to be charged with fault for leaving in the darkness."

See, also, *Diggs v. Louisville, etc., R. Co.*, 156 Fed. 564, 84 O. C. A. 330, 14 L. R. A. (N. S.) 1029; *Smith v. Ga. Pac. R. Co.*, 88 Ala. 538, 7 South. 119, 7 L. R. A. 823, 16 Am. St. Rep. 63; *Memphis, etc., R. Co. v. Stringfellow*, 44 Ark. 322, 51 Am. Rep. 598; *Ouellette v. Grand Trunk R. Co.*, 106 Me. 153, 76 Atl. 280, 138 Am. St. Rep. 340; *McGee v. Mo. Pac. R. Co.*, 92 Mo. 208, 4 S. W. 739, 1 Am. St. Rep. 706. In case of reasonable necessity, a sick passenger may resort to the platform for fresh air without incurring guilt of contributory negligence. *Morgan v. Lake Shore, etc., R. Co.*, 138 Mich. 626, 101 N. W. 836, 70 L. R. A. 609. A passenger on a crowded excursion train may ride on a platform without

such guilt. *Chesapeake & O. R. Co. v. Lang's Adm'r*, 100 Ky. 221, 38 S. W. 503, 40 S. W. 451, 41 S. W. 271. Under such circumstances, a passenger is excusable in sitting on a car step. *Devine v. Chicago, etc., R. Co.*, 177 Ill. App. 860. A negro passenger is excusable in standing on the car platform if there is no room for him in the colored compartment though there is room in the other to which he is not allowed access. *International & Great Northern Ry. Co. v. Williams*, 20 Tex. Civ. App. 587, 50 S. W. 732. The doctrine of justification by reasonable necessity, in taking a dangerous position on a train, extends to declination on the part of a male passenger to crowd his way to a place of safety, to the exclusion of ladies, in case of lack of room. *Chicago, etc., R. Co. v. Fisher*, 141 Ill. 614, 31 N. E. 406. Whether a person was guilty of negligence in not going inside of a street car where there was unoccupied space is a question of fact for the jury, where the evidence shows there were about 18 persons in the vestibule and on the steps, who obstructed passage into the car. *Petersen v. Elgin, etc., Traction Co.*, 238 Ill. 408, 87 N. E. 345. For additional decisions illustrating the principle, see 10 O. J. 1145, 1146.

These decisions and numerous others of their classes seem to proceed upon about three different principles, namely: Legal right in the citizen to have carriage, upon compliance with the conditions legally imposed upon him, by such means and facilities as the carrier has furnished, even though they may not be reasonably safe; legal right to observe and obey directions of the servants and agents of the carrier, or to act and rely upon inducements held out by them; and right to immunity from circumstances and conditions imposed or permitted by the carrier, which influence or affect his judgment and discretion or deprive him of opportunity for free and deliberate exercise thereof, in so far as he is required to rely upon them. The first is analogous to the right of a citizen respecting the use of a highway. Even though he knows it to be in an unsafe condition and that use of it is hazardous, he may nevertheless assume the risk, without prejudice to his right, provided he exercises care in the use thereof and it is necessary for him to make use of it. *Shriver v. County Court*, 66 W. Va. 685, 66 S. E. 1062, 26 L. R. A. (N. S.) 377. The other two have their foundation in the high degree of care and duty a common carrier owes to its passenger. It is bound not only to furnish safe and suitable vehicles, machinery, and appliances, but also to protect him from injury by others, as far as it is reasonably possible to do so, and to abstain from all acts and conduct on its own part and that of its officers, agents, and servants that may occasion injury to him in any way.

[2] There is an obvious difference, however, between the assumption, upon necessity or by inducement, of a known risk or hazard, and the incurrence of certain and inevitable injury. For the latter there is perhaps no justification, except in the case of sudden peril depriving the endangered person, whether a passenger, servant, traveler, or other individual, of opportunity for deliberate judgment or prudent action. In the determination of the question whether to board a train or alight from it, by a person standing in a safe place and influenced by nothing more than fear of being left or carried past his station, that element probably cannot enter. Likely only danger of death or injury excuses an error of judgment. Hence a passenger probably cannot put himself in a situation that no reasonable or prudent person would take in order to obtain passage on a train, or to prevent carriage beyond his station. But in such case, upon reasonable necessity or by inducement of the carrier, effected in any way, he may assume such a risk of injury as an ordinarily prudent person would take, without incurring guilt of negligence; wherefore the issue as to negligence or contributory negligence in such cases is ordinarily one for jury determination.

[3] Upon the inquiry as to the effect of the adoption of the unusual means of exit already described by the decedent, it is necessary to say: (1) Whether, under all of the circumstances, the jury could find that his conduct was induced or caused, directly or indirectly, by the carrier; and (2) whether the method adopted was such as the jury could say an ordinarily prudent man would not consider too dangerous to resort to.

The facts and circumstances bearing upon the question of inducement are not very fully developed. Much of the evidence offered for disclosure thereof was rejected. As has been stated, the train was crowded. The stop was very short. The witnesses for the plaintiff say it was not longer than half of a minute or a minute, and circumstances related by them tend to prove a very short stop. According to the testimony of witnesses Howard and Zarnes, the stop was customarily short and allowed but little time for getting off. On this occasion Speece stood on the first or lower step at the rear of the first car. Getting off and hurrying forward, he found Meadors endeavoring to get out through the front door. He says he "ran ahead." Howard, standing on the second step at the front end of the second car, when the train stopped hurried forward, and reached the tender just as Meadors called for a light. He says he "traveled at pretty good speed." All passengers moved rapidly in efforts to get out of the train and to reach the ferry as quickly as possible. Generally there was rivalry among them in reaching the ferry. Accord-

ing to Speece, Meadors did not stop to endeavor to open the door he found closed. He stepped right out of the vestibule on to the ledge at the end of the tender and called for light, which Burlew furnished. Just as it was turned on him, the train started with a lurch and threw him off. That evidently occurred just about the time of the arrival of Howard, who had rapidly walked a little more than 60 feet. Although it was no doubt possible for Meadors to have worked his way to the rear of the car he was in, during the run from Nitro to Sattes, he took a seat at the front of it and remained there until the train stopped, evidently intending from the first to leave the car through the door at that end. He and Speece had entered through the door by which he intended to leave the car. His conduct indicates reliance upon some sort of assurance or his belief that that door would be available to him, and there is evidence tending to prove ground for such belief. Zarnes testified that it was customary for passengers to leave that train in such manner as they saw fit and to use all doors. His words are:

"No certain way they could get out is the only way I could explain it. They came out of the vestibules."

Speece said:

"They most generally get off any place they can, and any way they can; off the front end of the engine, through the windows, or any other way, just to get off before the train starts, to keep from carrying them on through. I have got off that way many a time, down on the tender, before that time, myself."

As to this, there is some contradiction in the evidence. The brakeman testified that the door next to the tender and the one at the rear of the train were never left open, that the passengers were never let out at the head and next to the engine, and that they were always worked through the rear. On the occasion in question he assisted passengers to alight between the third and fourth cars. The conductor did not aid in the discharge of passengers. He thinks he was collecting tickets in the second coach. Passengers got off between the first and second unattended. About 75 got off, only about 15 of whom were attended by the brakeman. There is conflict also as to whether the lattice gate was closed at the front end of the first car, the brakeman saying it was, and other witnesses denying that it was. Contrary to the estimates of plaintiff's witnesses as to the length of the stop, the train register shows two minutes, and the brakeman said he thought it was about two minutes. As the evidence is to be viewed as if it stood upon a demurrer thereto, that of the plaintiff, in the instances of conflict, is to be taken as true, in the absence of something conclusively establishing the contrary. Coalmer

v. Barrett, 61 W. Va. 237, 56 S. E. 385; Buck v. Newberry, 55 W. Va. 681, 47 S. E. 889; State v. Sullivan, 55 W. Va. 597, 47 S. E. 267.

It is perfectly manifest that the jury could find, upon amply sufficient evidence, that the train was crowded; that the car door at the front end of the first car was unlocked, if not indeed open; that the lattice gate at that end of the car was not closed; that the vestibule door at that end of the car had been used for exit as well as entry; that the decedent knew it had; that the circumstances induced belief on his part that he could leave the car by that door; that he took the seat nearest to that door, intending to leave through it; that the train made very short stops in consequence of the rapidity with which the passengers debarked at that station; that the passengers were unduly hurried in alighting by reason of the shortness of the stops at that station; that, finding the door closed and not knowing how to open it, or deeming the time too short to permit opening thereof, he had not time, under the existing conditions, to reach the other end of the car and alight there; and that he was taken by surprise occasioned by the circumstances here related, and influenced or induced by them to take the risk and hazard of exit through the space between the car and the tender.

Authorities herein referred to make it clear that to bring about or permit a situation of that kind is inconsistent with the extremely high duty imposed by the law upon carriers of passengers. A combination of circumstances arising from the manner in which such a carrier conducts its business and influencing or inducing a passenger to assume a risk of injury amounts to an obvious breach of duty to take care of him while in the care of the carrier; abstain from harm to him; protect him from harm by others; provide for safety in his entry, occupation, and exit. The carrier, as his custodian, is guilty of a breach of duty in putting him in a situation which makes it necessary for him to choose between relinquishment of a right and incurrence of a risk of personal injury in the effort to retain it. To say the decedent, in the exercise of unusual caution, should have worked his way to the rear of the coach and thus insured his ability to get off safely, is not a sufficient response to this charge. To exact extreme caution and a high degree of care on the part of a passenger would necessarily involve a corresponding relaxation or abatement of care on the part of the carrier. The relation is reciprocal. Extreme duty rests upon the carrier. Hence the passenger need not be wary. He may rightfully drop into the situation provided for him by his custodian. He may act and rely upon a plainly extended invitation of the carrier, however effected or evi-

denced. He may yield to reasonable necessity occasioned by the situation made by the carrier, in his effort to obtain and enjoy his right of transportation, and, if in doing so he takes a position which ordinarily would be regarded as dangerous, he is nevertheless faultless in the eye of the law.

In *Hoylman v. Kanawha & Michigan Ry. Co.*, cited, the conditions were normal. The train was not crowded. Ample time for exit was allowed. The passenger did not avail himself of the clear opportunity afforded him. The train was in motion before he reached the door. Nobody was in fault save himself. Before the train started, the conductor looked through the coaches and saw nobody moving toward the doors. It was upon these facts that the court held the passenger guilty of negligence as matter of law. That decision does not fit this case. It was a case involving purely normal conditions. Judge Brannon observed that "there was no crowd." In the authorities he cited exceptions to the rule are recognized. As stated in *Walters v. Chicago, etc., Ry. Co.*, 113 Wis. 367, 89 N. W. 140, one of the cases he cited, the rule is stated thus:

"An adult who [knowingly and] unnecessarily steps from a [railroad] train * * * in motion is guilty of contributory negligence as a matter of law."

He interpreted *Wood on Railroads* as saying the question of negligence in such cases is not left to the jury unless there are exceptional circumstances tending to excuse or justify the act. Here we have exceptional circumstances strikingly similar to, though not like, those held in many cases to have tended to excuse or justify conduct that would otherwise have constituted negligence per se. If in the *Hoylman* Case there had been circumstances tending to prove inducement, invitation, or constraining influence, it would no doubt have been held to be a proper case for the jury. It is not intended here to hold that the decedent was not guilty of negligence. We merely hold that he was not guilty of it as matter of law, and that it was for the jury to say whether he was or not, provided the risk he assumed was not so great that the court would be bound to say no ordinarily prudent man of the age and physical condition of the decedent would have incurred it.

This conclusion is not in conflict with any decision we have found. In *Wenzel v. City & Elm Grove R. Co.*, 64 W. Va. 310, 61 S. E. 1001, there was no proof of the actual cause of the death of the plaintiff's intestate, and it did not clearly appear that the position he took in view of the crowded condition of the electric car on which he was riding exposed him to any peril. Another passenger occupying a like position was not hurt. For all that any person can say from the

evidence, he had voluntarily or negligently jumped, slid or fallen from the car. In Railroad Co. v. Jones, 95 U. S. 439, 24 L. Ed. 506, the decedent had unnecessarily taken a seat on the pilot of the engine; the box car provided for him and his coworkers affording plenty of room for him. Besides, he had been warned against riding on the pilot and forbidden to do so. In Lowry v. Baltimore & Ohio R. Co., 74 W. Va. 791, 82 S. E. 1101, there was not a circumstance tending in the lightest degree to justify the irregular action of the decedent, on the ground of necessity, invitation, or constraint. He made no effort to get off on the side on which provision had been made for him. In getting off irregularly, he followed no precedent. In his case there was no element of surprise induced in any way by the carrier. Besides, he walked into the very jaws of apparent death. He took a risk no prudent man would have taken. Here the thing attempted was feasible, and would have been safely accomplished, but for the starting of the train a second or two earlier than the decedent supposed it would start.

Though an aged man, he was physically strong and active. According to the testimony of Speece and Howard, he would easily have succeeded in his effort but for the starting of the train. From their evidence it is also clear that he acted quickly and energetically. Another second or two of time would have put him beyond danger. The jury could have found that the stop was too short to allow other passengers to get off, and therefore shorter than the usual short stop. Speece testified that people were still getting off as cars passed him. On this question the length of the particular stop, as compared with that of previous stops, may be considered and is forceful. Meadors could rely upon his knowledge of the usual practice. The evidence bearing upon the character of the risk obviously makes it also a question for the jury.

As the verdict is sustained upon this theory, it is clearly unnecessary to enter upon any inquiry as to the sufficiency of other grounds of liability insisted upon.

If the verdict had been properly set aside, there should not have been a judgment of nil capiat.

For the reasons stated, the judgment will be reversed, the verdict reinstated, and a judgment rendered thereon.

MILLER, J., dissents.

LIVELY, J., absent.

MILLER, J. (dissenting). I must decline to concur in the opinion of the court in this case. I do not see how there can be two opinions about the question of fact that decedent was guilty of the grossest negligence and disregard for his own safety, in attempting to alight from the end of the coach where

the vestibule doors were closed against him, and by undertaking to leave by the end sill of the tender, a method so manifestly dangerous and unusual as to warn any reasonable man of the great danger in doing so. When he entered, he took a seat near the door, and when the train stopped it took him but a second to discover that that door was closed, which was notice to him not to attempt to leave by that way. No other passenger undertook to do so. Every other passenger destined for Sattes moved in the direction of the rear door of the coach. A passenger who had gone out by the rear door and walked the entire length of the coach saw decedent in the act of trying to open the front door. How long he continued in this before taking his position on the end sill of the tender does not appear. Although the evidence tended to show a car more or less crowded, all got safely to the platform uninjured, except decedent.

The main act of negligence alleged and relied on, was the alleged failure of defendant to stop its train long enough for passengers to alight at Sattes. No trainman saw the decedent in his place of danger. Enough time elapsed for him to get out there in the dark, with no light to guide him, for one witness says he called to him to use a flash light upon him to enable him to see. Assuming that defendant was negligent in not making a longer stop, that fact did not justify the decedent in attempting to leave the coach by a way he knew had been closed against him. It was unnecessary for him to take this desperate chance. The fact that some passengers may have been seen jumping off the rear end of the coach when it passed the place where the front end had stood, argues little. It is most improbable, and no witness swears that the signal to go was given the engineer while passengers were still in the act of alighting from the train at the place where they were invited to alight. If any alighted afterwards, they had loitered or been slow in leaving the train. In Simmons v. Seaboard Air Line Railway, 120 Ga. 225, 47 S. E. 570, 1 Ann. Cas. 777, it was decided, opinion by Lamar, Judge, afterwards an associate justice of the Supreme Court of the United States, that if a person voluntarily assumes a risk, accompanied by some supposed negligence of the carrier, such conduct on his part is not merely contributory negligence, lessening the amount of damages, but a failure to avoid danger, defeating his right to recover anything. In this case Justice Lamar held that, if one has a "clear chance" to avoid a danger, which the evidence in this case shows decedent appreciated, and chooses not to do so, but to risk it, his negligence, not that of defendant, becomes the proximate cause of his injuries, and will defeat any recovery. The doctrine of the Georgia case is

settled law everywhere. See 2 Shearman & Redfield on Negligence (6th Ed.) § 519 et seq., and illustrative cases cited.

The liability of a carrier is always conditioned upon the exercise by the passenger of reasonable and proper care and caution for his own safety. *Baltimore & Potomac Railroad Co. v. Jones*, 95 U. S. 439, 24 L. Ed. 506. Does it need argument to show that Meadors was lacking in this particular, when he chose the most dangerous method of alighting from the coach? One or two of the counts in the declaration undertook to excuse his negligence by averring that he was old and deaf and that his eye sight was bad; but on the trial this theory was abandoned, and as some justification for his foolhardy act, evidence was introduced as tending to show that though he had passed beyond the time ordinarily allotted to man to live, Meadors was possessed of all his faculties, was agile and active, and therefore was justified in taking the hazardous choice of going out of the car over the end sill of the tender. In the case of *Railroad Co. v. Jones*, supra, it is held that a passenger will not be justified in taking such a risk, even though he may be invited by the trainman to do so; that in such case his injury must be ascribed to his own recklessness and folly. I see little room for distinguishing this case from *Hoylman v. K. & M. Ry. Co.*, 65 W. Va. 264, 64 S. E. 536, 22 L. R. A. (N. S.) 741, 17 Ann. Cas. 1149. The mere scintilla of evidence that the railroad company had suffered passengers to leave the train by unusual avenues, as windows, furnished no excuse for passengers to risk their lives in doing so when wholly unwarranted, so as to carry the case to the jury on the question of contributory negligence. *Dye v. Corbin*, 59 W. Va. 266, 53 S. E. 147; *Ketterman v. Dry Fork R. R. Co.*, 48 W. Va. 606, 614-615, 37 S. E. 683. In *Wenzel, Adm'r, v. City & Elm Grove R. R. Co.*, 64 W. Va. 310, 61 S. E. 1001, we affirmed the judgment below excluding plaintiff's evidence and directing a verdict, where a passenger was seated on the floor of an electric car with his feet on the running board, and was thrown off the car when running at a rapid rate when turning a curve, such running of the car not of itself showing negligence justifying a verdict against the railroad company.

In *Lowry v. Balto. & Ohio R. R. Co.*, 74 W. Va. 791, 82 S. E. 1101, we affirmed the judgment below sustaining defendant's demurrer to plaintiff's evidence, where plaintiff undertook in the daytime to alight from the end of the coach where no platform was provided, instead of the place where the other passengers were invited to alight; this upon the principle that it is the duty of a passenger to use his senses and use the way provided for alighting, and not to attempt to alight

by ways obviously dangerous. In that case we cited with approval *Norfolk & Western Railway Co. v. Hawkes*, 102 Va. 452, 46 S. E. 471, holding that the law imposes no such obligation on railways to one injured by his own negligence, against which common prudence would have protected him, and that it was immaterial that he thought he was in a place of safety.

I do not find it convenient to elaborate an opinion on the subject, and besides, a dissenting opinion is generally a work of supererogation and quite uninteresting; but this much I feel constrained to say in protest against the decision. I think the judgment below was clearly right and ought to be affirmed.

(89 W. Va. 438)

**NUTTALLBURG SMOKELESS FUEL CO.
v. FIRST NAT. BANK OF HARRISVILLE et al. (two cases).**

SAME v. PULLMAN STATE BANK et al.

(Nos. 4343-4345.)

(Supreme Court of Appeals of West Virginia.
Nov. 8, 1921. Rehearing Denied
Dec. 9, 1921.)

(Syllabus by the Court.)

1. Process \Leftrightarrow 149—Officer's return indorsed on summons is prima facie evidence of service, and may be overthrown.

Upon a proceeding to vacate a judgment taken by default, in a case in which the defendant had no notice of the pendency of the action in any manner or form, the return of the officer indorsed upon the summons is only prima facie evidence of service, and may be overthrown by proof of such lack of notice.

2. Judgment \Leftrightarrow 420—Bill will lie to vacate default judgment in law action based upon false return.

A bill in equity will lie to vacate a judgment rendered in consequence of such return, upon proper allegations that the return was in fact false, that the person so served was not the president of such corporation, that no notice, actual or constructive, was received by the corporation of the pendency of such action at law, and that the corporation had a just defense to the action at law, and was prevented by such false return from asserting it.

Appeal from Circuit Court, Kanawha County.

Two suits by the Nuttallburg Smokeless Fuel Company against the First National Bank of Harrisville and others, and one by the same plaintiff against the Pullman State Bank and others. Bills dismissed, and the plaintiff appeals. Suits considered together. Decree reversed, demurrer overruled, and remanded in each case.

E. B. Dyer and Morgan Owen, both of Charleston, for appellant.

S. A. Powell, of Harrisville, for appellees.

LIVELY, J. From decrees of the circuit court sustaining demurrers to and dismissing its bills, plaintiff obtained appeals.

The same questions arise in each of these three cases, and they will all be considered together. A discussion of and decision in the Bank of Harrisville Case will dispose of the others.

Plaintiff, a corporation, alleges that defendant, on the 10th of November, 1920, obtained a judgment against it and T. C. Beury for \$5,253.45 in an action of debt, in the circuit court of Kanawha county, without any appearance by or knowledge of plaintiff, on certain notes claimed to have been signed by plaintiff, payable to T. C. Beury, and by him indorsed to defendant; that no process was served on plaintiff; and that execution was issued and levied on plaintiff's property. The bill further alleges that on March 9, 1920, T. C. Beury was president of plaintiff corporation, and then issued said notes, payable to himself, and sold and indorsed the same to defendant bank, without the knowledge or consent of plaintiff corporation, and received and used the proceeds for his own personal ends, without knowledge of plaintiff; that the defendant bank knew that such notes were not authorized by the corporation; that Beury had no authority to so issue or use them, and that the money derived therefrom was to be used by him for his personal ends. It is charged that the making of the notes was ultra vires, the notes void, and the defendant bank had knowledge of these facts. It is alleged that the judgment was obtained solely on the affidavit filed with the declaration; that the notes were not produced in court; and that a fraud was practiced on the court in obtaining judgment without producing the notes; that, after the notes were so negotiated, and before said suit in debt was begun, the entire stock and assets of plaintiff corporation were sold and transferred to the Ford Motor Company and new directors and a new president of the corporation were elected on July 7, 1920, and that T. C. Beury was not the president of the corporation at the time service of process in said action in debt was served on him as such on the 26th of July, 1920; that no process was served on plaintiff and it knew nothing of said suit until the execution was levied as aforesaid. The bill prayed that the judgment be annulled and declared void as to plaintiff, the sheriff be enjoined from selling under the execution, and for general relief. A demurrer was interposed by the bank and sustained, and the bill dismissed on May 16, 1921.

[1] The return of the sheriff on the summons in debt reads:

"Executed the within process on the within named Nuttleburg Smokeless Fuel Company, a corporation, on the 26 day of July, 1920, by delivering a true copy thereof in writing in Kanawha county, West Virginia, wherein he resides, to Thos. C. Beury, the president of said corporation.

"S. B. Jarrett, S. K. C.,
"By J. H. Windell, D. S. K. C."

This record presents one controlling question: Is the return of the sheriff conclusive, having been served on Beury as president of the corporation, when in fact he was not president and had no connection with the corporation? If the service of process is conclusive, then plaintiff had legal notice of the action in debt, and its defenses of fraud and want of consideration should have been pleaded in that suit, and, if sustained, would have prevented recovery. *Prewett v. Bank*, 66 W. Va. 184, 66 S. E. 231, 135 Am. St. Rep. 1019. If it was legally summoned, and neglected to set up these defenses, it can receive no relief in equity for its neglect. The decisions of the states of Virginia and West Virginia have held to the common-law doctrine that a sheriff's return of process in a suit is conclusive, if sufficient on its face, and cannot be attacked by parties and privies to the suit. *Milling Co. v. Read*, 76 W. Va. 557, 85 S. E. 726; *Talbott v. Oil Co.*, 60 W. Va. 423, 55 S. E. 1009; *McClung v. McWhorter*, 47 W. Va. 151, 34 S. E. 740, 81 Am. St. Rep. 785; *Rader v. Adamson*, 37 W. Va. 582, 16 S. E. 808; *Stewart v. Stewart*, 27 W. Va. 167; *Bowyer v. Knapp*, 15 W. Va. 290; *Sutherland v. Bank*, 111 Va. 515, 69 S. E. 341, and Virginia cases cited there.

The reason for the rule given in our decisions does not seem to have been examined at length. They recognize it as a harsh rule, but it is said, its harshness is "offset by the great inconvenience that would arise from uncertainty of judicial judgments and decrees." *Milling Co. v. Read*, supra, 76 W. Va. 569, 85 S. E. 731. In *Stewart v. Stewart*, supra, it is stated that others besides the defendants are interested that the return should be regarded as true; that rights of property would suffer under any other rule; and that sufficient protection to the injured is conserved by right of action against the officer for false return. In that case the rights of others had intervened. It is asserted there that the rule at common law should be followed, and if it is thought wise to change the rule, the Legislature should furnish the remedy. The evils and great inconvenience which would arise from the uncertainty of judicial judgments and decrees seems to be more imaginative than real. Experience, the great practical test, has demonstrated that no harm to the stability and certainty of judgments

and decrees has resulted in the jurisdictions where the common-law rule of verity in the return has been abolished. On the contrary, we hear no challenge or outcry for that reason, or for any other reasons, from the 34 states which have either abolished or modified the verity rule, and the bench and bar of those states seem to be well satisfied. This rule is a heritage from ancient English law, formulated in times and under conditions which have very little resemblance to modern times and affairs; and, like a great many other ancient rules, has been meeting with disapproval in the transition of modern progressive jurisprudence. It has been abandoned by the courts in 21 of the states, by the federal courts, abolished by legislation in six others, and modified materially by the courts in seven other states. Eight states, including West Virginia, yet retain it. Another reason for the rule, not stressed by our decisions, is that the sheriff is a sworn officer to whom the law gives credit, and that he and his bondsmen are liable for damages caused by a false return. It seems somewhat anomalous, in present-day affairs, that the law should give more credit to a statement of the sworn officer in his return than it does in the suit against him for damages for false return. In the latter instance his oath is of no superior sanctity than that of the complainant and his witnesses, and there it becomes a jury question to be decided according to the rules for ascertainment of fact as in other cases. His return is as much of an official act in case of a suit on his bond as when questioned by a plea in abatement in the original suit, or in any other suit between the litigants relating thereto. If the law gives credit in the first instance, it seems logical that it should give the same measure of credit in the other instance, where the exact question is at issue. The remedy on the bond is a confession of the weakness of the verity rule; for it is an admission that the officer might make a false return; that he is not made infallible by being selected and sworn as an officer. The selection of officers by modern election methods is no index of sanctity or infallibility.

When the verity rule was anciently formulated, the sheriff was a high and important officer, the king's own representative, armed with the king's writ, and partaking of the king's fiction that he could do no wrong. He was the king's emissary, rather than the court's officer. When the verity doctrine made its bid to be embodied in judicial procedure, the times were feudal, the sovereigns were supreme, with almost unrestricted powers over life and property. The high sheriff was his agent and executive officer. His acts were, in a sense, the acts of the king, and not to be questioned. Having become adopted

and followed for many years, and transmitted to America, it was first followed as a matter of course by many of the states, including Virginia, and a mere statement of the rule seems to have become sufficient for its adoption and continued existence in this state, without consideration of its reasonableness or its adaptability to changed conditions.

It is axiomatic that wherever there is a wrong there is a remedy; and the only remedy imposed under the verity rule, the suit for false return, is illogical and cumbersome when carefully considered. The remedy may be ineffective, as it is within common knowledge that sheriffs often become insolvent, and their bonds exhausted by liabilities. But why limit the injured litigant to this remedy alone? And what is the logical result of such exclusive remedy? A. sues B., and the process is not served on B., but on some other person, but the return says it was on B. The mistake is made innocently by the sheriff, and the return made in good faith. A. obtains judgment and receives money to which he may not be entitled. B. not only suffers by payment of the judgment, but is required to expend time and expense in a suit against the sheriff, which may fall of full or even partial fruition, for reasons above suggested; and, if the sheriff is financially able, he is compelled to pay heavily for any innocent mistake. All of this litigation would have been saved, and the damages minimized, if the mistake could have been shown at the outset, in the original suit, or in a suit between the original parties; and the true facts would more likely be ascertained in such a proceeding than in a suit on the sheriff's bond. Thus the sheriff's liability would be lessened, confined to the expense, if any, of ascertaining and correcting the mistake, and would save a possible miscarriage of justice. The policy of the law is to save a multiplicity of suits. The sheriff is allowed to amend his return to show the true facts; and even the court's record may be corrected, to show the true facts upon strong and impregnable proof, in a proceeding for that purpose. The sheriff's return should not be more sacred than the solemn record of the court. As stated, the courts in the majority of the states have abolished the rule of verity as not consonant with modern procedure, and now permit a direct attack in the same court where the process is returned in the same action, or by procedure to vacate the judgment. *Paul v. Malone*, 87 Ala. 544, 6 South. 351; *Kavanaugh v. Hamilton*, 53 Colo. 157, 125 Pac. 512, Ann. Cas. 1914B, 76; *Buckingham v. Osborne*, 44 Conn. 133 (it seems that Connecticut has never held to the verity doctrine); *Hilt v. Heimberger*, 235 Ill. 235, 85 N. E. 304; *Bowden v. Hadley*, 138 Iowa, 711, 116 N. W. 689;

Sloan v. Menard, 5 La. Ann. 218; Taylor v. Welslager, 90 Md. 409, 45 Atl. 476; Lane v. Jones, 94 Mich. 540, 54 N. W. 283; Knutson v. Davies, 51 Minn. 363, 53 N. W. 646; Burke v. Interstate Savings, 25 Mont. 315, 64 Pac. 879, 87 Am. St. Rep. 416; Bankers' Life Ins. Co. v. Robbins, 53 Neb. 44, 73 N. W. 269; Higley v. Pollock, 21 Nev. 198, 27 Pac. 895; Hotovitsky v. Little Russian Church, 78 N. J. Eq. 576, 79 Atl. 340; Wheeler & Wilson Mfg. Co. v. McLaughlin, 8 N. Y. Supp. 95; ¹ Burlington v. Canady, 156 N. C. 177, 72 S. E. 324; Kingsborough v. Tousley, 56 Ohio St. 450, 47 N. E. 541; Ray v. Harrison, 32 Okl. 17, 121 Pac. 633, Ann. Cas. 1914A, 413; Genobles v. West, 23 S. C. 154; Randall v. Collina, 58 Tex. 231; Ill. Steel Co. v. Dettlaff, 116 Wis. 319, 93 N. W. 14; and Mechanical Appliance Co. v. Castleman, 215 U. S. 437, 30 Sup. Ct. 125, 54 L. Ed. 272 (holding that the state rule that the sheriff's return was conclusive should not be followed by the federal court sitting in that state). See, also, Earle v. McVeigh, 91 U. S. 503, 23 L. Ed. 398. In Ray v. Harrison, supra, the Oklahoma court said:

"It is fundamental that a judgment rendered without notice is void, and to make an officer's return, which is false, conclusive evidence against the truth, is not in harmony with reason or justice, and we think the better rule is that, while such a return is prima facie evidence of its truthfulness, and while it requires clear and convincing proof to set it aside, it is the duty of the court, when evidence meets this test, to act upon it, and not permit an established falsehood to stand as true."

Kansas seems to have modified the rule, holding that the return is conclusive as to all facts presumptively within the knowledge of the officer, but prima facie evidence only of facts which he would have to get by inquiry from others. Schott v. Linscott, 80 Kan. 536, 103 Pac. 997. The state of Washington seems to follow the Kansas decisions. Wilbert v. Day, 83 Wash. 390, 145 Pac. 446. See, also, Carr v. Commercial Bank, 16 Wis. 50, where the sheriff's return stated notice served on H. S. D. president, judgment was taken by default, and afterwards vacated upon evidence showing that H. S. D. was not president, or any other officer of the bank at the time of service.

In Arizona, California, Idaho, Utah, Georgia, and Mississippi statutes have been passed declaring the sheriff's return to be prima facie correct, and allowing it to be disputed. In Indiana, Kentucky, Massachusetts, and Rhode Island, the verity rule has been relaxed to an appreciable degree by construction of remedial statutes. Nietert v. Trentman, 104 Ind. 390, 4 N. E. 306; Bramlett v.

McVey, 91 Ky. 151, 15 S. W. 49; Brewer v. Holmes, 1 Metc. (Mass.) 288; Locke v. Locke, 18 R. I. 716, 30 Atl. 422. In Brewer v. Holmes, supra, Chief Justice Shaw said:

"It is said that the petitioner would have a remedy upon the officer for a false return, and, on showing his defense to the first action, recover back from him the amount he had been compelled to pay. Supposing he could, which may be doubted, the result would be that the present respondent, the original plaintiff, would have a sum of money, which, in the case supposed, he had no just claim to recover, and the officer would be compelled to pay a like sum for a slight and perfectly innocent mistake. An officer goes to a house to leave a summons with John Smith; not knowing the person, he is led to believe, without fault of anybody, that his brother James Smith is the man he is looking for, and he leaves the summons with him and makes his return accordingly. This is a false return. If somebody must necessarily suffer loss, in consequence of this mistake, it is no doubt right that it should fall on him who made it. But if it is seasonably discovered in time to prevent loss to anybody, why should not the remedy be applied, and the rights of all parties be saved? The effect of a review will be simply to give the petitioner opportunity to make a defense."

Arkansas has also practically abolished the verity rule. Wells Fargo v. Baker Lumber Co., 107 Ark. 415, 155 S. W. 122.

The courts of Maine, Missouri, New Hampshire, Pennsylvania, Tennessee, Vermont, Virginia, and West Virginia yet adhere to the verity doctrine. The Pennsylvania court formerly showed indications of breaking away from the ancient doctrine, but recently has affirmed it (three judges dissenting) in Holley v. Travis, 267 Pa. 136, 110 Atl. 230; and in Miller Paper Co. v. Keystone Coal & Coke Co., 267 Pa. 180, 110 Atl. 79. In the latter case the reason is given that the summons is a part of the record of the court, and not subject to attack.

We have directed attention to the decisions of the various states and to legislative action to show that judicial analysis has undermined the reasons anciently given for support of the verity rule, and that the doctrine has been recognized as unsuitable to modern conditions. The discussions are instructive and illuminating. It will be noted that, while our own decisions have followed the verity doctrine, there is but one case, McClung v. McWhorter, 47 W. Va. 151, 34 S. E. 740, 81 Am. St. Rep. 785, where it was not clearly shown that the party complaining had some notice of the pending suit, or failed to show that he had a just defense. We have discountenanced special appearances to quash, where the parties have been served with process or had actual notice. The object of process is to bring the defendant into court where a hearing will be accorded, and not much grace or consideration has been given to one who admitted that he had

¹ Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 54 Hun. 639.

received actual or constructive notice, but claimed there was some technical defect in the manner of service. Perceiving that no harm had come to him, or that he was in fault and had slept on his rights, we have refused to consider purely technical grounds, and the strict rule has been invoked by its mere statement and without analysis of the reason. In *Milling Co. v. Read*, supra, defendant averred in his answer in the chancery suit that he had not been served in the suit on the note before the justice, but did not say that he was ignorant of the pendency of the suit, and made no pretense whatever of a defense to the note. In *Talbott v. Oil Co.*, 60 W. Va. 423, 55 S. E. 1009, defendant appeared specially on the trial and averred that process had not been served on it, and then withdrew. Judge Poffenbarger pointed out that "there was notice in point of fact." Defendant "appeared and attempted to take advantage of the mistake of the officer." There the defendant with full notice relied on a technicality. Judge Poffenbarger impliedly questioned the verity doctrine, for after stating it he says: "If this rule is sound," it must apply to judgments by default," etc. (60 W. Va. 425, 55 S. E. 1010). In *Rader v. Adamson*, 37 W. Va. 595, 13 S. E. 808, the process was served by an individual who made oath to the service, and the question of verity seems not to have been passed upon, reference being made to *Bowyer v. Knapp*, 15 W. Va. 298, as stating the rule. However, the defendant appeared, set up want of proper service, then demurred and answered. He had notice, and was in court with a technical defense based on the service of the summons. In *Stewart v. Stewart*, 27 W. Va. 187, defendant had been served with the summons while in another state, and had been advised by counsel there that the process was not binding on her, and she made no appearance until nearly three years later, after the rights of others had intervened.

In *Bowyer v. Knapp*, supra, the question arose on a sheriff's return of a notice to take depositions, where the return was held to be prima facie true only. Even in *McClung v. McWhorter*, supra, one of the grounds for refusing relief in equity was that complainant did not aver that he had a defense to the judgment obtained on a false return. But it must be conceded that that decision expressly, and some of our other decisions tacitly, commit us to the verity doctrine. Shall we remain so? Here is a case which emphasizes the harshness of the doctrine, and impels more careful analysis of the reasons on which it is based. Plaintiff, accord-

ing to the averments of the bill which are not now questioned, is about to be forced by execution to pay large sums of money, which it does not owe, by reason of judgments obtained on false returns, innocently made, no doubt. It never had any notice, actual or presumptive, of the pendency of the suits, and has a just defense to the claims on which they are based. Are the sheriff and his bondsmen financially responsible if redress is sought on his bond and judgment obtained? The rights of no third party have intervened. If defendants here are not entitled to the moneys, appellants having a just defense, is it in good conscience that they should take it, because of an innocent mistake? The results of the abolishment or abridgment of the verity doctrine in other states have demonstrated that the main reason given to sustain it, namely, that inconvenience would arise from uncertainty of judgments and decrees, is more of fancy than of fact; and we have concluded that a sheriff's return should not be deemed to be conclusively true as against a direct attack seasonably made after judgment by default, where it is shown that the return is false, and that defendant had no knowledge whatever of the pendency of the action, and where no rights of third parties are jeopardized. We have attempted in this opinion to draw a distinction in cases of judgment by default upon no notice either actual, presumptive, or constructive; and where there has been notice and a technicality is relied upon, or where the defendant has appeared, and denies service, but has opportunity to defend. In the latter instance we would deny the right to question the return.

[2] It may be proper to say that the evidence necessary to accomplish an overthrow of a false return should be clear, satisfactory and convincing. *Kavanaugh v. Hamilton*, 53 Colo. 157, 125 Pac. 512, Ann. Cas. 1914B, 76; *Raulf v. Chicago Brick Co.*, 133 Wis. 126, 119 N. W. 646; *Kochman v. O'Neill*, 202 Ill. 110, 66 N. E. 1047. But as this question does not arise here, we state the quantum of evidence as the first impression.

"Equity may vacate or enjoin the judgment of a court of law when it is shown to be unjust and that the court rendering it never had jurisdiction of the person of the defendant, although assuming it, in consequence of a false return of service by the sheriff or other officer."

We reverse the decree, overrule the demurrer, and remand the cause.

Reversed and remanded.

(39 W. Va. 418)

STATE v. MURPHY. (No. 4215.)

(Supreme Court of Appeals of West Virginia.
Nov. 1, 1921. Rehearing Denied
Dec. 9, 1921.)*(Syllabus by the Court.)*

1. Witnesses \S 396(1)—Not error to permit witness to say that he had made extrajudicial false statement at suggestion of another made in defendant's presence.

It is not error to allow a witness, who has made an extrajudicial statement, which he admits was in conflict with the facts within his knowledge at the time, to give as a reason for such untrue statement the advice given him by another party in the presence of the person to be affected thereby, where it appears that the person whose interest may be affected was in such a position that he would in all probability have overheard the advice so given the witness.

2. Witnesses \S 245—Refusal to permit witness to answer question, where answer has been previously given, is not error.

It is not error to refuse to permit a witness to answer a question eliciting information which he has given in answer to a question previously asked.

3. Criminal law \S 1170½(6)—Refusal to permit witness to answer question in particular form not error, when witness is permitted to answer in different form.

It is not error to refuse to permit a witness to answer a question in a particular form, even though the answer thereto is pertinent to the inquiry being conducted, when such witness is permitted to answer the same question in a different form.

4. Criminal law \S 809—Refusal of misleading instruction is not error.

Misleading instructions should not be given upon the trial of a case, and it is not error for the court to refuse to give an instruction, the only effect of which would be to confuse or mislead the jury.

5. Homicide \S 44—Provocation from sudden passion, reducing homicide to manslaughter, must arise from physical injury inflicted or attempted.

Provocation for the sudden passion which will reduce a homicide to voluntary manslaughter must arise from something more than a quarrel or altercation, which consists of a warm contention in words or a dispute carried on with heat or anger. Such provocation can arise only from a physical injury inflicted or attempted.

6. Homicide \S 45—Refusal of instruction that sufficient provocation might arise from sudden passion to reduce to voluntary manslaughter not error.

It is not error, upon the trial of one charged with murder, to refuse an instruction, the effect of which would be to tell the jury that sufficient provocation might arise from a quarrel or altercation between the parties for

a sudden passion which would reduce the offense to voluntary manslaughter.

Error to Circuit Court, McDowell County.

Willard Murphy was convicted of murder in the second degree, and sentenced to the penitentiary, and he brings error. Affirmed.

Litz & Harman and Joseph M. Crockett, all of Welch, for plaintiff in error.

E. T. England, Atty. Gen., and R. A. Blessing, Asst. Atty. Gen., for the State.

RITZ, P. By this writ of error the defendant seeks a reversal of a judgment sentencing him to confinement in the penitentiary of this state rendered upon the verdict of a jury finding him guilty of murder in the second degree.

Defendant was charged with the murder of one Harry Swain on the 1st day of May, 1920. It appears that the deceased, Harry Swain, lived in Pocahontas, Va., some 14 or 15 miles from the residence of the defendant in McDowell county, W. Va., and that on the 1st day of May, 1920, Swain, together with a man by the name of Warburton, came to McDowell county for the ostensible purpose of procuring some whisky. They arrived at the home of the defendant Murphy about 1 o'clock in the afternoon of that day. Murphy had just left his house, but, observing these men stopping there, he returned, and Warburton and Swain ate dinner at Murphy's house. After dinner Murphy, Swain, and Warburton, together with a young man by the name of John Patterson, went up the creek upon which Murphy's house was situate to the residence of Mrs. Joe Freeman, and at that place a considerable quantity of whisky was procured and placed in a hand bag carried by Warburton. After leaving the Freeman residence, upon their return, it was suggested that they have a poker game. This was agreed to, and the parties entered into the game. It appears that Patterson lost what money he had in a very short time, and retired. Before this happened, however, a young man by the name of Walter Harman appeared upon the scene, and took part in the game for a short time. He, however, soon lost what money he had, and likewise retired. Swain, Warburton, and Murphy continued to play until about 6 o'clock in the evening, at which time, it is stated by Warburton, Murphy had lost all of his money, while Murphy states that he had lost up until the last hand, but that on the last hand he won a pot having in it something over \$100, which practically made up his previous losses. Warburton states that when Murphy discovered that he had lost all of his money he asserted that the cards which were being used, and which had been furnished by Swain, were marked,

and insisted that he would have his money back, and apparently with a view of enforcing his demand pulled his pistol from its holster and shot Swain, the bullet entering Swain's right shoulder and passing downward through his body, coming out at the back under the left shoulder blade.

Warburton says that after this shooting Murphy drew the pistol upon him, and that he told Murphy that he might have whatever money he (Warburton) had; that he did pull out his money, and that Murphy took \$110 of it, and allowed him to retain \$4. Murphy does not agree with Warburton as to the manner in which the shooting occurred. He says that when the last hand was placed, and it was discovered that he had the highest hand, both Warburton and Swain attempted to secure the stakes, and that he likewise reached for the pot which he had won; that Swain thereupon shoved him away with his left hand, and reached with his right hand to his hip pocket; that Swain continued to shove him away from the place where they were playing until he had gotten back to a point where he could go no further because of some bushes and undergrowth, and, believing that Swain was attempting to pull his pistol from his pocket for the purpose of shooting him, he drew his pistol and shot Swain. After the shooting Murphy fired his pistol to attract the attention of some one with a view of taking the wounded man to a doctor. It appears that two young men came along on horseback in a short time, and the horse of one of these young men was secured and Swain placed thereon, and Walter Harman, a brother-in-law of Murphy having come up in the meantime, got on the horse with Swain and took him to Murphy's house, Murphy, Warburton, and the owner of the horse, a boy by the name of Dillon, following on foot. When they reached Murphy's house they took Swain off the horse, and found that life was extinct. He was then placed upon the ground in close proximity to the house. Warburton says that Murphy stated to him at the place of the shooting, "If Swain dies you die with him," and that when they got to Murphy's house and found that Swain was dead, in answer to a question from Murphy as to whether he knew who killed Swain he (Warburton) replied that he did not; that he made this statement in contradiction to the fact because he was afraid that Murphy would kill him, and further because Murphy's brother-in-law, Walter Harman, who was present at the time, advised him to agree with any statement Murphy made. Warburton desired to return to his home in Virginia, and Murphy got his brother-in-law, Walter Harman, to escort Warburton across the line into Virginia, the means of conveyance being the horse belonging to the Dillon boy and a horse owned by Murphy, Murphy

furnishing Warburton \$10 for the purpose of paying expenses. It then appears that Murphy went to the home of his brother, a short distance away, where his wife and family were at the time; that some time during the night he went to his own residence, and removed the body of Swain to a secluded place in the woods, placed it behind a log, and covered it over with leaves and other debris. Murphy said nothing of the shooting to any one; neither did his brother-in-law, Walter Harman. After Warburton got back to Pocahontas he informed the chief of police of that town of the occurrence, and went with an officer to the town of Welch, the county seat of McDowell county, and communicated to the sheriff information as to the homicide. The sheriff sent a posse, together with Warburton, to the home of Murphy on the night of the 3d of May. Early on the morning of the 4th this posse entered Murphy's house before he was up, and placed him under arrest. It appears that at the time he denied that he knew where Swain's body was. He says that the reason he did this was because he did not want his wife to know anything about the transaction. A short distance from the house, however, he told the officers in charge of him that he would take them to the place where Swain's body was secreted. He did lead them to the place, and the body was removed. At the same time he also gave his version of the homicide. He was indicted in the criminal court of McDowell county, and on the 10th day of May, 1920, placed on trial, which trial resulted in the jury finding him guilty of murder in the second degree and the court passing sentence upon that verdict. To this judgment the circuit court of McDowell county granted a writ of error, but upon consideration affirmed the same.

The first error assigned by the defendant is to the action of the court in sustaining demurrers to two pleas in abatement filed by him, which charge the improper constitution of the grand jury making the indictment. Nothing is said in argument to support this assignment of error, nor is it insisted upon on this hearing. Apparently the defendant's counsel, upon consideration, deem it without merit, and we concur in this conclusion.

[1] The action of the court in permitting the witness Warburton to testify that another witness, Walter Harman, told him shortly after the occurrence to agree to whatever Murphy said, is assigned as error, for the alleged reason that the statement was not made in the presence of the accused. We do not consider this statement very material in any event. Warburton had admitted that he made a statement that he knew nothing about the homicide, and in explanation of this statement, which was in conflict with

the facts, he stated that he made it through fear and because Harman told him to agree with whatever the accused wanted. The accused admits in his testimony that Warburton did know all about the homicide, being present at the time, and it is entirely immaterial whether or not Warburton made any explanation of his contradictory statement. But the ground of the objection is not well taken in any event as it appears from the testimony of Warburton that the accused was present and within three or four steps of Harman when he made the statement, and while the witness says it was not made in a loud tone of voice, still it would be almost inconceivable that such a statement could be made under such circumstances without it being heard by one so close to the party making it. It is true Murphy says he did not hear it, and Harman says he did not make it, but if it be considered that it is at all material in the case, the fact of whether it was made, or whether Murphy heard it, was for the jury.

[2] The defendant also assigns as error the action of the court in refusing to allow him to answer the following question propounded by his counsel:

"At the time you shot, as you have testified to, did you think you were in danger of death or great bodily harm at the hands of Harry Swain or Warburton?"

There is nothing in this assignment of error. The court's action in refusing to permit the witness to answer the question was evidently based upon the fact that it was leading and suggestive, and the further fact that the accused had already stated why he fired the fatal shot. In answer to a question theretofore asked him by his counsel as to why he shot Swain he replied, "Simply because I thought he was going to shoot me." There was no error in the court refusing to allow him to again give his reason for shooting the deceased.

[3] It is likewise assigned as error that the court refused to allow the defendant to state that he was on a higher elevation than the deceased at the time he fired the fatal shot. It is contended that the answer to this question would be very material in view of the fact that the bullet entered at the top of the right shoulder and ranged downward through Swain's body, indicating that the pistol from which the shot was fired must have been held above Swain's right shoulder. This condition of course, made it very important to show the relative positions of the parties at the time, particularly in view of the accused's reliance upon self-defense, and if the court had refused to allow the defendant to give his version of the relative positions of the parties, and the condition of the ground at the scene of the tragedy, it would have been error. Upon examining the

record, however, we find that, while the court refused to allow him to answer the question about which complaint is made, he did permit and direct the witness to answer a question in which he was asked to describe the ground at the place of the occurrence, and how he and the accused were standing, and in answer to this question he did fully elucidate this point. The accused had the advantage of everything that he would have had had he been allowed to answer the particular question about which complaint is made.

It is likewise objected that the court refused to allow the defendant to testify as to whether or not there was any personal feeling or grudge of any kind existing between him and the deceased at the time of the tragedy. We find from an examination of the record that the accused did testify that there was no trouble or feeling of any kind existing between him and Swain previous to the time of the occurrence. It is true the court sustained an objection to the question in the form in which it was first propounded, but counsel immediately propounded it in a different form, and elicited the answer desired.

[4] The action of the court in refusing to give to the jury the following instruction, offered on behalf of the accused, is also assigned as error:

"The court instructs the jury that the fact that the defendant hid or concealed the body of deceased cannot be considered by them in aggravation of the offense with which he is charged."

This instruction could not have been of any assistance to the jury in reaching a correct conclusion upon the matters submitted to them for decision. It tells the jury that the fact that Murphy hid the body of Swain could not be considered in aggravation of the offense with which Murphy was charged. The offense charged in the indictment is murder in the first degree, and of course it would be very difficult to aggravate an offense of that character. But even if it be said that the indictment also charges the various degrees of homicide recognized by the law, and that this instruction was meant to apply to those lower than murder in the first degree, the query naturally arises, To which one is it intended to apply? This evidence was admissible as characterizing the acts of Murphy. His conduct in hiding the body of his victim was the result of mental reaction from the occurrence in which he had theretofore recently engaged, and the mental attitude of a party during a particular transaction is frequently accurately reflected by his subsequent conduct. No purpose could have been accomplished in giving this instruction except to confuse the jury, and perhaps indicate to them that in the

opinion of the court the fact that the body was concealed by the accused immediately after the occurrence was of no weight.

[5, 6] The court's refusal to give the following instruction is also assigned as error:

"The court instructs the jury that, although you may believe from the evidence in this case that at the time the defendant fired the shot resulting in the death of Harry Swain, he, the defendant, was not justified in so doing in self-defense, yet if you further believe from the evidence that at the time of firing the shot the defendant and the said Swain were in a quarrel and altercation, that the act was done by the defendant in passion and heat of blood on sudden provocation, then you cannot find the defendant guilty of any offense higher than voluntary manslaughter."

This instruction attempts to give to the jury the law governing voluntary manslaughter, and it will be noted that it tells the jury that if Swain and the accused were in a quarrel and altercation, and that the shooting was done by the defendant in passion and heat of blood on provocation, he would only be guilty of voluntary manslaughter. The instruction does not tell the jury what provocation will reduce a homicide to voluntary manslaughter except inferentially. By necessary inference it does say that if the accused was provoked into a sudden passion by a quarrel or altercation in which he and the deceased were engaged, that would reduce the shooting to voluntary manslaughter. It is quite well established that no provocation arising from mere words, however violent or insulting, will reduce a homicide to voluntary manslaughter. *State v. Crawford*, 66 W. Va. 114,¹ and authorities there cited. There must be some actual affray, some physical encounter, which excites passion to constitute such provocation. If the court had given this instruction he would have said in effect to the jury that anger or passion arising from a quarrel or altercation which consists of nothing more than a contention by words may be sufficient provocation to reduce a homicide from murder in the first or second degree to voluntary manslaughter. In this case the vice of such an instruction is apparent. According to the testimony introduced by the state, there was no affray or physical encounter between the parties, nothing more than some contention by words, entirely insufficient to furnish provocation for a sudden passion which would reduce the offense to voluntary manslaughter, but the effect of this instruction would have been to tell the jury that this contending by words might furnish such provocation.

Upon the whole case it appears that the accused has had a fair and impartial trial before the tribunal constituted by law for

that purpose, and we see no reason for disturbing the judgment complained of. It is therefore affirmed.

(89 W. Va. 448)

CASDORPH et al. v. HINES, Director General of Railroads. (No. 4224.)

(Supreme Court of Appeals of West Virginia.
Nov. 8, 1921. Rehearing Denied
Dec. 9, 1921.)

(Syllabus by the Court.)

1. Railroads \S 348(4)—Testimony of witnesses in position to observe failure to give crossing signals entitled to peculiar weight.

In an action for injuries sustained by the driver of a wagon at a railway crossing, the testimony of witnesses, who were in position to observe with unusual care the failure of the railway company's agents to sound the whistle or bell of the approaching locomotive, is entitled to peculiar weight.

2. Railroads \S 346(5)—Injury at crossing not in itself evidence of contributory negligence.

Infliction of an injury at a railroad crossing is not in itself evidence of contributory negligence on the part of the person injured.

3. Railroads \S 350(13)—Contributory negligence at crossing may in some circumstances be question for court.

Whether an injury inflicted at a railroad crossing was due to the negligence of the person injured, or whether but for his negligence the injury would not have occurred, may in some circumstances be questions for the court to determine.

4. Railroads \S 350(13)—Contributory negligence at crossing question for jury on conflicting evidence.

But where the facts are controverted, or, if not controverted, are such as warrant either of two reasonable inferences or conclusions as to the negligence of the person injured, one of which would warrant and the other preclude recovery by him, or his personal representatives, it is for the jury to say in such a case whether the person exercised due care for his own protection in driving upon the crossing.

5. Railroads \S 350(28)—Contributory negligence of traveler relying on flagman's omission of signal question for jury.

It is a matter of common knowledge and experience that travelers approaching a railway crossing, where gates or flagman are usually maintained, take into consideration that fact in determining their course of conduct, and it is for the jury to determine whether in relying upon the omission of the flagman to give the proper signal the traveler has given that circumstance such weight and consideration as an ordinary prudent man would under such circumstances.

6. Railroads \S 330(2)—Flagman's omission of signal circumstance to be considered in determining care by traveler.

The omission of a flagman stationed at a crossing to give the customary stop signal

¹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

is a circumstance to be considered with all other facts and circumstances in determining the degree of care exercised by an approaching traveler.

7. Railroads ☞327(1)—Traveler not bound to look and listen in one particular direction.

A traveler approaching a crossing is not bound to look and listen exclusively in one particular direction for an approaching train, since danger might come from another; it being also his duty to observe the signals of the flagman stationed there for his protection against injury.

8. Railroads ☞327(1)—Traveler under no absolute duty to stop, look, and listen under all circumstances.

A traveler approaching a crossing is under no absolute duty to stop, look, and listen for approaching trains under any and all circumstances. The failure so to do is no more than a circumstance for the jury to consider in determining the degree of care exercised by him.

9. Railroads ☞347(11)—Testimony as to flagman's practice to warn travelers admissible on issue of contributory negligence.

Where the evidence for the plaintiff shows that the person injured was accustomed to drive over a crossing at frequent intervals, testimony as to a flagman's habitual practice to warn travelers of approaching trains is admissible and important, as tending to prove his knowledge of and reliance upon the flagman's duty to give such warning.

Error to Circuit Court, Kanawha County.

Action by John O. Casdorph and others, as executors of Caleb Casdorph, deceased, against Walker D. Hines, Director General of Railroads, for damages for the death of the deceased. Judgment for defendant, and plaintiffs bring error. Reversed and remanded for retrial.

Linn & Byrne, of Charleston, for plaintiffs in error.

W. N. King, of Columbus, Ohio, and Leroy Allebach, of Charleston, for defendant in error.

LYNCH, J. Caleb Casdorph, while driving his horse and light wagon along Virginia street in the city of Charleston, attempted to drive over defendant's railway tracks where they intersect the public road or street, and in doing so was struck by an east-bound passenger train operated by defendant's agents, his wagon demolished, his horse fatally hurt, and he himself sustained injuries from which he died a few minutes later. His executors sued to recover damages for the injuries, and from a judgment for defendant, directed by the trial court, they have brought the case here for review.

From the testimony and map filed, it appears that the street and tracks approach and cross each other at an acute angle. The

tracks, three in number, extend approximately east and west, and Virginia street in a somewhat southeasterly direction through that part of the city traversed by it. At the time of the accident, about 9 o'clock in the morning, as was his custom for years, Casdorph was driving towards the business center of Charleston from his country home, Virginia street being his most direct and convenient route into the city. A short distance from the railroad, Mrs. Casdorph having alighted from the wagon, he continued the journey unattended.

Certainly, at least five persons saw him between this time and the collision, which occurred a few minutes later. Three of them, the watchman on duty at the crossing, James, who saw the accident from his office window 150 feet away, and Nunnally, who was standing against a truck in the street about 160 feet beyond the tracks, witnessed the actual impact of the locomotive with the wagon. Two others, Singleton and Littlepage, also on their way to Charleston, had crossed the tracks in an automobile, and were distant also about 150 feet when the crash caused by the collision occurred.

While charging defendant with general negligence and carelessness in the operation of the train and locomotive, the chief points relied on in the proof were the failure to give proper warning of the train's approach by means of the locomotive whistle or bell, and more especially the omission of the watchman stationed at the crossing to apprise Casdorph of the proximity of the train before he went upon the tracks. Defendant, on the other hand, insists that, assuming—though we suppose not conceding—that the proper signals and warnings were not given, still, the decedent, under the facts presented, was guilty of such contributory negligence, as would preclude recovery. As the trial court sustained the motion to exclude plaintiff's evidence, and directed a verdict for defendant, the principal question presented here is whether the court erred in holding decedent guilty of contributory negligence as a matter of law.

The solution of this question necessitates a further inquiry into the facts. Casdorph, it appears, was 83 years old, but as no evidence was introduced as to his physical incapacity, his advanced age need not be considered. He was driving a gentle horse, and, according to Singleton, who with Littlepage passed decedent about 100 feet from the crossing, was "holding over to the right of the street." Apparently oblivious of the impending danger, he did not look in the direction of the train, but "just came right on, and the train was coming," decedent being within 15 or 18 feet of the center of the crossing when the train, then about 100 feet distant, sounded several sharp distress blasts

with its whistle. James says he received no warning from the watchman, and Singleton and Littlepage, who, after passing decedent, crossed the tracks slightly ahead of the train, approaching rapidly from the west, insist that the watchman, at the time they passed him, was not out in the street, but was standing between the curb and his watch house, with his back partly towards them, his signal staff resting upon the ground, and that he offered no word of warning, although the train was then very near. They were first apprised of its approach at about the same time they passed decedent, by the steam and smoke, which they saw emanating from the locomotive, which they judged to be about 300 feet from the crossing, the train itself being at least partially obscured from view by several box cars standing on the track nearest the street. Concerned primarily with their own safety, and being then within a very short distance of the tracks, they undertook to cross, and succeeded in crossing, ahead of the train.

Witness James corroborates so much of Singleton's and Littlepage's testimony as relates to decedent's actions, and, in addition, states that, although he noticed Casdorph when the latter was about 60 feet from the crossing, the train then being perhaps 400 feet distant, the watchman "showed no indication of recognizing Casdorph's approach," and continues with the statement as to the short distress blasts of the whistle, already referred to. All the witnesses who testify about the matter agree that the atmosphere was very dense and foggy, for which reason the steam and smoke, which Littlepage observed, lay low along the ground, and to some extent obstructed the view of the train, as did also the box cars mentioned, and in addition say that they heard no warning from whistle or bell, except the several short blasts immediately preceding the collision.

[1] As these witnesses were in position to observe with unusual care the circumstances surrounding the accident, their testimony as to the neglect to sound the customary warnings by bell or whistle or both within a reasonable distance from the crossing, a duty dictated by reason and required by statute (section 61, c. 54, Code 1918 [Code 1913, § 2971]), is entitled to peculiar weight (*Carnes v. Railroad Co.*, 73 W. Va. 534, 537, 82 S. E. 219; *Railroad Co. v. Bryant*, 95 Va. 213, 28 S. E. 183). But as the court's ruling could not have been founded on these facts, sufficiently proved, it is necessary to consider decedent's alleged contributory negligence, which, according to defendant's argument, was the proximate cause of the collision.

[2-4] On this question, the case of *Canterbury v. Director General*, 104 S. E. 597, is very instructive. That case also involved a collision at a crossing, and, as here, defendant relied for defense on the contributory

negligence of the injured man. "It must be borne in mind" says the court, "that the fact that one is injured at a railway crossing does not of itself prove that he is guilty of contributory negligence," and further:

"Each case of this character must turn upon its own peculiar state of facts. Ordinarily, where the facts are not in dispute * * * the question of contributory negligence is for the court; but where the facts are disputed, or where they are not disputed, and two reasonable inferences may be drawn therefrom, or two reasonable conclusions as to the conduct of the plaintiff may be reached therefrom, one of which would make the plaintiff guilty of contributory negligence and the other of which would relieve him thereof, it is for the jury to say, upon a consideration of all the circumstances, whether or not he was at the time of the injury in the exercise of due care."

This doctrine is supported by many decisions, notably *Carnes v. Railroad Co.*, supra, and *City of Elkins v. Railway Co.*, 76 W. Va. 733, 86 S. E. 762, 1 A. L. R. 198. See, also, *Massoth v. Delaware & Hudson Canal Co.*, 64 N. Y. 524; *Valin v. Milwaukee, etc., R. Co.*, 82 Wis. 1, 51 N. W. 1034, 33 Am. St. Rep. 17, and note.

This rule being thus clearly announced, its applicability to the facts here presented remains to be considered. Is the fact of contributory negligence on the part of Casdorph disputed? May two reasonable inferences be drawn from his conduct? Without undertaking to speculate upon what acts or dereliction the order of the court below was predicated, it would appear that defendant relied largely upon the suggestion that decedent, without observing the precaution of stopping, looking, or listening for an approaching train, recklessly drove upon the crossing, known by him to be dangerous.

The evidence tends strongly to prove that the view of the center track, upon which the train was approaching, was to some extent obstructed—although defendant disputes this contention—by the box cars; that the atmosphere was foggy and murky, by reason of which the smoke from the locomotive did not rise as it ordinarily would; and the absence of a signal or warning by the train until decedent was within 15 or 18 feet of the center of the crossing. It has also been suggested, and reasonably so, that the very fact of Littlepage's automobile passing on to the left of the wagon distracted decedent's attention, and enabled Littlepage and Singleton more easily to look over and beyond the box cars and see the smoke of the oncoming locomotive. From these observations, it seems reasonably clear that there was little, if anything, to attract Casdorph's attention to the danger, so perhaps, with his eyes upon the tracks, he drove upon them, as James says, without any sign or warning from the watchman, who stood near the side of the street, probably with his back towards

decident. This circumstance introduces another, possibly the controlling, element in the case; to what extent may a traveler depend upon the absence of the warning signal from the watchman, as he approaches a place of danger.

[5] As the railroad had employed and for 8 years kept a watchman at the crossing, during which time decident had used it "on an average once in 10 days during certain seasons of the year," no reasonable question could arise as to Casdorff's knowledge of the watchman's customary presence or his duties there. Travelers under such circumstances have, within certain limits, a right to assume that, in the absence of such signal, no train is approaching. 3 Elliott, Railroads (3d Ed.) 516:

"It is a matter of common knowledge and experience that travelers approaching a railway crossing at a time when gates or flagmen are ordinarily or usually maintained take into consideration that fact in determining their course of conduct, and it is for the jury to determine whether or not, in a particular case, a traveler has given that circumstance such weight and consideration as the great mass of mankind ordinarily do under such circumstances, except in cases where it clearly appears that the traveler has approached the crossing in a careless and heedless manner without the proper regard for his own safety." Gundlach v. Chicago & N. W. R. Co. et al., 172 Wis. 438, 179 N. W. 577.

[6] This case, we think, states fairly the principles involved in the present inquiry. There are decisions that go even further in support of decident's conduct, those out of which has grown the theory that the absence of the customary signal amounts to an invitation to cross (Illinois C. R. Co. v. Lindgren, 80 Ill. App. 609; Chicago & Alton Ry. Co. v. Wright, 120 Ill. App. 218; McNamara v. Chicago, R. I. & P. R. Co., 126 Mo. App. 152, 103 S. W. 1093; Wiggin v. Boston & Maine R. Co., 75 N. H. 600, 75 Atl. 103), but for present purposes, at least, it is not necessary to apply that doctrine, but rather the view of the Gundlach Case, that such omission was a circumstance to be considered with all other facts in determining whether decident exercised that degree of care ordinarily required under the same circumstances. The latter seems more reasonable, and finds ample support in authority. Morrissey v. B. & M. R. Co., 216 Mass. 5, 102 N. E. 924; Chicago, etc., R. Co. v. Hutchinson, 120 Ill. 587, 11 N. E. 855; Louisville & Interurban R. Co. v. Schuester, 183 Ky. 504, 209 S. W. 542, 4 A. L. R. 1344, and Kimball v. Friend, 95 Va. 140, 27 S. E. 904, from which we quote as follows:

"The erection of gates, gongs, or other devices at highway or street crossings to warn travelers of approaching trains does not excuse a traveler at such crossings from exercising ordinary care and caution. And while courts and

text-writers differ as to the degree of reliance that may be placed upon the invitation which an open gate or silent gong gives to the traveler to cross, they generally, if not universally, hold that the same degree of care and caution is not required of him as if there were no such invitation. * * * The question of negligence in such a case is peculiarly one for the * * * jury."

[7, 8] It is difficult to credit the argument in defendant's brief that Casdorff took no care whatever of his own safety. He may have acted as prudently as another in the same circumstances, as prudently as Littlepage and Singleton, had they not been fortunate enough to notice the smoke lying low above the box cars. May not prudence have demanded even that he should have directed his eyes towards the road ahead, possibly towards the watchman stationed there for his guidance?

"A traveler is not required to keep his eye in one particular direction for an approaching engine, since direct danger might approach from either way, and it was his duty to observe at the same time the watchman." McNamara v. Chicago, R. I. & P. R. Co., supra.

See, also, Louisville & Interurban R. Co. v. Schuester, supra. This court, as well as many others, does not follow the so-called Pennsylvania doctrine that there is an absolute duty to stop, look, and listen. As stated in the Canterbury Case, since there are many instances where such action would place the traveler in no better position to observe the danger signals than if he merely looked from his moving conveyance, it would often be a useless caution. May not such have been the case here?

The circumstances discussed in the foregoing paragraphs are sufficient to lead to the reasonable conviction that other proper and justifiable inferences as to decident's approach to the crossing may have been drawn by the jury, had the facts been left to their consideration. The direction of the verdict, therefore, was not justified by the evidence submitted.

[9] So far we have confined our remarks chiefly to the third point of error specified by plaintiffs, namely, the directing of the verdict instead of submitting the question to the jury. There remain two others: (1) The excluding of evidence tending to prove the customary conduct and practice of the watchman at this crossing to give notice of approaching trains to travelers; and (2) the excluding of evidence tending to show the condition of the street and railway tracks at the crossing.

Both of these inquiries were raised upon questions directed to Littlepage. The first, relating to the watchman's custom, was objected to and not answered, counsel for plaintiffs stating to the court that they thereby desired to prove by the witness that the

watchman made it an invariable practice to stand in the middle of the street, and there warn travelers of approaching trains. Such testimony was relevant and admissible, and also an important element of the case. In order to prove reliance by Casdorph to any extent upon the watchman's signal, it was of course necessary to show his acquaintance with the watchman's usual practice. It having already been shown that decedent was accustomed to drive over the crossing at frequent intervals, and that a watchman had been stationed there for 8 years or more, we think the evidence proper for the purpose.

As to the second ground of error, the striking out of Littlepage's testimony regarding the condition of the street and crossing, we need only say that, while of small evidentiary value, so far as it relates to the issue, there is no objection to its admissibility. Although counsel give us no information as to their purpose in offering such testimony, it may have been of some assistance to the jury in their consideration of decedent's conduct.

For the reasons assigned, we reverse the judgment, and remand the case for retrial.

On Rehearing.

By way of reply to the criticism of counsel in their petition for rehearing, this note seems advisable. There is no disposition on our part to hold them responsible for the points in the syllabus criticized by them. The points state the law applicable to the facts in the case, notwithstanding their objection. The restatement and reapplication of a legal principle when appropriate do not warrant condemnation.

In the petition counsel quote only part of section 1661, 3 Elliott, Railroads (3d. Ed.):

"The general rule is that it is not sufficient to look in one direction, but the traveler is under a duty to look in both directions. The duty to look and listen requires the traveler to exercise care to select a position from which an effective observation can be made."

In the same section the author, after stating the rule affirmed by the authorities as to the duties of travelers approaching a railroad crossing to look and listen, and the right of a court to direct a verdict for defendant if the performance of the duty is omitted, qualifies the general statement by the additional phrase "except in cases of a peculiar nature, where there are facts excusing the performance of that duty." And, although the failure of a flagman to give the signal to cross, or an express invitation by him to cross, does not absolve the traveler from the duty to look and listen, either or both of these omissions "may be sufficient to carry the case to the jury." Elliott, Railroads (3d. Ed.) §§ 1651, 1661, citing Buchanan v. Chicago, M. & St. P. R. Co., 75 Iowa, 393, 39 N. W. 663, which supports the text. There the flagman

gave plaintiff the signal to cross, and she obeyed, although she knew the train was approaching, and it arrived at the crossing before she did, wherefore he stopped her, but the train so alarmed her horse that it ran away and caused the injury for which she sued. Of course, in facts like those in *Delkman v. Morgan L. & T. R. & S. B. Co.*, 40 La. Ann. 787, 5 South. 76, *Lake Shore & Mich. So. Ry. Co. v. Ehlert, Adm'r*, 63 Ohio St. 320, 58 N. E. 812, *Allerton v. Boston & Maine R. Co.*, 146 Mass. 241, 15 N. E. 621, and *Baltimore & Ohio R. Co. v. Colvin*, 118 Pa. 230, 12 Atl. 837, in each of which the railroad company's agents exercised the utmost caution to prevent the collisions, the court properly held in each case that the negligence of the plaintiff was the proximate cause of the injury.

A traveler must not omit precautions legally necessary for his own safety when about to drive over a railroad crossing—

"for under all circumstances he must himself exercise ordinary care, and must not rely entirely upon the acts of others, but, as we have said, what is or is not ordinary care depends very often upon the facts of the particular case. Under the rule just stated, namely, that whether due care was exercised depends upon the facts of the particular case, the question whether the traveler stopped at a proper place or the like is generally a question for the jury, but it is sometimes a question of law. If there is but one reasonable inference that men of average intelligence can justly draw from the facts, the question is one of law to be disposed of by the court." Elliott, Railroads (3d Ed.) § 1661.

Counsel also seem to be of the opinion that we fail to interpret properly the evidence of the lack of reasonable care on the part of Casdorph, and the exercise of reasonable diligence on the part of the flagman. Both Littlepage and Singleton, when in the act of passing over the crossing, or just before or after they had crossed it, saw him, but, so far as they could recall, he did not notice them. He was there between the street curb and the "little house" occupied by him in cold weather, and, although at that time he had in his hands a jack staff with the word "Stop" at the top, he gave them no signal or warning. "He was not the regular watchman," and did not hold it so it could be read by them, or by any one approaching from the direction they were driving. James corroborates Littlepage and Singleton in this and other particulars. The watchman, he says, did halt some taxicabs driving westward towards the crossing, Casdorph approaching it in an easterly direction. When he did so, however, his face was towards James, who was east of the crossing and in a position where he could see it and the railroad track 400 feet west of the crossing and the watchman, who at the time was standing facing James, and who "showed no indication of

recognizing Mr. Casdorph's approach, neither did Mr. Casdorph look that way. He just came right on and the train was coming."

The record furnishes no substantial support for the statement that, while Casdorph was in a place of safety, he could have saved his life, had he heeded the signals given of the approach of the train. There is now no evidence of the giving of any signal until he was within 15 or 18 feet of the center of the crossing, and the train 75 feet from it. To avoid a collision in circumstances such as this record presents would require unusually expeditious action. In any event, however, these facts are for the jury.

Rehearing denied.

(89 W. Va. 564)

PAYNE v. WRIGHT BROS. CO. (No. 4280.)

(Supreme Court of Appeals of West Virginia.
Nov. 22, 1921.)

(Syllabus by the Court.)

1. Pleading \S 192(2)—Declaration not demurrable where showing cause of action with reasonable certainty.

A declaration is not subject to successful challenge by demurrer where it shows with reasonable certainty the cause of action and the negligence on which the action is based.

2. Master and servant \S 155(1)—Employer failing to warn employee of latent defect liable for injury.

If an employer knows or ought to have known of latent defects in the place at which he engaged his employee to work, without warning him of the existence of such defects, and he had no notice or knowledge of their existence, and in the exercise of reasonable care did not and could not ascertain their existence, and, because of want of knowledge and means of knowledge, received an injury which resulted in immediate death, the employer is liable in damages at the suit of decedent's personal representative.

3. Master and servant \S 88(1)—Contract generally immaterial.

A contract for the performance of labor in the construction of a cesspool, to serve as a receptacle of fecal and urinous deposits in a privy, generally is immaterial in the trial of an action for personal injury except in so far as it may be necessary to show by what right the person injured was at the place the injury occurred.

4. Master and servant \S 155(1)—Failure to warn employee digging cesspool held negligence.

Where a cesspool, in the form of a circular well 30 feet deep, on a town lot, intended as a conduit to receive and convey fecal and urinous substances from a privy to lower sand or gravel stratum for absorption by or percolation through the stratum, and, to remove some invisible obstruction to the free discharge

of the accumulation, the lot owner caused a charge of dynamite to be exploded in the well, the explosion being unsuccessful, and engaged the service of an employee to drill or excavate another similar well within 2½ to 3 feet of the other for the same purpose, and to connect them by drainage tile, and the employee, without being informed by the owner, and not knowing, and in the exercise of ordinary care could not have ascertained, that the well had been shot and its walls thereby probably weakened, and without such notice or knowledge had virtually completed the excavation work, when the walls collapsed, and the contents of the cesspool submerged and suffocated him, the owner is liable in damage for such negligence on his part to give warning of the danger incident to such employment.

5. Trial \S 252(11)—Instruction not supported by evidence held properly rejected.

Rulings upon instructions requested and refused or given considered, discussed, and approved.

Error to Circuit Court, Wayne County.

Action by G. W. Payne, administrator of the estate of Charles Payne, deceased, against the Wright Bros. Company for damages for the wrongful death of plaintiff's intestate. Judgment on the verdict for plaintiff, defendant's motion for new trial overruled, and defendant brings error. Affirmed.

Vinson, Thompson, Meek & Renshaw and Marcum & Marcum, all of Huntington, for plaintiff in error.

R. S. Dinkle and R. O. Preston, both of Catlettsburg, Ky, and J. M. Rigg, of Huntington, for defendant in error.

LYNCH, J. The ruling of the trial court upon defendant's motion for a new trial and the entry of a judgment upon a verdict for plaintiff and the matters of law and fact upon which the motion depends are the subjects to be investigated and decided upon this writ.

Charles Payne, plaintiff's son and intestate, died from suffocation in a well he contracted to construct for Wright Bros. Company, a corporation, November 17, 1914. He had almost completed the necessary excavation, and at the time of the injury was in the well preparing it to receive the brick work he agreed to do, as part of the contract between him and defendant. Near the well excavated by him was another, the two being separated by a wall of earth from 2½ to 3 feet in thickness, protected only by a brick wall inclosing the first one dug, to prevent subsidence of the surrounding earth into that well and thereby thwart the purpose it was intended to serve. In some manner and to some extent the well had become obstructed, and for that reason did not perform the function contemplated by defendant, namely, to act as a conduit or channel for sewage from a privy on the lot to the lower stratum

of sand or gravel, where the contents were supposed to percolate through or to be absorbed in the stratum, whatever the formation may have been. To remove the obstruction the defendant caused dynamite to be exploded in the well, or, to use the parlance popular in the oil fields, shot the well. As the explosive, however, proved unavailing, defendant decided to dig the second well alongside the first, and employed Charles Payne to do the necessary work. This he did with the assistance of the plaintiff, his father, and a brother named Henderson. Before the accident that caused his death occurred he had completed the excavation and was at the bottom of the well, then about 30 feet below the surface, preparing it to receive the open brick work, a part of his contract, when, without warning, the wall between the two wells collapsed in part, thereby permitting the fecal and liquid contents of the old well to envelop and suffocate him.

The only defect in the declaration to which defendant demurred is the failure to allege the negligent act of omission or commission of which defendant was guilty, or but for which the accident would not have happened, and death would not have ensued. Defendant does not seem to have misapprehended the pleading and could not well misapprehend it. It shows with sufficient perspicuity the omission of the ordinary duty to inform an employee of the latent dangers and hazards of the employment when the employer knows what they are, and the employee does not, and perhaps could not in the exercise of reasonable care, know, or anticipate. Payne, of course, knew the old well was there and what its purpose was, but, according to the allegations of the declaration, he also knew that the wall of the well was supported by inside columns of brick, and that, if theretofore undisturbed by an internal or external violent force or explosion, the brick inclosure would afford him ample protection against the danger that culminated in his death. Defendant without doubt was fully aware of the use of the dynamite, and the probable, if not the certain, weakening of the wall of brick and earth, and, being so aware, it was its duty to warn decedent of these conditions. Defendant does not pretend that Charles Payne had any information or knowledge of the explosion in the well and no reason to suspect the impairment of the brick wall or its displacement by the explosion, or of the use of dynamite in it. These matters the declaration avers with sufficient particularity to enable a person possessed of the usual faculties to understand what he is called upon to answer and enable him to prepare his defense.

[1-4] Defendant also relies for the reversal of the judgment upon variance between the averments of the declaration and the proof. According to the declaration the parties to

the contract were defendant, on the one hand, and the three Paynes, the plaintiff and his two sons, Charles and Henderson, on the other; and by the proof for plaintiff the contract was between defendant and decedent. This, however, is not a suit on the contract; it is an action to recover damages for a wrong for which defendant is called upon to render compensation to plaintiff, next of kin to decedent and his heir at law. The sole purpose for averring the contract is to show the reason for decedent's presence upon the premises. There is, it is true, some disagreement between plaintiff and defendant as to who are the real parties to the contract. Maxwellton Wright, defendant's president and business manager, testifies that he and plaintiff were the only parties to the contract. This question, however, is only speculative, and, if it were serious, it could not be raised for the first time upon this writ. *Bertha Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. 869, 70 L. R. A. 999; *Shenandoah, etc., R. Co. v. Moose*, 83 Va. 827, 3 S. E. 796; *Richmond R., etc., Co. v. West*, 100 Va. 184, 40 S. E. 643; *Moore Lime Co. v. Johnston*, 103 Va. 84, 48 S. E. 557.

The exact location of the excavation, as designated by Maxwellton Wright, is also a matter of dispute between the parties. According to his testimony, the location to be drilled or dug was 12 feet from the old or first well, thus leaving sufficient space between it and the new one to afford ample protection against the possibility of an injury in doing the work required by defendant. The evidence, however, so clearly preponderates in support of the location at which the excavation was made, $2\frac{1}{2}$ to 3 feet from the first, as to warrant the finding of the jury as disclosed by their verdict.

Counsel for defendant in argument insist and rely upon the right to treat decedent as an independent contractor or subcontractor, or an employee of one or the other of such agencies, and thereby defeat legal recovery against their client. It is difficult to comprehend the force of this contention, if force it has. They attempted to prove a contract with George W. Payne, the father, and plaintiff, and to show that Charles Payne had no part in the arrangement, or in doing the work except as an employee of his father, and the communication by Maxwellton Wright to the father during the negotiation preliminary to the agreement later consummated by them. Here again the evidence, though conflicting and apparently almost equally preponderant, was for the jury to determine, and they did determine the conflict in favor of the plaintiff.

But, if it be admitted that plaintiff was a party to the contract and decedent was his employee, the admission does not absolve defendant from liability, if the facts were as they appear in the record to have been, unless the father knew or was informed by

Maxwellton Wright of the dangerous condition produced by the explosion in the old well. There is not the slightest intimation that decedent was advised or knew of its impairment by the explosion, or could have known of it if he had examined it with that end in view. Whether it was necessary for Wright to impart knowledge of that condition to any other than the person with whom the contract was made is a question that does not fairly arise from the facts in evidence, and for that reason it is not decided. With the exception of the testimony relative to the actual participants in the making of the contract the trial proceeded almost exclusively upon the theory of nonliability on the part of the defendant in any event. This theory manifestly appears in the discussion of the rulings upon the instructions later referred to.

As to liability of defendant for the injury inflicted, as it was, under the circumstances related, conceding the contract was not with him, and assuming that he was merely an employee of his father, and that neither of them knew of the explosion and the damage to the wells, the only authority that need be cited is *Wilson v. Valley Improvement Co.*, 69 W. Va. 778, 73 S. E. 64, 45 L. R. A. (N. S.) 271, Ann. Cas. 1913B, 791. Plaintiff in that case was, when injured, an employee of defendant, and as such was engaged in the performance of a contract between defendant and the owner of the property for wiring a building for electricity, the injury having resulted from a defect in a scaffold erected by or for the owner, and necessary to enable the employee to wire the building, if indeed the owner did not erect it pursuant to his agreement with the employer. The question of liability predicated upon substantially similar facts makes that case peculiarly pertinent here, and the discussion appropriate and controlling. The decision is elaborate, logical, and convincing, and, while the defendant was exonerated, it was because the owner, not he, was the party at fault.

[5] The only other question is as to the giving and refusal of instructions. Of these three were asked by plaintiff and two were given, and seven by defendant and four were given, and defendant excepted to the refusal of the three asked by him, and to the two given for plaintiff. These instructions have received careful consideration, and the examination has led to the conviction that the trial court committed no error in its rulings on them. As said before, they were requested by the parties and propounded by the court in part and refused in part upon the theory that decedent was the contractor. Plaintiff's No. 1, after the usual advisory restriction, or limitation to a belief founded upon the evidence, told the jury that, if they

believed there was a contract between Charley Payne and defendant to drill a new well for the purpose of draining the old one, and that defendant had caused the latter to be shot to remove obstructions from it, and that the shot injured the walls, and that defendant failed to inform Charley Payne that the well had been shot, and Charley Payne had no knowledge, and by the exercise of due care could not have known, that it had been shot, or that the well walls had thereby been injured to such an extent that the well broke through into the well being dug by decedent, thereby causing his death, and, if they did so believe from the evidence, then they should find for plaintiff. Plaintiff's No. 3, which was given, No. 2 being refused, is like the other in every particular except that it proceeds upon decedent's right to assume that the premises were in a reasonably safe condition and not rendered dangerous by any latent or unseen defects, other than those usually attendant upon such work, and that the caving in of the old wall was caused by dynamiting it, and concluding as No. 1 did as to defendant's knowledge and decedent's lack of knowledge and means of knowledge, etc.

Of defendant's instructions Nos. 1, 2, 5, 6, and 7 were given as requested; defendant cannot and plaintiff does not complain. The court refused No. 3 because covered by No. 2, and No. 4 because covered by No. 7. In so far as the principles embodied in Nos. 2 and 3 are concerned, they are in effect the same. For, as stated, it is immaterial with whom the contract was made as between G. W. Payne and Charley Payne, and No. 2 requires the jury to find for the defendant if the contract was not made with Charley Payne, and No. 3 to find for defendant if they believe G. W. Payne was the contractor. But No. 3 is silent upon the question of the knowledge of the shooting of the well and the impairment due to the shot. So that in substance and effect Nos. 2 and 3 are the same.

While there is not the same similarity between Nos. 4 and 7, they are substantially alike in principle. No. 4 was predicated upon Charley Payne's knowledge of the dangerous nature of the work he contracted to do, owing to the explosion, and if with that knowledge be performed the work, plaintiff cannot recover in the action. There is not in the evidence the slightest intimation of the possession by him of any such knowledge and information, and hence No. 4 was properly rejected for that reason alone, without regard to No. 7.

Being unable to find error in the proceeding, our order will affirm the judgment.

LIVELY, J., absent.

(89 W. Va. 1)

STATE ex rel. WORKMAN v. ANDERSON,
Judge (two cases). (Nos. 4372, 4373.)(Supreme Court of Appeals of West Virginia.
Sept. 13, 1921. Rehearing Denied
Dec. 9, 1921.)*(Syllabus by the Court.)***1. Bribery** ⇨(1)—**Prohibition** ⇨10(3)—
County court commissioner accepting bribe
is not guilty of a felony; where court with-
out jurisdiction assumes to try relator for
felony, prohibition will lie.

A commissioner of the county court who, as such, receives and accepts a bribe intended to influence him in the discharge of his official duties, is not guilty of a felony and subject to the penalty imposed by section 5a(3) of chapter 147 of the Code of 1918 (Code 1913, § 5251), and the court in which an indictment is returned against him for a felony for so receiving and accepting such bribe is without jurisdiction to try him for a felony, and if such court has assumed jurisdiction to try for a felony prohibition will lie.

*(Additional Syllabus by Editorial Staff.)***2. Bribery** ⇨1(2)—**"Officers of this State"**
does not apply to officers generally.

The phrase "officers of this state" as used in Const. art. 6, § 45 and Code 1918, c. 147, § 5a(3), relating to bribery of executive or judicial officers of this state, applies only to officers such as the governor, attorney general, members of the public service commission, commissioner of banking, and like officers, whose powers or duties extend over the state, and does not apply to officers generally and indiscriminately.

Proceeding by the State, on the relation of D. F. Workman, against John M. Anderson, Judge, for writ of prohibition to prevent the trial of the relator on two indictments for felony. Writ awarded.

C. M. Ward and Hugh A. Dunn, both of Beckley, for relator.

E. T. England, Atty. Gen., R. Dennis Steed, Asst. Atty. Gen., D. D. Ashworth, Pros. Atty., and J. W. Maxwell, both of Beckley, and Osenton & Lee, of Fayetteville, for respondent.

LIVELY, J. At the March term, 1921, of the criminal court of Raleigh county, two indictments were returned against D. F. Workman, each for a felony, charging him with accepting certain bribes as commissioner of the county court of that county in the performance of his official duty. The first felony indictment charged him with accepting and receiving from one C. L. Lilly the sum of \$2,500, paid or given to said Workman by said Lilly upon an agreement between them that Workman, then a commissioner of the county court, would vote for the purchase of a tract of land of 79 acres which Lilly was offering to sell to the county

court for county purposes. This indictment charged that Workman received this bribe on the 12th day of March, 1919. The second felony indictment was for unlawfully, feloniously, and corruptly demanding and receiving from one J. L. Richmond in said county on the 23d day of February, 1921, a sum of \$800 in money, upon the understanding and agreement with said Richmond that he (Workman), as a member of the county court, would vote to sell to said Richmond, for the sum of \$1,600, a certain steam shovel, which then belonged to the county court and which it proposed to sell. Workman appeared in court to answer these two indictments, and was placed under bond for his appearance at the trial, which was set for the 24th day of June, 1921, and the judge of the criminal court, Hon. John M. Anderson, then announced in open court that he expected to try Workman on the charges of felony in said indictments on that date.

Conceiving that the facts and allegations charged in these indictments did not constitute a felony under the statute, Workman petitioned for and obtained rules in prohibition against the judge of the criminal court to show cause why he should not be prohibited from proceeding to try the petitioner upon the indictments for felony. To the rule in prohibition the judge appeared by counsel, demurred to the petition filed, and moved to quash the rule issued thereon because the facts alleged in the petition were not sufficient to warrant the writ as prayed for, and for answer says that as judge of the criminal court he has jurisdiction to try and determine the matters alleged in the indictments.

[1] If the facts charged in these indictments do not constitute felony under the law, then the criminal court has no right or jurisdiction to try Workman for a felony, and, as we understand it, the petitioner seeks only to prohibit the trial of the felony charge. At common law all forms of bribery, except bribery of a judge in relation to a cause pending before him, where misdemeanors to be visited with imprisonment and fine. Bishop's New Criminal Law, vol. 2, § 87. In Virginia, at the time of the formation of this state, it was a misdemeanor for any executive, legislative, or judicial officer to corruptly accept a bribe, punished by being confined in jail for one year, and by being fined not exceeding \$1,000, forfeiture of his office, and also being forever incapable of holding any office of honor, trust, or profit under that state. This provision is found in the Code of Virginia of 1860, in chapter 194, and was adopted by this state, and is now section 5 of chapter 147, of the Code of 1918 (Code 1913, § 5248). This statute of Virginia, adopted by this state at its formation, continued as the law for punishing the crime of bribery by any executive, legislative, or judicial officer.

er until after the adoption of the Constitution of 1872. By section 45 of article 6 of that Constitution, the Legislature was directed, at its first session after the adoption of the Constitution, to provide by law for the punishment by imprisonment in the penitentiary of any person who shall bribe, or attempt to bribe, any executive or judicial officer of the state or any member of the Legislature in order to influence him in the performance of any of his official or public duties; and also to provide by law for the punishment by imprisonment in the penitentiary of any of said officers or any member of the Legislature who shall demand or receive from any corporation, company, or person any money, testimonial, or other valuable thing for the performance of his official or public duties, or for refusing or failing to perform the same, or for any vote or influence a member of the Legislature may give or withhold as such member, etc. In pursuance of the mandate of the Constitution as above set out, the Legislature of 1873, c. 75, carried into effect this constitutional requirement, making it a felony for bribing, or attempting to bribe, any executive or judicial officer of this state, or any member of the Legislature, and made it a felony for any executive or judicial officer of the state, or any member of the Legislature, to demand or receive from any corporation, company, or person any money, testimonial, or other valuable thing for the performance of his official or public duties or for refusing or failing to perform the same. These provisions of chapter 75 of the Acts of 1872-73 are now found as sections 5a(1), 5a(2), 5a(3), and 5a(4) of chapter 147 of the Code of 1918 (Code 1913, §§ 5249-5252). It is under section 5a(3) (section 5251) that Workman is indicted for a felony. This is the only section of the bribery statutes under which he could be indicted for a felony, and reads:

"That if any executive or judicial officer of this state shall demand or receive from any corporation, company or person, any money, testimonial, or other valuable thing, for the performance of his official or public duties, or for refusing or failing to perform the same, shall be deemed guilty of felony, and, upon conviction thereof, shall be imprisoned in the penitentiary for not less than five years, nor more than ten years; and shall, moreover, be forever disqualified from holding any office or position of honor, trust or profit in this state."

It is insisted by the Attorney General and counsel for the state that Workman, as commissioner of the county court, is an executive or judicial officer within the meaning of this section. It is unnecessary to decide to what division of powers a county court belongs. Some of their duties are judicial or quasi judicial, as when they sit to try election contests. *Brazie v. Commissioners*, 25 W. Va. 213; *Arkle v. Board of Commissioners*, 41 W.

Va. 471, 23 S. E. 804; *Fleming v. Commissioners*, 31 W. Va. 608, 8 S. E. 267. The majority of their duties are ministerial or executive, often involving discretion. It is sufficient to say that the acts or duty of the commissioner in the performance of which the indictment charges he received and accepted a bribe are ministerial or executive.

But does a commissioner of the county court fall within the designation of an executive officer of the state? Is he an officer of the state? Is he not an officer of the county? The statute under which the felony indictments are returned include executive or judicial officers of the state, using the same language and designating the same officers in the section of the Constitution which directed that such law be passed. These officers are placed in the same class as members of the Legislature and are subject to the same degree of punishment. See section 5a(4), c. 147, Code (Code 1913, § 5251). It was evidently the purpose of the framers of the Constitution of 1872 to raise the punishment of the crime of bribery from a misdemeanor to a felony for certain designated officers (officers of the state), but not to raise it for every executive, legislative, or judicial officer. We must give some significance to the words "of this state" following the word officer in the above-quoted statute. Unless an executive or judicial officer of the state is distinguished from those of a county or municipality, then bribery of a constable would be equal to bribery of a governor, and bribery of a police judge to that of a circuit or Supreme Court judge and the penalty the same. We are of the opinion that the framers of the Constitution of 1872 and the Legislature of that year and the following year clearly intended a distinction between the executive and judicial officers of the state and the executive and judicial officers of the counties, districts, and municipalities, and to take these state officers out of the operation and effect of the then existent statute adopted from the laws of the mother state (now section 5, c. 147, of the Code), which makes it a misdemeanor for any executive, legislative, or judicial officer to take a bribe. It will be observed by inspection of chapter 75, Acts 1872-73, that there is no reference therein to the misdemeanor bribery statute, then appearing in the Code of 1868 as section 5 of chapter 147. It is not an amendment to or repeal in terms of that or any other statute. It is new and independent legislation to carry into effect the provisions of section 45, art. 6 of the Constitution. If it be a repeal of the then existing misdemeanor bribery statute, it is only by implication; and repeals by implication are never favored and will never be indulged if there is any other reasonable construction. 25 R. C. L. p. 918; *Lewis Sutherland Stat. Construction* (2d. Ed.) vol. 1, § 247.

In arriving at the intention of the Legisla-

ture, these two acts must be considered in pari materia, and effect given to each, if there be any reasonable construction which will permit it. If every officer, either executive or judicial, who accepts a bribe, is to be punished as for a felony, then the misdemeanor act is entirely repealed in so far as executive and judicial officers are concerned. Members of the Legislature who receive bribes are subject to punishment for a felony under section 4, c. 75, Acts 1872-73 (now section 5a(4) of chapter 147, Code [Code 1913, § 5252]); and if section 5, c. 147, Code, has been repealed, then there would be no statutory punishment for any other legislative officer, for instance a member of town or city council who has power to make laws for the government of the town or city. Clearly section 5a(4) does not undertake to include all legislative officers. It applies solely to "members of the Legislature." Then so far as legislative officers are concerned, except members of the Legislature, section 5 is not repealed; and to hold that section 5 is repealed so far as executive and judicial officers are concerned by section 5a(3) would result in making a town councilman guilty of a misdemeanor for accepting a bribe, while a police officer of the same town, or a justice of the peace, would be guilty of a felony for the same offense—a rather anomalous distinction and result, which we do not think was intended by the lawmaking power.

Moreover, these statutes under consideration are penal, and it is a firmly settled rule that penal statutes must be strictly construed. "They will not be construed to include anything beyond their letter, even though within their spirit, and nothing can be added to them by inference or intend-

ment." 25 R. C. L. p. 1081. See, also, Lewis Sutherland Stat. Construction (2d Ed.) vol. 2, §§ 337, 520-527. Every word and phrase must be given some significance and meaning; and the phrase "any executive or judicial officer of this state," as found in section 5a(3), which inflicts punishment for a felony, is quite different from "any executive or judicial officer," as found in section 5, which inflicts the misdemeanor penalty. The phrase "of this state" qualifies the preceding words, and is equivalent to state executive and judicial officers. This construction is impelled in view of the constitutional mandate and the preceding legislation.

[2] Considering these sections together, we hold that the construction to be given to section 5a(3) makes it apply only to executive or judicial officers of the state, such as the Governor, Attorney General, members of the public service commission, commissioner of banking, and like officers, whose powers or duties extend over the state, whether executive or judicial, and does not apply to executive or judicial officers generally and indiscriminately. Thus we follow the well-settled rules of statutory construction, and give life and vigor to each of these two acts of the Legislature, which, on first impression, may seem to conflict. From what we have said it follows that the petitioner, D. F. Workman, is not guilty of a felony under the facts charged in the indictments, and that the criminal court of Raleigh county is without jurisdiction to try him thereon as for a felony. Whether or not he can be tried on these indictments for a misdemeanor is a question which is not presented to us in this proceeding. The writ of prohibition will issue.

Writ of prohibition awarded.

(89 W. Va. 630)

SNODY v. ANDERSON. (No. 367.)

(Supreme Court of North Carolina. Dec. 14, 1921.)

1. Executors and administrators \S 451(4)—Verdict for plaintiff on account for services not inconsistent with verdict against her on another account.

Where plaintiff in her first cause of action sought to recover for services rendered under a promise that compensation would be made therefor by will, and in her third cause of action to recover for such services independent of the promise to pay by will, though repeating the allegations of the first cause of action, evidently to show that the services were rendered in expectation of pay, a jury finding against her on the first cause of action was not inconsistent with a finding in her favor on the third cause of action.

2. Trial \S 343—Verdict to be interpreted with reference to pleadings, evidence, and charge.

A verdict will be interpreted by reference to the pleadings, the facts in evidence, and the charge of the court.

Appeal from Superior Court, Surry County; Long, Judge.

Action by Christina Snody against William Anderson, administrator of W. A. Snody. From a judgment for plaintiff, defendant appeals. Affirmed.

The action is to recover for value of services rendered by plaintiff to intestate for 35 years or more prior to latter's death, of the alleged value of \$4,000. The first cause of action is on the allegation that these services were under a promise and assurance given to plaintiff that the intestate would provide compensation for plaintiff in his last will and testament. Second cause of action, alleging services, and that intestate would compensate plaintiff therefor by devise of a certain piece of land. Third cause of action was for value of services.

Plaintiff offered evidence tending to prove extent of services, and their value, and under an assurance of compensation, and that intestate had died a short time before suit brought, and failed to make any provision by will or otherwise for compensation. There was denial of liability on part of administrator, and plea of statute of limitations, with evidence tending to show that said services were not given or received in expectation of pay, and were not worth anything over and above plaintiff's support. The cause was submitted and verdict rendered on the following issues:

"Did the plaintiff, at the request of W. A. Snody, defendant's intestate, go to intestate's home, and render services as alleged in the complaint in plaintiff's cause of action, with the

mutual understanding between plaintiff and defendant's intestate that the intestate would provide compensation for such services in his last will and testament?

"Answer: No.

"(2) If so, what were such services reasonably worth?

"(3) Did plaintiff render to the defendant's intestate services as alleged in plaintiff's third cause of action?

"Answer: Yes.

"(4) If so, what were such services reasonably worth?

"Answer: Twelve hundred dollars.

"(5) Is plaintiff's cause of action barred by the statute of limitations?

"Answer: No."

Judgment on the verdict for plaintiff, and defendant excepted and appealed.

Folger, Jackson & Folger, of Mt. Airy, for appellant.

E. C. Bivens and Carter & Carter, all of Mt. Airy, for appellee.

HOKE, J. On perusal and proper consideration of the case on appeal, it appears that the charge of the court is comprehensive, clear, and in accord with our decisions on the questions presented; that the jury in the third cause of action have rendered a verdict for the value of the services within the statutory period of 8 years; and we find nothing in the record that would justify the court in disturbing the results of the trial.

[1] The court is not impressed with the position that the finding in the first cause of action is inconsistent with the verdict in the third. It is true that in stating the third cause of action the pleader reaffirmed the allegations of the first as to the assurance of a provision by the last will and testament, but this was evidently only by way of averment that the services were given and received in expectation of pay, and it is clear that the third cause of action was intended as a demand for services and their value, disconnected with the averment of compensation by last will and testament. The court so interpreted the pleadings, and accordingly charged the jury that, in considering the issues in the third cause of action, they would only allow for services rendered within the statutory limitation of 8 years.

[2] It is recognized that a verdict will be interpreted by reference to the pleadings, the facts in evidence, and the charge of the court. *Reynolds v. Express Co.*, 172 N. C. 487, 90 S. E. 510, Ann. Cas. 1918C, 1071. And, applying the principle, it is clear that by their verdict on the third cause of action the defendant has only been charged with the reasonable value of services rendered within the statutory period, and not

otherwise. The other exceptions, also, are without merit.

There is no error, and the judgment on the verdict is affirmed.

No error.

(89 W. Va. 883)

STATE v. JOHNSON. (No. 498.)

(Supreme Court of North Carolina. Dec. 7, 1921.)

1. Seduction §32—Prosecutrix must be "innocent" as well as "virtuous."

To convict one of seduction under promise of marriage under Code, § 1113, the prosecutrix must be innocent, as well as virtuous, and a widow who had illicit relations with her deceased husband before marriage was neither innocent nor virtuous, where she willingly surrendered her chastity to accused, prompted by her own lustful passions, or any other motive than that produced by accused's promise of marriage.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Innocence; Virtuous.]

2. Seduction §48—Whether prosecutrix was seduced held for jury.

In prosecution for seduction under promise of marriage, whether the illicit intercourse was induced by accused's promise of marriage or merely to gratify prosecutrix's lust held for the jury.

3. Seduction §32—One who has reformed may be innocent and virtuous.

An adulteress may reform and become innocent, and even virtuous, under Code, § 1113, punishing the crime of seduction under promise of marriage.

Appeal from Superior Court, Wilkes County; Ferguson, Judge.

Smith Johnson was convicted of seduction under promise of marriage, and appeals. New trial.

This was an indictment for seduction under promise of marriage. There was evidence tending to show that the prosecutrix, Darrie Ball, before the seduction charged in this case, had been seduced under promise of marriage by Thomas Ball. This she admitted. Ball afterwards married her, and they lived together as man and wife, but he did not marry her until she gave birth to a child, of which he was the father, she being at that time about 16 years of age. She had been married to Ball about 14 years, when he died, in January, 1916. She had five children by him including the one not born in wedlock. She was 30 years old when Ball died, and the defendant was 21 at that time. There was some evidence that he had never had anything to do with a woman in his life, and at the time of the death of prosecutrix's husband the defendant was

going to see a young girl just across the mountain beyond the home of the prosecutrix. The defendant prior to the death of prosecutrix's husband, and afterwards until about one year ago, lived within sight and within less than one-half mile of her home.

There was evidence tending to show that the prosecutrix was seduced by the defendant under a promise of marriage, and, slight though it may have been, it was sufficient to be submitted to the jury. She confessed to the jury that she submitted to the defendant "partly because she loved him and partly because she knew that it would be good to her." There was considerable testimony, which was, more or less to the same effect. There also was further testimony in defendant's behalf tending to show that soon after the death of the husband and prior to July, 1916, prosecutrix began meeting the defendant along the road near the home of defendant and would walk with him and tease him about the girls and invite him to come and see her. As defendant would pass the home of prosecutrix's brother going to see his girl across the mountain, she would be there, and her brother would hitch his ox to the wagon and drive the defendant to see his girl, and the prosecutrix would go along, and come back in the same wagon, and leave defendant at the home of his girl. Later they would carry him in the wagon to visit their homes. Some time during the month of July, 1916, at the invitation of the prosecutrix, the defendant went to her home, and they sat around the fireplace until the children went to bed. After they sat there for a while, the prosecutrix moved her chair over close to defendant, put her arms around his neck, and said, "I have been loving you for a good while, and you did not find it out until a few days ago." She hugged and kissed him, and put her hands upon him in such a way as to excite his sexual passions. At this he asked her to have intercourse with him, she consented, and they had intercourse there in a chair. After the intercourse, they talked about the girl the defendant was going to see, and she asked defendant when he and the girl were going to marry, after which defendant went home. Nothing was said about their marrying. Defendant went to see prosecutrix often afterwards, and often had sexual intercourse with her up to some time before the baby was born on July 16, 1918. Defendant and prosecutrix had said nothing about marrying until defendant was drafted into the United States army for service overseas, and after the child was born and prior to July 21, 1918, when defendant left for the camps. At this time defendant went to see prosecutrix, she cried and complained to him that she was not able to raise the

baby and begged defendant to marry her. Defendant promised her then if she would keep a decent house and conduct herself properly, until he returned from the army, that he would marry her, and this is the promise he referred to in the letters copied in the record. After defendant returned from the army he found that prosecutrix had not kept a clean house as she had promised to do and prosecutrix asked him to try her again and she would keep the boys away. Defendant consented to do so, all of her promises she failed to keep, and all relations were broken off, and the defendant married December 5, 1920, and was arrested in this action in January, 1921.

The court charged the jury among other things not related to this instruction, as follows:

"If you find from the evidence beyond a reasonable doubt that the prosecutrix never had sexual intercourse with any man except her husband and the defendant, and if you should further find from the evidence beyond a reasonable doubt that she only had sexual intercourse with her husband before she was married after the engagement between her and her husband to be married, and it was at his solicitation after the said engagement and promise of marriage and before their marriage, and if you should further find from the evidence beyond a reasonable doubt that the defendant and the prosecutrix were engaged to be married, and that the defendant solicited her to have intercourse with him, promising to marry her, and she yielded to him because she trusted him and because he promised to marry her, she would be in the eyes of the law an innocent and virtuous woman."

The court refused to give the following instruction requested by the defendant:

"(1) The court charges you that an innocent and virtuous woman under the law of this state is a woman who had never had actual illicit sexual intercourse with any man. The court further charges you that, if you should find from the testimony that the prosecutrix permitted her husband to have sexual intercourse with her prior to their marriage, then the court charges you that she would not be an innocent and virtuous woman, and your verdict in this case, if you so find, will be not guilty."

"(2) If you find from the testimony that the prosecutrix permitted her husband prior to their marriage to have sexual intercourse with her, that said sexual intercourse was illicit, notwithstanding you further find that the same was produced by seduction under promise of marriage, as the seduction under such a promise does not render sexual intercourse legal (except as between the prosecutrix and her husband), but to all the rest of the world it was illicit sexual intercourse, and the defendant would not be guilty."

Defendant duly excepted to the instruction given and to the refusal of those requested.

There was a verdict of guilty, and from

the judgment thereon defendant appealed to this court, after reserving his exceptions.

J. A. Rousseau, of North Wilkesboro, and Chas. G. Gilreath, of Wilkesboro, for appellant.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

WALKER, J. (after stating the facts as above). [1] The evidence in this case is not only repulsive, but filthy, in some of its parts, but we are to determine upon the legal guilt of the defendant, or, in other words and speaking more accurately, whether he has been legally tried below. We do not think that he has been, and will proceed now to state our reasons for so thinking. The instruction above set forth contains a proposition of law which cannot be sustained, and it no doubt caused the defendant's conviction. We know of no case in this state which decides that a woman would be innocent and virtuous under the facts and circumstances detailed by the judge therein. If a woman commits adultery with a man simply because she is solicited to do so, even upon the promise of marriage, she is to be pitied, but is not "innocent and virtuous" within the meaning of the statute upon which this prosecution is based. If she yielded to temptation solely because of the promise, and not to gratify her lustful passions, she is still an adulteress, and cannot be said in the language of this court, to be a woman who never had had actual sexual intercourse with a man. She may be virtuous, but not innocent, within the meaning of the statute, as is shown so clearly by Justice Davis in *State v. Ferguson*, 107 N. C. 841, 12 S. E. 574. It is said in that case, without quoting literally, that the woman must be virtuous—that is, pure and chaste—as well as innocent. The purpose of this statute is to protect innocent and virtuous women against wicked and designing men, who know that one of the most potent of all seductive arts is to win love and confidence by promising love and marriage. In section 1113 of the Code the word "innocent" is used, which Justice Ruffin defines, in *State v. McDaniel*, 84 N. C. 805, as meaning "a pure woman—one whose character," to use the language of the preamble of the statute, "is unsullied." In *State v. Davis*, 92 N. C. 764, "an innocent woman," within the meaning of that section, is defined to be "one who had never had actual illicit intercourse with a man," and mere lasciviousness and the permission of liberties by men are not contemplated by the statute; and this definition of the words, "an innocent woman," has been followed in *State v. Horton*, 100 N. C. 447, 6 S. E. 238, 6 Am. St. Rep. 613, in construing the word "innocent" in the statute now under review. But the woman must not only be "innocent," but "virtuous." What force, if

any, does the word "virtuous" impart to the act? In *State v. Grigg*, 104 N. C. 882, 10 S. E. 684, it is said, citing *State v. Aldridge*, 86 N. C. 680, that a woman who at some time in her life has made a "slip in her virtue" is entitled to the protection of section 1113 of the Code, if she is "chaste and virtuous" when the slanderous words are uttered. There is a manifest reason why the words "an innocent woman" in section 1113 of the Code, and "innocent and unprotected woman" in section 3763, should be construed to mean innocent of illicit sexual intercourse, as affecting her reputation when the slanderous words are spoken, for the purpose of those sections is to protect women who, however imprudent they may have been in other respects, have not so far "stooped to folly" as to surrender their chastity and become incontinent, or who have regained their characters for innocence and chastity if a "slip has been made," from "the wanton and malicious slander" of persons who may attempt to destroy their reputations and blast and ruin their good names. But the act of 1885, recognizing the frailty of man as well as woman, superadds to the word "innocent" the word "virtuous," and before it will condemn and punish the man, who may be seducible as well as seductive, requires that it shall be made to appear that the woman was herself "innocent and virtuous," and that the seduction was compassed by winning her confidence and love under the false and alluring means of a promise of marriage; but, if she willingly surrenders her chastity, prompted by her own lustful passions, or any other motive than that that produced by a promise of marriage, she is in *pari delicto*, and there is no crime under the statute. She must not only be innocent, but virtuous—that is, chaste and pure—and if such a woman yields under the promise of marriage to the "studied, sly, ensnaring art, * * * dissembling smooth," of the seducer and is betrayed, she deserves sympathy and charity; and he not only deserves the "curse" of all who love honor and virtue, but the severest penalties of the law. The woman, however, must be "virtuous" as well as "innocent," and this implies something more in her conduct than mere innocence of illicit sexual intercourse. If she willingly submitted to his embraces, the mere promise of marriage would not make it seduction. *People v. Clark*, 33 Mich. 117. And her evidence must be supported. No such proviso is to be found in sections 1113 and 3763. For illustration, there is no evidence that Potiphar's wife ever had illicit sexual intercourse with any one, and yet the idea of a "virtuous woman" would hardly be suggested by her name.

[2, 3] This definition of the words has been the settled and fully accepted one ever since the decision in *State v. Ferguson*,

supra, and has been adopted and followed in several more recent cases. *State v. Horton*, 100 N. C. 443, 6 S. E. 238, 6 Am. St. Rep. 613; *State v. Crowell*, 116 N. C. 1052, 21 S. E. 502; *State v. Whitley*, 141 N. C. 826, 53 S. E. 820; *State v. Ring*, 142 N. C. 596, 55 S. E. 194, 115 Am. St. Rep. 759; *State v. Kincaid*, 142 N. C. 657, 55 S. E. 647; *State v. Raynor*, 145 N. C. 472, 59 S. E. 344; *State v. Maloney*, 154 N. C. 200, 69 S. E. 786; *State v. Cooke*, 176 N. C. 731, 97 S. E. 171; *State v. Pace*, 159 N. C. 462, 74 S. E. 1018; *State v. Cline*, 170 N. C. 751, 87 S. E. 106; *State v. Moody*, 172 N. C. 967, 90 S. E. 900; *State v. Fulcher*, 176 N. C. 724, 97 S. E. 2. If we are still to follow the opinion of Justice Davis, which has always guided us in cases such as this one, the charge of the court cannot be sustained. *State v. Crowell*, 116 N. C. 1052, 21 S. E. 502 (opinion by the present Chief Justice); for he told the jury that, notwithstanding that the prosecutrix (Darrie Ball) had committed adultery with Thomas Ball (by whom she had a child) before they were married, the jury should find that she was both an innocent and a virtuous woman. And the judge committed the same error in a more pronounced way, if anything, when he refused the clear-cut requests of the defendant for instruction as to this feature of the case. The first prayer for instructions omitted the element of seduction, and defendant was entitled to have the jury charged as requested, because the defendant was not concluded by the statement of the prosecutrix that the illicit intercourse was induced by his promises of marriage. It was for the jury to say whether it was merely to gratify her lust or was induced by his promise, and there was evidence in this case, and, too, some strong evidence, that she was a very lustful woman, and enough to justify the jury in finding that she did not require a promise to overcome the longing of her lewd nature or her lascivious desires, or even yearnings. But we may pause here to state that on the next trial it will be proper for the court to instruct the jury that, if the prosecutrix had committed adultery with the man who afterwards became her husband, even though it was often repeated before marriage, yet if, after she thus fell, she married her lover and was always faithful to him, and ever after the first act of adultery with him was innocent and virtuous—that is, had not had sexual intercourse with any man—until the defendant seduced her under promise of marriage, if he did such a thing, then that she would be an innocent woman, and, if she was also chaste and pure in the sense above defined, she also would be a virtuous woman within the meaning of the statute. An adulteress may reform and become innocent, and even virtuous, and, if this woman has done so,

the statute protects her just as much as if she had never fallen but had always walked in the straight and narrow way of spotless innocence, virtue, and chastity, not even permitting undue familiarity from any man, and especially the debaucher. This was clearly decided in *State v. Ferguson*, supra, and some of the other cases above cited have carefully followed it.

The statute was passed to guard and protect the innocent and virtuous woman, and not those who seek only to gratify their own lustful desires and have no proper regard for the sacredness and purity of the marriage promise, and do not even wait for it, before yielding their persons to the embraces of evil-minded men. In such a case the woman is considered to be as bad as he is, and beyond the pale of the law's protection under this statute.

We have not overlooked the fact of the disparity in the ages of this woman and the defendant, she being nine years his senior, and that he contends, and offered evidence to prove, that he was the seduced, and not the seducer. She was, by her own evidence, of a most lascivious disposition, and seemed to have lured this young man from the path of virtue by constantly "vamping" him, if the testimony be true, and even going to the length of saying, unblushingly, and to her open shame, that in the perpetration of the act itself "she preferred the woods to the porch."

There was error in the respects indicated, for which another trial is necessary.

New trial.

(182 N. C. 865)

MCCULLOUGH v. SCOTT et al., State Board of Accountancy. (No. 443.)

(Supreme Court of North Carolina. Nov. 30, 1921.)

1. Appeal and error ¶329—Attorney General made a complainant on appeal.

Though the Supreme Court will not allow an amendment making an additional party plaintiff where the result will be to deprive defendants of the benefit of a ground of demurrer below, a motion to make the Attorney General a complainant in an action by a certified public accountant to enjoin the State Board of Accountancy from examining applicants for certificates beyond the state held not to be denied.

2. Attorney General ¶7—May maintain suit to enjoin ultra vires act by State Board of Accountancy.

Under Code, § 965, authorizing pleading by making proper parties, and C. S. § 1143, specifying the nature of suits and proceedings which the Attorney General may conduct on his own information or on complaint of a private party, he may maintain, or be a complainant in,

an action by a certified public accountant to enjoin the State Board of Accountancy from examining applicants for certificates beyond the state.

3. Appeal and error ¶917(2)—On demurrer, court can consider only facts alleged in complaint, which are taken as admitted.

In dealing with an overruled demurrer, the Supreme Court can consider only the facts alleged in the complaint, which are to be taken as admitted, and no extraneous matter.

4. States ¶45—Members of State Board of Accountancy are state officers.

Members of the State Board of Accountancy, created by Laws 1913, c. 157 (C. S. §§ 7008-7024), are state officers.

5. States ¶66—Jurisdiction of "state officers" only coextensive with territory of state.

The jurisdiction of "state officers," who are those officers whose duties concern the state at large or the general public, though exercised within defined limits, and to whom are delegated the exercise of a portion of the sovereign power of the state, is only co-extensive with the territory of the state.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, State Officer.]

6. Officers ¶103 — "Jurisdiction" includes territory as well as subject-matter.

The word "jurisdiction" embraces not only the subject-matter coming within the powers of officials, but also the territory within which such powers are to be exercised.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Jurisdiction.]

7. Officers ¶103—Official power does not accompany person beyond bounds of sovereignty which conferred it.

Official power cannot accompany the person beyond the bounds of the sovereignty which has conferred it.

8. Licenses ¶22—Examination of applicants for certificates as public accountants must be within the state; "quasi judicial" power; "judicial action."

Examination of applicants for certificates as public accountants under C. S. §§ 7008-7024, section 7016 of which authorizes the State Board of Accountancy to hold such examinations "at such places as it may designate," is not a mere ministerial duty, such as might be delegated to others, but a "judicial action" or "quasi judicial" power required to be performed by the members of the Board themselves, the submission and supervision of the holding of the examination and the determination of the qualifications of applicants constituting one official act requiring judgment and discretion, and, the performance of such act being a function of government designed to benefit the people of the state, the Board exceeds its jurisdiction in going beyond the boundaries of the state to perform it.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Judicial Action; Judicial Power.]

9. Statutes \Leftrightarrow 225—Construed in relation to other laws on same, cognate, or even different subjects.

A statute is to be construed in its relation to other laws as part of a general and uniform system of jurisprudence in connection with other statutes on the same or cognate subjects, or even on different subjects.

10. Statutes \Leftrightarrow 183—Construed consistently with general principles of law, the spirit prevailing over letter.

Where the language of a statute is of doubtful meaning or adherence to the strict letter would lead to injustice, the court gives a reasonable construction consistent with the general principles of law; the spirit or reason of the law prevailing over its letter.

11. Statutes \Leftrightarrow 194—Meaning of general terms restrained by evident object and general language construed to admit implied exceptions.

The meaning of general terms in a statute may be restrained by the evident object or purpose to be attained and general language construed to admit implied exceptions in order to accomplish what was manifestly intended.

12. Statutes \Leftrightarrow 203—Court may adopt construction from analogous provisions and thus supply an omission.

Where ordinary interpretation leads to consequences so dangerous and absurd that they could never have been intended, the court may adopt a construction from analogous provisions and thus supply an omission.

13. Statutes \Leftrightarrow 1—Not effective beyond territorial limits of sovereignty from which authority derived.

As a general rule, no law has any effect of its own force beyond the territorial limits of the sovereignty from which its authority is derived, every statute being *prima facie* confined in its operation to the persons, property, rights, or contracts which are within the territorial jurisdiction of the Legislature which enacted it.

14. Officers \Leftrightarrow 103—Official acts to be done beyond state's limits must be by express legislative permission.

Though the Legislature may require certain official acts to be done beyond the state's limits, such as taking depositions of witnesses, acknowledgments of deeds, etc., such acts are done by its express permission and cannot be implied.

15. Evidence \Leftrightarrow 10(2)—Court on admitted facts may determine whether certain official acts are for public or mere private convenience.

In an action to enjoin the State Board of Accountancy of North Carolina from examining applicants for certificates in Washington, D. C., on the ground it exceeded its jurisdiction under C. S. §§ 7008-7024, where defendants claimed they proposed to give such examination at the solicitation and for the convenience of applicants living in and near Washington, but did not deny that some applicants were going to Washington from North Caro-

lina, the Supreme Court may judge for itself of the relative convenience of Washington and the city of Raleigh for applicants already in North Carolina, and whether examination outside the state is for public interest or personal interest of applicants.

16. Constitutional law \Leftrightarrow 12—Exercise of granted power limited to means expressly given.

When the means for the exercise of a granted power are given, no other or different means can be implied as being more effective or convenient.

17. Injunction \Leftrightarrow 74—Equity may enjoin acts of judicial and quasi judicial officers.

When judicial and quasi judicial officers exceed their jurisdiction or abuse their discretion, their action is subject to review by the courts, which may enforce or enjoin their act.

18. Officers \Leftrightarrow 119—Exercise of discretion may be reviewed by the courts.

The exercise of discretionary power is subject to review by the courts where it has violated some rule of public policy, is illegal, or in excess of jurisdiction.

19. Constitutional law \Leftrightarrow 81—Act requiring examination of applicants for certificates as public accountants lawful exercise of police power.

C. S. §§ 7008-7024, creating the State Board of Accountancy and requiring the examination of applicants for certificates to practice such profession, is a lawful exercise of the state's police power to safeguard the public against incompetent accountants and to prevent unjust discrimination against accredited members of the profession who have met the conditions imposed by law in the manner prescribed.

20. Injunction \Leftrightarrow 75—Court may enjoin examination of applicants for certificates as public accountants outside state.

The Supreme Court, at the suit of a citizen or taxpayer, may enjoin the State Board of Accountancy from examining applicants for certificates beyond the state, though the Board, under C. S. § 7016, may hold such examination at such times and places as it may designate.

21. Injunction \Leftrightarrow 136(1)—Interlocutory injunction to preserve status quo until determination of controversy is generally proper.

When the parties are at issue concerning a right, it is generally proper to grant an interlocutory injunction to preserve the status quo pending the controversy, especially when the principal relief sought is in itself an injunction, as in the case of an action to enjoin the State Board of Accountancy from holding an examination of applicants for certificates outside the state.

22. Injunction \Leftrightarrow 21—Repetition of illegal official act will be enjoined though officers declare intention not to do so.

The court will enjoin the State Board of Accountancy from examining applicants for certificates outside the state in excess of its authority under C. S. §§ 7008-7024, though

such an examination had been held; it being still possible for defendants to repeat such act, though they had declared their intention not to do so.

Appeal from Superior Court, Mecklenburg County; Ray, Judge.

Action by D. H. McCullough against George G. Scott and others, constituting the State Board of Accountancy. Judgment for defendants, and plaintiff appeals. The Attorney General was made a party plaintiff in the Appellate Court. Reversed.

This action was brought by the plaintiff, who is a duly certified public accountant, to enjoin the defendants from exercising certain of their duties beyond the limits of the state, and, to be more exact, from examining applicants for licenses and certificates to practice, as public accountants, beyond the state and in the city of Washington, D. C.

The case was tried below on demurrer to the complaint and the motion to vacate a restraining order theretofore granted. The court sustained the demurrer and vacated the restraining order, and refused a preliminary injunction to the final hearing. Plaintiff appealed.

Cochran & Beam and Carrie L. McLean, all of Charlotte, for appellant.

E. R. Preston, of Charlotte, and James A. Lockhart, of Wadesboro, for appellees.

WALKER, J. (after stating the facts as above). The State Board of Accountancy was created by a special act of the Legislature of 1913, the act being chapter 157 of the Public Laws of 1913, brought forward in the Consolidated Statutes as chapter 116, §§ 7008 to 7024, inclusive. The function of this Board is to examine applicants and grant certificates, as certified public accountants of the state of North Carolina, to those giving evidence by such examination that they are qualified. The statute provides (C. S. 7010) that—

"The Board shall determine the qualifications of persons applying for certificates under this chapter, and make rules for the examination of applicants and the issue of certificates herein provided."

The statute further provides (C. S. 7016):

"The examination shall be held as often as may be necessary in the opinion of the Board, and at such times and places as it may designate, but not less frequently than in each calendar year."

[1] Before entering upon a discussion of the merits, we will first consider a preliminary question based upon the motion of the plaintiff in this court to make the Attorney General a party as coplaintiff, so that the title of the case shall be "The State, on the

Relation of the Attorney General and D. H. McCullough," as plaintiffs, against the present defendants. The defendants resist the granting of this motion on the ground that the amendment here will deprive them of the benefit of their second ground of demurrer taken below, that plaintiff had no right to bring this action, and that this court will not allow an amendment, when such a result will follow. This is true generally, as the cases cited by the defendants show. *West v. Railway*, 140 N. C. 620, 53 S. E. 477, 6 Ann. Cas. 360; *Bonner v. Statesbury*, 139 N. C. 3, 51 S. E. 781; *Wilson v. Pearson*, 102 N. C. 290, 9 S. E. 707; *Grant v. Rogers*, 94 N. C. 755. And they further contend that it would substitute a new cause of action. If we could see that such would be the result, and that defendants would be prejudiced thereby, we might deny the motion; but it does not so appear to us. The plaintiff has some interest in the cause of action, as a member of the class for whose benefit this law was enacted, and is subject to the general supervision of its Board and its official bodies, and also he has such interest as a citizen and taxpayer, in seeing that funds, in which the public have an interest, should not be diverted to an illegal purpose or squandered for unauthorized purposes, and more especially he has an interest in requiring that funds raised for the support of this quasi public body, they being trustees of the class of which he is a member, should not be unlawfully expended by the Board, but should be held by it to subserve the special objects for which it was created.

[2] But, however this may be, and it is not necessary that we should definitely decide it, this court has allowed the amendments requested, which are in the interest of a hearing of the case upon its real merits, and in accordance with, at least, one of our former decisions, when a similar amendment was ordered here. *Fort v. Boone*, 114 N. C. 176, 19 S. E. 632 (op. by the present Chief Justice). There it was held, as the syllabus of the case shows, that where an action was brought on the official bond of a clerk of the superior court in the name of the parties injured by a breach thereof, it was not error in the court below to permit an amendment of the summons by the insertion of the words "The State on Relation of" after the pleadings were filed. The court, in the opinion, says with respect to this holding:

"We may note, however, that the exception that the judge allowed the summons to be amended by adding the words 'State on Relation of' before the name of plaintiff was not error. *Maggett v. Roberts*, 108 N. C. 174. It might have even been allowed after verdict (*Brown v. Mitchell*, 102 N. C. 347), or, indeed, in this court"—citing *Hodge v. Railroad*, 108 N. C. 24, 26, 12 S. E. 1041; *Grant v. Rogers*, 94 N. C. 755; *Tyrrel v. Simmons*, 48 N. C. 187; Code, § 965.

We then have a case in the name of the state, upon the relation of its Attorney General and D. H. McCullough, against the defendants, to enjoin the violation by the latter of the law creating them, wherein it is alleged that they have committed an ultra vires act, and to the extent that, if they may pay their expenses in the doing of the alleged unlawful act, they will misapply the trust fund established by the statute for the lawful costs and expenses of the Board, and thereby are diminishing the amount which should go into the public treasury by the terms of the law, which provides in Consol. Statutes, § 7019, that after paying expenses, "any surplus arising shall, at the end of each year, be deposited by the treasurer of the Board with the state treasurer to the credit of the general fund." The Consol. Statutes, § 1143, entitled "Actions by the Attorney General to Prevent Ultra Vires Acts" by corporations, provides:

"In the following cases the Attorney General may, in the name of the state, upon his own information, or upon the complaint of a private party, bring an action against the offending parties for the purpose of—

"1. Restraining by injunction a corporation from assuming or exercising any franchise or transacting any business not allowed by its charter.

"2. Restraining any person from exercising corporate franchises not granted.

"3. Bringing directors, managers, and officers of a corporation, or the trustees of funds given for a public or charitable purpose, to an account for the management and disposition of the property confided to their care.

"4. Removing such officers or trustees upon proof of gross misconduct.

"5. Securing, for the benefit of all interested, the said property or funds.

"6. Setting aside and restraining improper alienations of the said property or funds.

"7. Generally compelling the faithful performance of duty and preventing all fraudulent practices, embezzlement, and waste."

—to restrain corporations from ultra vires acts, and which was applicable where purpose was not to dissolve corporation, as under section 1187, but to preserve it in its useful functions without abuse of powers. *Atty. Gen. v. R. R.*, 28 N. C. 456. This section embodies provisions of Rev. Code, c. 26, § 28; Rev. Statutes, c. 26, § 10; Acts of 1831, c. 24, § 5—which authorized injunction proceedings in a court of equity.

The authority, given by statute, as approved by this court, would seem to be ample justification for granting the relief prayed for by plaintiff in this action. The Attorney General is doing only what the statute permits him to do in the interest of the public, of his own motion, or upon the complaint of a private party.

[8] Having disposed of this preliminary question, we proceed to consider the case upon its merits. It must be steadily kept

in mind that we are now dealing with an overruled demurrer, and we can consider only the facts alleged in the complaint (which are to be taken as admitted), and no extraneous matter. *Hartsfield v. Bryan*, 177 N. C. 166, 98 S. E. 379; *Brewer v. Wynne*, 154 N. C. 467, 70 S. E. 947; *Wood v. Kincaid*, 144 N. C. 393, 57 S. E. 4.

[4] We are firmly convinced that the statute, under which the defendants professed to hold this examination, does not authorize them to perform their duties, and exercise their functions, outside the state, and that, on the contrary, it requires them to confine their activities strictly within its limits. We do not suppose, for an instant, it will be controverted that defendants are public officers. The Board created by the act is, at least, a quasi public corporation, required to discharge certain public duties and responsibilities to the state and bound for their proper and legal performance, and also for the care and administration of the funds they handle, the surplus of which, not used for defraying the Board's expenses, being required to be deposited in the state treasury. In *Groves v. Barden*, 169 N. C. 8, 84 S. E. 1042, L. R. A. 1917A, 228, Ann. Cas. 1917B, 316, our court defines the word "officers," and refers with approval to the case of *Attorney General v. Tillinghast*, 17 Ann. Cas. 452. These cases, with the authorities therein collected, and the later authorities given in the notes to *Groves v. Barden* (169 N. C. 8, 84 S. E. 1042, L. R. A. 1917A, 228) in Ann. Cas. 1917B, p. 316, furnish us the indicia by which we determine whether a given position is or is not an "office." Applying to the State Board of Accountancy the tests laid down in the cases, we find that the Board was directly created by the Legislature; the qualifications of its members are prescribed by law; all to be residents of the state, three to be actively engaged as certified public accountants of this state, one to be a lawyer of the state in good standing; the treasurer is required to give bond; the funds belong to the state after the expenses of the officer are paid; there is intrusted to this Board some of the sovereign authority of the state, it being an arm of the state government; the duties are not merely clerical, or those of agents or servants, but are performed in the execution and administration of the law, in the exercise of power and authority bestowed by the law; they are appointed by the Governor; the people of the state at large are concerned in the performance of their official acts; their compensation is derived from fees fixed by law; they are not under contract with the state, either as to their duties or their compensation; the law fixes the duration of their term of office; such discretionary power is granted and such judgment required in the exercise of the functions for which the Board

was created as to render the official acts of its members quasi judicial; the duties are continuing in their nature, i. e., they are to be regularly performed; and the duties pertaining to the office cannot be delegated to others. The certificates granted by the Board constitute a license to practice as certified public accountants within the state. The position held by each of the defendants complies with all the tests prescribed in *State ex rel. Attorney General v. Noland Knight*, 169 N. C. 333, 85 S. E. 418, L. R. A. 1915F, 898, Ann. Cas. 1917D, 517.

[5] In 22 R. C. L. 896, boards of education, boards of legal examiners, and boards of equalization of taxes are mentioned as among various well-known instances of boards of public officers. It is admitted that the jurisdiction of the Board is state-wide, and if the members are officers, they are therefore state officers. The plaintiff contends, and it is true, that the jurisdiction of state officers is only coextensive with the territory of the state from which they derive their powers. "It is apparent that in strictness a mere license or power conferred by statute is only coextensive with the sovereignty from which the license or power emanates." 17 R. C. L. 502. "State officers are those whose duties concern the state at large, or the general public, although exercised within defined limits, and to whom are delegated the exercise of a portion of the sovereign power of the state. They are in a general sense those whose powers and duties are coextensive with the state." 38 Cyc. 852. In *State v. Hocker*, 39 Fla. 477, 22 South. 721, 63 Am. St. Rep. 174, after reciting very fully the attributes necessary to constitute an officer, it was held that without any semblance of doubt the members of the board of legal examiners were state officers; the field for the exercise of whose jurisdiction, duties, and powers was coextensive only with the limits of the state.

[6] It cannot be said that "coextensive with state boundaries" means more than the words imply; that is so contradictory that the mere statement of it is seemingly absurd. The word "jurisdiction" embraces not only the subject-matter coming within the powers of officials, but also the territory within which the powers are to be exercised. *State v. Magney*, 52 Neb. 508, 72 N. W. 1006, 1008. The question as to jurisdiction must be considered with reference to the territory within which it is to be exercised. *Konold v. Rio Grande W. Ry. Co.*, 16 Utah, 151, 51 Pac. 256. "Jurisdiction" is defined to be the "power to hear and determine causes." The hearing is as important a part of jurisdiction as the determining. The power of officials to act as fixed and limited by the place of performance is discussed in the case of *Harris v. State*, 72 Miss. 960, 18 South. 387, and particularly in the

notes to the same case in 33 L. R. A. 85. While it is true that in most of the cases referred to in those notes some place for performance was designated in the statute, still in the case of *Ex parte Branch*, 63 Ala. 383, cited in this connection, it is said:

"If the law should not, however, appoint a place for the sitting of a court, it would doubtless rest in the power of the judge to appoint the time and place of the sitting; and the only limitation of the power would be, that the place should be within the territory of his jurisdiction."

In *Ferebee v. Hinton*, 102 N. C. 99, 8 S. E. 922, the clerk of the court of Camden county, N. C., went to Virginia, and took the examination and acknowledgment of the parties to a deed of trust on land in North Carolina, but did not write out his certificate and sign it until he returned to Camden county, N. C. The court said that—

"the deed was void as to the wife, if the clerk of the superior court of Camden county took her privy examination in the state of Virginia," cannot be denied, and "it is unnecessary to cite authority in support of such a plain proposition [as to the admissibility of the evidence]. As to the other point, it is equally clear that the clerk had no jurisdiction when he took the privy examination in the state of Virginia."

This case is cited with approval in *Long v. Crews*, 113 N. C. 256, 18 S. E. 499, in which the present Chief Justice wrote the opinion, and in which he says:

"In this state it is settled law that an acknowledgment of a deed by the husband and privy examination of the wife taken before a justice of the peace, commissioner or notary, is a judicial, or at least, a quasi judicial act, and if such officer is not authorized to take it, the probate * * * and registration are invalid against creditors and purchasers. * * * The principle has been since followed in *Todd v. Outlaw*, 79 N. C. 235; *Duke v. Markham*, 105 N. C. 131; and many other cases. * * * These were all cases where the registration and probate were insufficient because the acknowledgment was made before an officer, by reason of his locality, not authorized or acting outside of his local jurisdiction, and the ruling is sustained by ample authority elsewhere. 1 Am. & Eng. Enc. 146, note 2, and 1 Devlin on Deeds, sections 487 and 488, with cases cited. * * * The acknowledgment is taken, so to speak, coram non iudice, and cannot authorize probate by the clerk and registration"—citing authorities.

Acts of a school officer must generally be performed at the times and places designated by law, or they will be invalid; and, generally speaking, they must be performed within the territory over which the officer's jurisdiction extends. 24 R. C. L. 578.

In *Pardrige v. Morgenthau*, 157 Ill. 395, 42 N. E. 74, the judge out of court and off the bench approved an appeal bond and di-

rected it to be filed *nunc pro tunc*, and it was decided to be invalid. In *Bear v. Cohen*, 65 N. C. 511, it was held that a judge appointed by the Governor to hold court in Wilson and Craven counties did not have jurisdiction to act in cases pending in other counties of the district—specifically, to set aside an attachment in Wayne county. In *State v. Jefferson*, 68 N. C. 309, the judge left the court in Warren county before the jury agreed on a verdict, and went to his home in the adjoining county of Franklin, where he was advised by telegraph that the jury could not agree. He instructed the clerk by wire to discharge the jury and remand the prisoner. Discussing error in the exercise of power by the court (the validity of his act as affected by the place of its performance), it was held to be the duty of the judge that he should be personally present in court, and therefore his act was illegal, and the prisoner was entitled to his discharge. When in 1913 our Legislature enacted a curative statute validating probates and acknowledgments taken prior to 1913 by officers out of the county, or district, authorized by law, only such probates or acknowledgments were validated as had been taken within the state. Laws 1913, c. 125; C. S. 3336. In *re Allison*, 13 Colo. 525, 22 Pac. 820, 10 L. R. A. 790, 16 Am. St. Rep. 224, it was said that—

"No issue was made with the definition usually given, that a 'court' consists of 'persons officially assembled, under authority of law, at the appropriate time and place, for the administration of justice,' nor was it denied that the place of meeting was an important element in the definition."

[7, 8] It is elementary that when the law confers upon a person powers that he as a natural person does not possess, that power cannot accompany his person beyond the bounds of the sovereignty which has conferred the power. For example, letters testamentary or of administration have no legal effect beyond the territorial limits of the state in which they are granted. An executor or administrator cannot sue in his official capacity in the courts of any other state than that from which he derives his authority to act in virtue of the letters there granted to him, because his appointment stops at the boundary of the state which appointed him. 11 R. C. L. pp. 432-447. He must resort to ancillary administration in the other state. A state may have extraterritorial officers, such as commissioners to take acknowledgments of deed in other states and territories, but such cases are clearly exceptional. 22 R. C. L. 405. The same familiar principle that forbids court officials, executors, administrators, and guardians from acting in their official capacity beyond the state boundaries, is applied in the case of corporations. In the case of *Miller v. Ewor*, 27 Me. 509,

46 Am. Dec. 619, it was held that a general clause in a charter authorizing certain persons to call the first meeting of a corporation at such time and place as they think proper does not authorize them to call the meeting at a place without the state. Numerous cases may be cited to establish the general principle that meetings of corporations for the performance of corporate acts must be held within the state creating the corporation. 14 Cor. Jur. 886, and 7 R. C. L. 335. Our own state has enacted this principle into the statute, i. e., that meetings of stockholders must be held within the state. The reason given for this rule is that in the performance of corporate acts, the corporation shall be at all times under the supervision and control of the laws of the state creating the corporation. If this be true of private corporations, a fortiori is it true of an arm of the state government, a body corporate to whom has been intrusted the performance of a governmental duty designated to protect the people of the state against unskilled and incompetent persons in a profession for which the state has seen fit to fix standards of proficiency before admission to practice.

As has been said, "jurisdiction" involves the hearing as well as the determining of matters to be decided—indeed the hearing of the matter is the basis for the determination. The giving of examinations for determining the qualifications of applicants is not a mere incidental or ministerial duty such as might be delegated by the State Board of Accountancy to other persons, but is a judicial or quasi judicial duty required to be performed by the members of the Board themselves, and in order further to safeguard the public, certain standards of skill are required of the examiners. The plaintiff contends that the submission and the supervision of the holding of the examination, and the determination of the qualifications of applicants, constitute one official act, requiring such judgment and discretion as to render it judicial or quasi judicial in character; that it is the performing of a function of government designed to benefit the people of the state; and therefore in going beyond the boundaries of the state to perform this function, the Board would exceed its jurisdiction. It seems superfluous to cite other authorities than those already cited from our own court in *Ferebee v. Hinton*, 102 N. C. 99, 8 S. E. 922, and in *Long v. Crews*, 113 N. C. 256, 18 S. E. 499, either as to the judicial character of the official acts of the Board of Accountancy, or as to the place where these acts may be performed. The comparatively simple act of taking the acknowledgments and examination of the grantors in a deed, by a notary, commissioner, justice of the peace, or clerk, has been repeatedly held by this court to be

judicial, not only in the cases cited above, but in *Attorney General v. Knight*, 169 N. O. 333, 85 S. E. 418, L. R. A. 1915F, 898, Ann. Cas. 1917D, 517; *Paul v. Carpenter*, 70 N. C. 508; *White v. Connolly*, 105 N. O. 68, 11 S. E. 177; *Piland v. Taylor*, 113 N. O. 1, 18 S. E. 70; and others.

Bishop on Noncontract Laws, §§ 785, 786, says that quasi judicial functions are those which lie midway between the judicial and the ministerial ones. The lines, separating them from such as are on their two sides, are necessarily indistinct; but in general terms, when the law, in words or by implication, commits to any officer the duty of looking into facts, and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is termed quasi judicial. In 18 R. O. L. 294, in discussing the extent to which a board of examiners may be controlled in granting professional licenses, the discretionary power to pass on qualifications is termed "judicial," and in every case where the acts complained of constituted an abuse of discretion or an excess of jurisdiction, it is held that the courts should intervene to enforce or enjoin, as the circumstances might be. In 22 R. C. L. 383, it is said that certain officers are considered quasi judicial, as, for example, members of a board of pilot commissioners, to whom the law has intrusted certain duties, the performance of which requires the exercise of judgment. In *Boner v. Adams, Auditor*, and *Jenkins, Treasurer*, 65 N. O. 639, it was held that the state auditor is not a mere ministerial officer, but exercises discretionary powers. It was held in *Ex parte Garland*, 4 Wall. (U. S.) 333, at 378, 18 L. Ed. 366, that the admission and exclusion of attorneys is the exercise of judicial power, and had been so held in numerous cases at that time. This has been approved in numerous later decisions referred to in *Rose's Notes*, vol. 6, p. 55. In *Troop on Public Officers*, p. 507 et seq. it is said that although an officer may not in strictness be a judge, still, if his powers are discretionary, to be exerted or withheld according to his own view of what is necessary and proper, they are in their nature judicial. Where a power rests in judgment or discretion, so that it is of a judicial nature or character, but does not involve the exercise of the functions of a judge, or is conferred upon an officer other than a judicial officer, the expression used is generally "quasi judicial." It is a general and sound principle that whenever the law vests any person with a power to do an act, and constitutes him a judge of the evidence on which the act may be done, and, at the same time, contemplates that the act is to be carried into effect through the instrumentality of agents, the person thus clothed with power is invested with discretion, and is quoad hoc a judge.

By "judicial action" is meant, in legal understanding, that which requires the exercise of judgment or discretion by one or more persons, or by a corporate body, when acting as public officers, in an official character, as shall seem to them to be equitable and just.

In *State v. State Medical Examining Board*, 32 Minn. 324, 20 N. W. 238, 50 Am. Rep. 575, in *People v. Dental Examiners*, 110 Ill. 180, in *State v. Gregory*, 83 Mo. 123, 53 Am. Rep. 565, in *Williams v. Dental Examiners*, 93 Tenn. 619, 27 S. W. 1019, and many similar cases, it was held that examining boards for physicians, dentists, lawyers, and other professions, exercise judicial or quasi judicial powers; and in all other cases the courts addressed themselves largely to determining whether the act complained of was within, or in excess, or abuse, of such powers; if the latter, it could be enjoined or enforced by the courts. In the much-cited case of *State v. Chittendon*, 127 Wis. 468, 107 N. W. 500, at 516, it is said that the law leaves the matter (decision as to status of the college) to the board, acting reasonably, the same as similar matters are commonly left to such agencies exercising quasi judicial authority. It contemplates that the members of the board will proceed with the dignity and fairness commonly expected of tribunals exercising judicial or quasi judicial authority; that they will act as a body; that they will act upon proof of some sort reasonably appropriate to the case and made a matter of record, not necessarily that they will, in all cases, act regardless of personal investigation, but that in case of reliance thereon the result of the investigation will be made a matter of record. In short, that they will exercise their judicial function judicially, and that their decisions will be open to review by the courts for jurisdictional error.

[9-11] The general rule for the construction of statutes, when applied to the law under consideration, clearly indicate that the intention of the Legislature, and the object to be secured by the performance of the duties presented for the Board of Accountancy, require that the words "at such places as it may designate" shall be construed to mean "at such places within the state as it may designate." In construing a statute, it is to be considered in its relation to other laws, as part of a general and uniform system of jurisprudence, in connection with other statutes on the same or cognate subjects, or even on different subjects. Where the language is of doubtful meaning, or adherence to the strict letter would lead to injustice, the court gives a reasonable construction consistent with the general principles of law. The spirit or reason of the law prevails over its letter. The meaning of general terms may be restrained by the evident object, or

purpose to be attained, and general language may be construed to admit implied exceptions, in order to accomplish what was manifestly intended. It is proper to consider the occasion and the necessity for its enactment, and that construction should be given which is best calculated to advance the object by suppressing the mischief and securing the benefits contemplated. If the purpose, and well-ascertained object of a statute, are inconsistent with the exact words, the latter must yield to the controlling influence of the legislative will resulting from a consideration of the whole act. A statute should not be extended beyond the fair and reasonable meaning of its terms because the Legislature did not use proper words to express its meaning. Where the ordinary interpretation of a statute leads to consequences so dangerous and absurd that they could never have been intended, the court may adopt a construction from analogous provisions and thus supply an omission. *Abernethy v. Com'rs*, 169 N. C. 631, 86 S. E. 577.

[12] The above is a summary of some of the general principles for the construction of statutes as laid down in 36 Cyc. 1102 et seq., and many decisions, and when applied to the statute under consideration in the case at bar, the conclusion is inevitable that the field for the discharge of the functions of the State Board of Accountancy is not the whole world, but only "such places within the state as the Board may designate." In *State v. Insurance Co.*, 66 Ark. 466, 51 S. W. 633, 45 L. R. A. 348, in construing a statute in which the word "any" occurred thirteen times in the first section, the court held that although the Legislature may use generally words, such as "any" or "all," in describing the persons or acts to which the statute applies, still it does not follow that the law has any extraterritorial effect; for it is presumed that the Legislature did not presume it to have such an extensive, or world-wide effect, unless the language of the statute admits of no other reasonable interpretation. *Bond v. Jay*, 7 Cranch (U. S.) 351, 3 L. Ed. 367. The reports furnish numerous instances of the application of this rule, by which general words used in statutes are taken as limited to cases within the jurisdiction, of the Legislature passing the statute, and confining its operation to matters affecting persons and property in such jurisdiction. If it were necessary, hundreds of cases and statutes could be referred to containing general words which are thus limited. Among the vast number of cases construing such statutes, it is doubtful if one can be found in which such general words have not been treated as limited to some extent, for it is unusual for a Legislature to intend that its statutes shall apply everywhere.

[13] We have already referred to the law of corporations as being a law on a cognate

subject. Even more closely allied is our law as it relates to such professions as law, medicine, etc. Until 1917, our statute did not prescribe where the examinations for entrance to the bar were to be held, and even now the statute (C. S. 195) says that examinations for license to practice law may be held in the city of Raleigh. Before 1917 the examiners for admission to the bar did not construe their authority to permit holding examinations outside the state, nor since 1917 at any place other than the city of Raleigh, even though the word "may" sometimes implies discretion. Section 6609, Cons. St., prescribes that the board of medical examiners shall meet in the city of Raleigh. Section 6701, Cons. St., prescribes that the board of osteopathic examiners shall meet in Raleigh in July of each year, "and at such other times and places as a majority of the board may designate." In our statutes, some discretion is permitted the various other boards of examiners for dentists, pharmacists, nurses, teachers, etc. In these cases, however, we are not left to apply only the general rules for the construction of statutes. The law is unmistakably clear that the Legislature has no power to enact statutes, even though in general words, that can extend in their operation and effect beyond the territory of the sovereignty from which the statute emanates. The legislative authority of every state must spend its force within the territorial limits of the state. *Cooley's Cons. Lim.* p. 154. As a general rule, no law has any effect of its own force beyond the territorial limits of the sovereignty from which its authority is derived. 25 R. O. L. 781; *Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95. Black, on Interpretation of Laws, p. 91, says:

"Prima facie, every statute is confined in its operation to the persons, property, rights, or contracts, which are within the territorial jurisdiction of the legislature which enacted it. The presumption is always against any intention to attempt giving to the act an extraterritorial operation and effect."

Endlich, on Interpretation of Statutes, p. 233, announces the same principle.

No presumption arises, from a failure of the state through its legislative authority to speak on the subject, that the state intends to grant any right, privilege, or authority under its laws to be exercised beyond its jurisdiction. *Walbridge v. Robinson*, 22 Idaho, 236, 125 Pac. 812, 43 L. R. A. (N. S.), 240. Either the statute applies to "such places within the state as the Board may designate," or its scope is unlimited, and, for the convenience of applicants, the Board may hold examinations anywhere and everywhere it sees fit. And if this Board may go outside the state to hold examinations, why may not every other examining board of the state do

likewise if the place is left to its discretion? Obviously, this would be subversive of public policy, of the spirit and intent of the law, would defeat the very ends which these protective statutes were enacted to accomplish, and might, in effect, make the creature greater than the creator.

[14] We must not be understood as holding that the Legislature may not require certain official acts to be done beyond the state's limits, for it can legally do so, as for example in requiring depositions of witnesses or the acknowledgment of a deed or other instrument, to be taken in some other state, or even in a foreign country, and perhaps there are other illustrations of this legislative power. But they are done by its express permission, and are not merely implied.

The demurrer of the defendants admits as true the allegations of the complaint that the defendants intended:

1. To hold the examination outside the state.

2. To use in that examination the same questions that had been used in the preceding week in an examination in Raleigh; and

3. That these duplicate questions were available to candidates for certificates in the Washington examination.

[15, 16] The defendants say that it was at the solicitation of applicants and for their convenience (not for the public welfare or interest) that they proposed to give the duplicate examination in Washington the week following the Raleigh examination. As a matter of fact, the defendants do not deny that some applicants were going to Washington from North Carolina to take the duplicate examination. This court may judge for itself of the relative "convenience" of Washington and Raleigh for applicants already in this state, and of the interest of the citizens of this state to be served by holding a duplicate examination outside the state the week after such examination was held in Raleigh. The plaintiff seems to be in entire accord with the statement of the defendants in their demurrer that the act creating the State Board of Accountancy and prescribing its duties and powers was passed in the interest of the general public, to protect them against incompetent, inefficient, or dishonest persons, and not for the purpose of granting special privileges or emoluments to any class of persons. The plaintiff contends, however, that in attempting to hold an examination in the city of Washington, "at the earnest solicitation of numbers of applicants living in that section," and, as stated by defendants on the hearing, "for the convenience of applicants," the Board was attempting to "grant special privileges" to those applicants, and even greater "special privilege" was the intended use of duplicate questions which were available to applicants. This court, with these admitted facts before it, can judge

whether an official act thus performed is "for the public interest" or for the promotion of the personal interest of applicants. It is an unprecedented thing for the other examining boards of the state to go beyond the borders of the state to give examinations (much less duplicate examinations) to applicants who may not find it convenient to come to the state to take the same. Yet the defendants claim that they are justified in going hundreds of miles beyond the state boundaries, the week following an examination in Raleigh, to give a duplicate of that examination, because it is more convenient to certain applicants to take the examination in Washington—and some of the applicants going from this state to Washington for that purpose. As well suggested by the plaintiff's learned counsel, it is peculiar to certified accountants in Washington that the mountain should come to Mahomet. It is an established rule that when the means for the exercise of a granted power are given, no other or different means can be implied, as being more effective or convenient. Cooley's Cons. Lim. (4th Ed.) p. 78. In stating in the call that this was "positively the last examination to be held outside the state," the Board of Accountancy impliedly admits that it considered such procedure irregular, to say the least.

[17, 18] The authorities cited above, defining judicial and quasi judicial officers, also establish the principle that when such officers exceed their jurisdiction or abuse their discretion it is subject to review by the courts; in fact, so fundamental is this principle that in most of the cases the courts do not discuss it, but address themselves to determining whether or not the act complained of was in excess of jurisdiction or in abuse of discretion, and if they decide these questions in the affirmative, then it is held as a matter of course that the act should be enforced or enjoined, as the case may be. In *Throop on Public Officers*, p. 525 et seq., it is said that where, in the exercise of a power, an officer is vested with a discretion, his act is regarded as quasi judicial. But, of course, if the officer or board attempts to exercise a power, either judicial or ministerial, in a case to which his or its jurisdiction does not extend, the act is either absolutely void or voidable by judicial proceedings, as the case may be. But the exercise of discretionary power is always subject, in some respects, to review by the courts. So it may be reviewed, where it has violated some rule of public policy, and of course it will be violated by any illegality or excess of jurisdiction. This principle has been enacted into our state laws for municipalities (C. S. 2962), giving to any taxable inhabitant the right to maintain an action to set aside or prevent any illegal official act on the part of the municipality or its officers, and it

is also well settled by numerous decisions of this court, and has received the sanction of the Supreme Court of the United States in *Crampton v. Zabriskie*, 101 U. S. 601, 609, 25 L. Ed. 1070, quoted in *Dillon, Mun. Cor.* § 1581, and cited with approval in *Stratford v. Greensboro*, 124 N. C. 127, 32 S. E. 394. In referring to statutes similar to our own as found in *C. S. 2962, Dillon, Mun. Cor.,* § 1585, says:

"The first class of wrongs provided for by the statute is simply defined as 'an illegal act,' and the statute contains no express provision that the illegal official act against which redress is sought be one which has resulted or will result in loss or injury to the municipality. So far as the literal language of the statute is concerned, any illegal official act may be prevented at the suit of a taxpayer having the requisite status as such. This liberal interpretation of the statute has been supported by the courts."

In the notes to the above, it is said, citing authorities, that an illegal official act which may be the subject of the taxpayer's action may be any act of a municipal officer which is not authorized by law or which is in excess of the authority conferred by law. In actions brought by taxpayers the court has taken jurisdiction and has restrained or annulled official acts of great diversity of character.

[19] The state in the lawful exercise of its police power has created the State Board of Accountancy and required examinations of applicants to safeguard the public against incompetent accountants. Every citizen of the state is, in a certain sense, injured when the duties of the Board are performed in such a manner as to let down the bars and lower the standards of the profession. There is an especial injury to properly accredited members of the profession who have met the conditions imposed by law, in the manner prescribed by law. Poor Richard says, "He who hath a trade hath an estate." A man's profession is his capital. The state has set standards for entrance into this profession, and those who have entered in the manner prescribed by law are entitled to the protection of the state to the extent, at least, that they shall not be unjustly discriminated against by admission of other into the profession in any other way than that prescribed by law.

[20] It is not necessary to go beyond the decisions of our own court to establish the contention that this is a subject for the cognizance and intervention of our courts. In *Glenn v. Commrs.*, 139 N. C. 421, 52 S. E. 58, our court said: "If an ultra vires act were being threatened, the courts would enjoin it." In all the following cases it is said that when a discretionary power is exercised wrongfully, or transcends the authority of the officers, or is ultra vires, or when there

is a manifest abuse of discretion, the courts will enforce, or enjoin the act, as the case may be, at the suit of a citizen, or taxpayer, and whenever the court has declined to intervene, it has been on the ground that the act complained of was *infra vires*. *Brodnax v. Groom*, 64 N. C. 244; *Vaughn v. Commissioners*, 118 N. C. 636, 24 S. E. 425; *Stratford v. Greensboro*, 124 N. C. 127, 32 S. E. 394; *Edgerton v. Water Co.*, 126 N. C. 93, 35 S. E. 243, 48 L. R. A. 444; *Ewbank v. Turner*, 134 N. C. 77, 46 S. E. 508; *Barnes v. Commissioners*, 135 N. C. 27, 47 S. E. 737; *Graves v. Commissioners*, 135 N. C. 49, 47 S. E. 134; *Merrimon v. Paving Co.*, 142 N. C. 539, 55 S. E. 366, 8 L. R. A. (N. S.) 574; *Newton v. Com'rs*, 158 N. C. 196, 73 S. E. 886; *Commissioners v. Commissioners*, 165 N. C. 632, 81 S. E. 1001; *Supervisors v. Com'rs*, 169 N. C. 548, 86 S. E. 520; *Cobb v. R. R.*, 172 N. C. 58, 89 S. E. 807.

The decisions of the courts of other states and the principle announced by the various text-books are well summarized in *Perkins v. Indl. School Dist.*, 56 Iowa, 476, 9 N. W. 356, where it was held that the courts of the state are arbiters of all questions involving the construction of the statutes conferring authority upon officers and jurisdiction upon special tribunals. It was certainly never the intention of the Legislature to confer upon school boards, superintendents of schools, or other officers discharging quasi judicial functions, exclusive authority to decide questions pertaining to their jurisdiction and the extent of their power. All such questions may be determined by the courts of the state. Hence, when the rights of a citizen are involved, in the exercise of authority by a school officer, the courts may determine whether such authority was lawfully exercised.

[21] As to the demurrer, we have covered the entire field of inquiry, as the facts stated in the complaint are to be taken as admitted. On the motion for a continuance of the injunction to the hearing, there is an affidavit of Mr. G. G. Scott denying that the same questions as propounded in the state were used in the Washington examination, thereby giving the applicants there a decided advantage over those examined here. But we need not settle the controversy of fact, because it has been the rule for time out of mind that where there is conflict in the evidence the injunction is generally continued to the hearing. We stated the prevailing rule in *Cobb v. Clegg*, 137 N. C. 153, at page 159, 49 S. E. 80, where it was said that it is generally proper, when the parties are at issue concerning the legal or equitable right, to grant an interlocutory injunction to preserve the right in statu quo until the determination of the controversy, and especially is this the rule when the principal relief sought is in itself an injunction, because a dissolution of

a pending interlocutory injunction, or the refusal of one, upon application therefor in the first instance, will virtually decide the case upon its merits and deprive the plaintiff of all remedy or relief, even though he should be afterwards able to show ever so good a case. The principles we have attempted to state are, we think, well supported by the authorities upon this subject, citing 1 High on Injunctions (3d Ed.) § 6; Bishpam's Eq. (6th Ed.) § 405; Marshall v. Com'rs, 89 N. C. 103; Capehart v. Mhoon, 45 N. C. 30; Jarman v. Saunders, 64 N. C. 367; Lowe v. Com'rs, 70 N. C. 532, and other authorities. In the Marshall Case, supra, the court said:

"The injunctive relief sought in this action is not merely auxiliary to the principal relief demanded, but it is the relief, and a perpetual injunction is demanded. To dissolve the injunction, therefore, would be practically to deny the relief sought and terminate the action. This the court will never do, where it may be that possibly the plaintiff is entitled to the relief demanded. In such cases, it will not determine the matter upon a preliminary hearing upon the pleadings and ex parte affidavits, but it will preserve the matter intact until the action can be regularly heard upon its merits. Any other course would defeat the end to be attained by the action."

[22] The case last cited is directly in point here. But without the aid of this principle and the authorities sustaining it, we hold that the injunction should have been continued to the final hearing. It is argued that this case is like that where the tree was cut down, after the restraining order against felling it had been vacated. Harrison v. Bryan, 148 N. C. 315, 62 S. E. 305, and these additional cases are cited, supposedly to the same effect. Pickler v. Board of Education, 149 N. C. 221, 62 S. E. 902; Wallace v. North Wilkesboro, 151 N. C. 614, 66 S. E. 657; Moore v. Monument Co., 166 N. C. 211, 81 S. E. 170. But they do not apply to this case, as the facts are not the same. In Harrison v. Bryan, supra, the tree had fallen under the stroke of the axe, never to rise again. It could not grow again after it had been destroyed. It had died and was therefore beyond restoration. This was a fact established, and not even a mandatory injunction could change it. But here, the act of the defendants may be repeated—it, at least, is possible for them to do so, and plaintiffs are not bound by their declared intention not to repeat their mistake. The law will strip them of the power to do so by its restraining process.

The entire judgment below will be reversed, injunction to the final hearing issued, the demurrer overruled, and the defendants permitted to answer over, if they so desire.

Reversed.

SCHOOL DIST. NO. 19 v. MARION COUNTY. (No. 10762.)

(Supreme Court of South Carolina. Dec. 6, 1921.)

Appeal and error \Rightarrow 1099(3)—Judgment reversing order sustaining demurrer to complaint held *res judicata* as to right to recover on merits.

Judgment of Supreme Court, reversing order sustaining demurrer to complaint in action against county on ground that county could not be sued, *held res judicata* on subsequent appeal as to the right to recover against the county in the action on the merits.

Appeal from Common Pleas Circuit Court of Marion County; R. W. Memminger, Judge.

Action by School District No. 19 against the County of Marion. Judgment for plaintiff, and defendant appeals. Appeal dismissed.

The exceptions referred to are as follows:

(1) In that his honor erred, it is respectfully submitted, in not granting the first ground of defendant's motion for a directed verdict, to wit: "Because it now appears affirmatively from the testimony and evidence that, in the cutting of the trees in question, the road hands went without the public highway and committed a trespass, and the enabling act, whereby counties may be sued, does not extend the liability of the corporation to trespasses committed by persons who may be in its employment"—it being submitted that the injury proved in this case arose through neither a defect in the highway nor in the negligent repair thereof, but, on the contrary, arose from a trespass on property entirely without the highway.

(2) In that his honor erred, it is respectfully submitted, in not granting the second ground of defendant's motion for a directed verdict, to wit: "Because it now appears affirmatively from the testimony and evidence that, in the cutting of the trees in question, the road hands went without the public highway and committed a trespass without authority from the county commissioners, and, under the terms of the enabling act, providing for suits against counties, the county is no more liable for the cutting of these trees than it would be, had the hands burned the schoolhouse or committed some other like act of trespass"—it being submitted that, in going upon the lands of another and committing a trespass thereon, the road hands exceeded the scope of their employment or agency, and the corporation cannot be held liable therefor.

M. C. Woods, of Marion, for appellant.
J. W. Johnson, of Marion, for respondent.

GARY, C. J. The following statement appears in the record:

"This action was commenced by respondent against appellant on September 1, 1919, for damages alleged to have been sustained by re-

spondent from the cutting down of trees by road hands on respondent's lot. To the complaint, the appellant interposed a demurrer, which was sustained by the circuit judge, and the order of the circuit judge was reversed on appeal. 114 S. C. 382, 103 S. E. 767. The case was tried on its merits at the spring term of the court of common pleas for Marion county, and the jury gave respondent a verdict for \$250. Within due time appellant gave notice of intention to appeal."

There are two reasons why the exceptions cannot be sustained. In the first place, the questions raised are res adjudicata; and, in the second place, the principles for which the appellant contends are concluded by the cases of *Faust v. Richland County* and *Kelly v. Richland County*, 109 S. E. 151, in which the opinions were recently filed; the decisions having been rendered by the court en banc.

Appeal dismissed.

WATTS, FRASER, and COTHRAN, JJ., concur.

COTHRAN, J. I concur in the ground that the former appeal is res adjudicata. The judgment in that appeal is in my opinion wrong, and should have been overruled, for the reasons given by me in the case of *Faust v. Railroad Co.* Both cases will yet be overruled.

(118 S. C. 10)

MILLER v. COOPER, Governor, et al.
(No. 10759.)

(Supreme Court of South Carolina. Dec. 6, 1921.)

Mandamus ¶10—Will not lie to compel state official to present, audit, and approve claim for services where it is not clear that state agreed to pay.

Mandamus will not lie to require officials to present, audit, and approve dentist's claim for services performed on inmates of penitentiary where there is a controversy as to whether the state had agreed to pay for such services.

Appeal from Common Pleas Circuit Court of Richland County; W. H. Townsend, Judge.

Mandamus by G. F. Miller against R. A. Cooper, Governor of the State of South Carolina, as ex officio member of the Board of Directors of the State Penitentiary, and others. Writ denied, and relator appeals. Appeal dismissed.

Relator claimed to have performed dental services for inmates of state penitentiary, and brings this proceeding against the defendant officials to require them to present, audit, and approve his claim therefor. The defendants denied that the state had con-

tracted to pay relator for such services, and claimed that the services were to have been paid for by the inmates for whom services were rendered.

Order of lower court denying writ is as follows:

This matter came on for hearing before me upon petition and return thereto and traverse herein filed. Upon consideration of the entire matter, and after hearing argument of counsel, I hold that the matter of contract between the parties herein is in controversy, and is not conclusive; it is not clear that the petitioner was employed by the superintendent of the penitentiary, and therefore the case does not present facts justifying a writ of mandamus. Therefore it is ordered that the petition be, and hereby is, dismissed, and the prayer refused.

T. H. Peebles and G. D. Bellinger, both of Columbia, for appellant.

Samuel M. Wolfe, Atty. Gen., for respondents.

GARY, C. J. For the reasons assigned by his honor the circuit judge, the appeal herein is dismissed.

WATTS, FRASER, and COTHRAN, JJ., concur.

(118 S. C. 73)

DE HAY et al. v. SMITH et al. (No. 10757.)

(Supreme Court of South Carolina. Dec. 6, 1921.)

1. Partition ¶46(1)—Rule requiring personal representative to be made a party is not jurisdictional.

Circuit court rule 55, prohibiting partition of real estate of a deceased person unless the personal representatives are parties, and the personal estate is sufficient for the payment of debts, or provision for such payment is made in the decree for partition, is only a rule of practice, and is not jurisdictional in its nature.

2. Partition ¶46(1)—Administrator of deceased owner held not a necessary party.

In a suit for partition of the estate of a deceased person, a complaint alleging that the estate owed no debts, and that the sole distributees were parties to the action, shows that the administrator was not a necessary party to the action, especially where the plaintiffs, in their exception to the sustaining of a demurrer for failure to make him a party, indicated willingness that provision in the decree should be made for the payment of any debts of the estate.

Appeal from Common Pleas Circuit Court of Dorchester County; I. W. Bowman, Judge.

Action for partition by Shulle De Hay and others against C. V. Smith and others. From an order sustaining the demurrer of the

named defendant to the complaint because of a defect of parties, plaintiffs appeal. Reversed.

M. S. Connor, of St. George, and Wolfe & Berry, of Orangeburg, for appellants.

Legare Walker, of Summerville, for respondent.

GARY, C. J. The facts are thus stated in the record:

"This is an action for partition of 43 acres of land situate in Dorchester county, in said state.

"The complaint states, *inter alia*, 'that T. G. Smith, late a resident of the county of Dorchester and state aforesaid, departed this life intestate on or about the — day of May, 1917, leaving as his sole heirs at law and distributees of his estate the plaintiffs and the defendants above named, together with his widow, Sarah Smith, who died on or about the — day of September, 1919; (2) that there was no administration upon either the estate of T. G. Smith, deceased, or Sarah Smith, deceased, and their respective estates owed no debts.'

"To this complaint, and in due season, the respondent, C. V. Smith, by counsel interposed a demurrer that the complaint showed upon its face a defect of parties in that the administrator of the estate of T. G. Smith had not been made a party.

"After hearing arguments thereon, Hon. I. W. Bowman, presiding judge, sustained this demurrer, and made an order requiring the complaint to be amended within 30 days by making the administrator a party, else that the complaint stand dismissed.

"Within 10 days the appellants served due written notice of intention to appeal therefrom to the Supreme Court."

The following are the appellant's exceptions:

"1. Because his honor erred in sustaining the said demurrer.

"2. Because his honor erred in requiring the administrator to be made a party.

"3. Because his honor erred in not holding that the said demurrer should be overruled because: (1) More than 12 months had elapsed since the death of T. G. Smith; (2) no creditor had administered; (3) no administrator had ever been appointed; and (4) due provision could be made for the payment of debts, if any, in the decree of the court, by advertising for such creditors, and requiring them to present and prove their claims, agreeably to the practice of this court, before the master."

[1] So much of rule 55 of the circuit court as relates to the question involved is as follows:

"No partition of real estate of a deceased person shall be had unless the legal representatives of such deceased person be made parties to the action and it be made to appear to the court that the debts of such deceased person are fully paid, or that the personal es-

tate in the hands of the personal representative or representatives is sufficient for the payment of the debts of such deceased person, or unless in the decree due provision is made for the payment of debts."

It is only a rule of practice, and not jurisdictional in its nature. *Gladden v. Chapman*, 106 S. C. 486, 91 S. E. 796.

[2] The complaint alleges that neither the estate of T. G. Smith nor that of Sarah Smith owed any debts, and that the sole distributees of said estates are parties to this action. Therefore the administrator of T. G. Smith's estate was not a necessary party to the action. *Fogle v. St. Michael Church*, 48 S. C. 86, 26 S. E. 99; *Grant v. Poyas*, 62 S. C. 426, 40 S. E. 891; *Thompson v. Ins. Co.*, 95 S. C. 16, 78 S. E. 439; *Lanter v. Ins. Co.*, 114 S. C. 536, 104 S. E. 193.

Subdivision (4) of the third exception indicates a willingness on the part of the appellant that due provision should be made for the payment of the debts, if there should be any.

Reversed.

WATTS, FRASER, and COTHRAN, JJ., concur.

(118 S. C. 6)

GULF REFINING CO. v. McCANDLESS et al. (No. 10758.)

(Supreme Court of South Carolina. Dec. 6, 1921.)

1. Bailment \S 21—Renting or hiring of property for "temporary use" within statute as to recordation of agreement defined.

The renting or hiring of property for "temporary use" within Civ. Code 1912, \S 3740, requiring agreements between bailor and bailee to be in writing, and to be recorded in same manner as chattel mortgages, and providing that the requirement shall not apply to "persons renting or hiring property for temporary use," is a renting or hiring of property for such length of time as is not reasonably calculated to mislead subsequent creditors and purchasers into the belief that the person in possession is the owner; the word "temporary" not being used in contradistinction to the word "permanent."

2. Judicial sales \S 50(1) — Rule of caveat emptor prevails in sale of property under compulsory process.

Where property is sold under compulsory process to raise money to pay debts, the rule of caveat emptor prevails, and the officer sells and the purchaser buys only the interest which the debtor has in the property.

Appeal from Common Pleas Circuit Court of Richland County; W. H. Townsend, Judge.

Action by the Gulf Refining Company against W. J. McCandless and another. Judgment for defendants, and plaintiff appeals. Reversed.

W. N. Graydon and A. J. Bethea, both of Columbia, for appellant.

E. J. Best and C. N. Sapp, both of Columbia, for respondents.

GARY, C. J. This is an action to recover the possession of a gasoline tank and piping; and the appeal involves the construction of section 3740, Code of Laws 1912, which is as follows:

"Every agreement between the vendor and vendee, bailor or bailee, of personal property, whereby the vendor or bailor shall reserve to himself any interest in the same, shall be null and void as to subsequent creditors (whether lien creditors or simple contract creditors) or purchasers for valuable consideration without notice, unless the same be reduced to writing and recorded in the manner now provided by law for the recording of mortgages; but nothing herein contained shall apply to livery stable keepers, inn keepers, or any other persons, letting or hiring property for temporary use or for agricultural purposes, or depositing such property for the purpose of repairs or work or labor done thereon, or as a pledge or collateral to any loan."

The allegations of the complaint material to the questions raised by the exceptions are as follows:

"That on or about the 15th day of March, 1917, plaintiff entered into an agreement with Motor Accessory Company of the city of Columbia whereby plaintiff, at the request of said Motor Accessory Company, and because said Motor Accessory Company was purchasing gasoline from plaintiff, and agreed to continue so to do, and in further consideration of an annual rental of \$1, installed on the street in front of the premises occupied by said Motor Accessory Company at 1205 Lady street one gasoline storage tank with the necessary piping by permission of said city of Columbia, and also by permission of the owner of the premises occupied by said Motor Accessory Company; that in and by said agreement it was understood that the Motor Accessory Company would not incur or remove said equipment, or do or suffer to be done anything where said equipment, or any part thereof, should be seized, taken in execution, attached, destroyed, or damaged, or by which the title of the plaintiff to same might in any way be disturbed or prejudiced. It was further stipulated in said agreement that upon the sale or any disposition of the premises by said Motor Accessory Company, or at the end of one year, said agreement should terminate, and plaintiff should have the right to enter upon the said premises and remove said equipment and every part thereof."

The defendants denied the allegations of the complaint and alleged by way of defense that on or about the 28th day of November, 1919, they purchased at a public sale which

was made pursuant to an order of the court in a bankruptcy proceeding all the goods and chattels of the Motor Accessory Company, including the said gasoline tank and piping, without notice of the plaintiff's title to the property.

The defendants were not creditors of the Motor Accessory Company.

His honor the presiding judge thus charged the jury:

"If you intrust your property into the hands of some one else, you should record that in writing in the clerk of court's office if that should be such property as the statute which I have just read includes. But, unless it should be in accordance with what the statute provides, then you are not required to record such a paper. For instance, if you go to a pawnshop, it would be different, and if you would go to a livery stable, and leave your horse there, it would be different. You would not have to have an agreement written out and recorded. If the property is intrusted to another party for a short, temporary period of time, that is one matter; but, if you intrust your property to some one else for a long period of time, which is intended to last indefinitely, from year to year, then the law requires that an agreement such as that be reduced to writing, and to be recorded. So I charge you that, if the gasoline tank was in the possession of the Motor Accessory Company, you will decide this case under the law as I have charged you, applied to the facts as you find them from the evidence."

The exceptions assign error on the part of his honor the circuit judge in defining the words "temporary use" in the foregoing section of the statute.

[1] In order properly to construe the words "nothing herein contained shall apply to any persons renting or hiring property for temporary use," it is necessary for us to ascertain the intention of the statute. Its primary purpose, unquestionably, was the protection of subsequent creditors and purchasers for valuable consideration without notice. Therefore the word "temporary" was not used in contradistinction to the word "permanent," or any definite period of time, but to indicate such length of time as is not reasonably calculated to mislead subsequent creditors and purchasers into the belief that the person in possession of the property is the owner thereof.

The charge of his honor the presiding judge failed to conform to this construction, and the error was prejudicial to the rights of the plaintiff.

There is another reason why the plaintiff was entitled to recover possession of the property.

[2] When property is sold under compulsory process to raise money to pay debts, the rule of caveat emptor prevails. The officer sells and the purchaser buys only the interest which the debtor has in the property.

In Perry v. Williams, Dud. 44, it is said:

"The rule in sheriff's sales is caveat emptor. The sheriff sells the interest of the defendant in the property, and the purchaser buys it, be it more or less. In the case of Moore v. Aiken, 2 Hill, 406, although it appeared that the defendant had no title, yet Aiken, who was the purchaser, was held to pay his bid. * * * In Davis v. Hunt, 2 Bailey, 412, the purchaser was held bound to pay, although he bought his own land, and did so under the supposition that his *fi. fa.* was the oldest."

See, also, *Latimer v. Wharton*, 41 S. C. 503, 19 S. E. 835, 44 Am. St. Rep. 739, and 16 R. C. L. 119, 120.

Reversed.

WATTS, FRASER, and COTHRAN, JJ., concur.

(118 S. C. 99)

STATE v. KNIGHT. (No. 10760.)

(Supreme Court of South Carolina. Dec. 6, 1921.)

1. Criminal law \S 516—Testimony as to defendant's statement, on demand for possession of automobile, that automobile was in another state, held not evidence of confession.

In prosecution for disposing of mortgaged automobile without mortgagee's consent, in violation of Cr. Code 1912, \S 447, admission of testimony as to statement, made by defendant on demand for the automobile, that the automobile was in another state, held not error, as against contention that it constituted the admission of confession before establishment of *corpus delicti*; such testimony not proving a confession.

2. Criminal law \S 1169(12) — Admission of testimony held harmless, in view of subsequent testimony as to certain facts.

The admission of testimony as to certain facts claimed to constitute a confession, to which the defendant afterwards testified without objection, if error, was harmless.

3. Chattel mortgages \S 230 — Removal of mortgaged automobile to other state held violative of statute against disposal of mortgaged property without mortgagee's consent.

Mortgagor's removal of a mortgaged automobile to another state without mortgagee's consent held violative of Cr. Code 1912, \S 447, prohibiting a person from selling or disposing of mortgaged personal property without mortgagee's consent.

Appeal from General Sessions Circuit Court of Greenwood County; F. B. Gary, Judge.

E. D. Knight was convicted of disposing of a mortgaged automobile without consent of mortgagee, and he appeals. Appeal dismissed.

Jones & Harrison and Tillman & Mays, all of Greenwood, for appellant.

H. S. Blackwell, Sol., of Laurens, for the State.

GARY, C. J. The defendant was charged with disposing of an automobile over which the Overland-Greenville Company held a mortgage, in violation of section 447 of the Criminal Code, which provides:

"Any person or persons who shall sell or dispose of any personal property on which any mortgage or lien exists, without the written consent of the mortgagee or lienor, or the owner or holder of such mortgage or lien, and shall fail to pay the debt secured by the same within ten days after such sale or disposal, * * * shall be deemed guilty of a misdemeanor. * * *"

The jury found him guilty; and the appeal herein is from the sentence imposed upon him. The exceptions are as follows:

"(1) Because his honor erred in admitting the testimony, over the objection of defendant's counsel, of A. McD. Singleton tending to show a confession of the defendant, E. D. Knight, that the automobile in question was in Augusta, Ga., before the state had established the *corpus delicti*.

"(2) Because his honor erred in admitting over objection the testimony of A. McD. Singleton tending to show a confession of E. D. Knight that the car had been removed from the county of Greenwood before the state had proved that the car had been sold or disposed of as contemplated in section 447, vol. 2, of the Code of Laws of South Carolina for 1912.

"(3) Because his honor erred in allowing A. McD. Singleton to testify as to the conversation which took place between himself and E. D. Knight, in that his honor stated that there was some testimony tending to prove the *corpus delicti*; whereas, there was no testimony tending to show that E. D. Knight had sold or disposed of the mortgaged property as contemplated by the statute.

"(4) Because his honor erred in refusing the defendant's motion for a directed verdict, in that the state had failed to prove that the removal of the property from Greenwood county was for the purpose of depriving the lienor of his rights under the mortgage.

"(5) Because his honor erred in refusing the defendant's motion for the direction of a verdict in that the state had failed to show that the automobile had been removed for the purpose of defrauding the holder of the mortgage.

"(6) Because his honor erred in refusing to allow the defendant's motion for the direction of a verdict at the close of the taking of all the testimony, in that there was not testimony sufficient to send the case to the jury."

[1, 2] The exceptions numbered 1 and 2 cannot be sustained, for the reason that the testimony therein mentioned cannot properly be classed as confessions. Furthermore, the defendant afterwards testified to such facts without objection.

[3] The third exception must be overruled, for the reason that there was testimony tend-

ing to show that the removal of the property to another state had the necessary effect of defeating the mortgage lien, which was sufficient to constitute a violation of section 447. In *State v. Haynes*, 74 S. C. 450, 55 S. E. 118, this court said:

"We think that removal of property from the jurisdiction of the state with the purpose or necessary effect of defeating the mortgage lien is such a disposal of property as falls within the meaning of the statute. If intention to defeat the lien is essential, one must be presumed to intend the necessary consequences of his voluntary acts." (*Italics added.*)

This language is quoted with approval in *Hill v. Winnsboro Granite Corp.*, 112 S. C. 243, 90 S. E. 836.

What we have already said disposes of the remaining exceptions.

Appeal dismissed.

WATTS, FRASER, and COTHRAN, JJ., concur.

(118 S. C. 93)

ADAMS v. WILKES et al. (No. 10735.)

(Supreme Court of South Carolina. Oct. 10, 1921.)

1. Appeal and error \S 1002—Findings on conflicting evidence not disturbed.

Finding of jury on sharply conflicting evidence cannot be disturbed on appeal.

2. Evidence \S 505—Conclusion of expert held properly excluded.

In an action against installers of heating plant for damages for loss of house by fire, court did not err in refusing to allow witness offered as an expert to state that pipe was not properly installed, and to state where in his opinion the fire started, having been allowed to state that the chimney was built wrong, that pipe entered the corner thereof, and to be safe it should have entered at front of the chimney, etc., since the opinion of witness as to where the fire started must necessarily have been a conjecture which the jury were as capable of forming as the witness.

3. Appeal and error \S 1058(2)—Erroneous exclusion of evidence cured by admission of testimony of same witness.

Any error of the court in refusing to allow a witness to answer the question, "If that pipe had been properly installed, how ought it to have gone in there," was cured where such witness as an expert testified what would have been a proper way to install the pipe.

4. Appeal and error \S 736—Exception contrary to rule not considered.

An exception containing three distinct propositions with no specification of error to any one of them in violation of Supreme Court Rules, No. 5, \S 6 (90 S. E. vii) will not be considered.

5. Evidence \S 353(8)—Pleaded portion of contract below signature held admissible.

Court did not err in allowing in evidence the pleaded portion of a contract containing a guaranty which appeared below the signature of the complaining party, being upon the same sheet, and becoming a part of the contract regardless of the particular point upon the paper where the signature appeared.

6. Evidence \S 150—Test of furnace held admissible in action for loss by fire.

In an action against installers of heating plant for loss of house by fire claimed to have been caused by proximity of wood to pipe, where defendant contended that furnace did not start fire, court properly permitted witness to testify that they tied paper on the pipe of a larger furnace, and that the pipe did not set it afire, though the paper was left there $8\frac{1}{2}$ hours with the register red hot.

7. Trial \S 28(2)—Allowing attorneys to accompany jury in viewing premises discretionary.

It is discretionary with the presiding judge to allow or refuse to allow attorneys in the case to accompany the jury on an inspection of premises involved.

8. Negligence \S 138(1)—Instruction held not to absolve installers of furnace from exercising due care.

In an action against installers of heating plant for damages for loss of house by fire, an instruction held to protect plaintiff from any possible inference that in contracting to furnish a suitable chimney defendants were absolved from the duty of due care under the circumstances.

9. Trial \S 327—Verdict in singular instead of plural not reversible.

In an action against several defendants, plaintiff cannot complain that the verdict was in the singular, "for the defendant" instead of in the plural.

Appeal from Common Pleas Circuit Court of Laurens County; Ernest Moore, Judge.

Action by J. J. Adams against S. M. Wilkes and others, partners in trade, and doing business under the firm name of S. M. & E. H. Wilkes & Co. Judgment for defendants, and plaintiff appeals. Affirmed.

Richey & Richey and H. S. Blackwell, all of Laurens, for appellant.

Simpson, Cooper & Babb and Featherstone & Knight, all of Laurens, for respondents.

COTHRAN, J. Action for \$7,000 damages, alleged to have been sustained by the plaintiff, in the destruction of his dwelling house by fire caused by the alleged negligence of the defendants in installing a heating plant, which they had undertaken under a written contract. The case was tried before Judge Moore and a jury, November term, 1920, and resulted in a verdict for the defendant. Plaintiff appeals.

On April 2, 1919, the plaintiff and the de

(109 S.E.)

defendants entered into a written contract, by which the defendants undertook to furnish and install in the plaintiff's dwelling house a heating plant of specified description, with certain accessories mentioned, for \$253.50. The contract contained a certain guaranty, the only portion of which pertinent to the present controversy is an undertaking on the part of the plaintiff to furnish "a suitable chimney," into the lower part of which the smoke pipe from the furnace was to be inserted.

[1] The contention of the plaintiff was that the connection between the smoke pipe and the flue of the chimney was negligently made, in that the end of the pipe where it entered the chimney was so near the wood-work of the house, the sill, and hearth box that the latter caught fire from the heat of the pipe and destroyed the house. The defendants contend that the installation was properly completed and that the fire originated from some other cause. Each contention was supported by more than a dozen witnesses. The issue was sharply drawn, one of fact, submitted to the jury in an exceedingly clear and fair charge; they decided it in favor of the defendants, and their verdict cannot be disturbed unless the appellant has been able to point out prejudicial error in the admission of testimony or in the charge of the presiding Judge. This he has failed to do, as we will endeavor to demonstrate.

[2] The first exception imputes error in refusing to allow the witness Fitzsimmons to state that the pipe was not properly installed, and to state where, in his opinion, the fire started, the witness having as claimed, qualified as an expert in the investigation and location of the origin of fires.

The witness was allowed to state that the flue (of the chimney) was built wrong; that the pipe entered the corner of the chimney; that to be safe it should have entered in front of the fireplace, and not at the corner of the chimney, with an elbow; that, entering the corner, there should have been a course of two bricks laid flat between the entrance of the pipe and any inflammable material. It was a necessary conclusion from this testimony that the pipe was not properly installed, which the jury were as capable of forming as the witness, and must have formed if they believed the witness. The refusal to allow the witness to state the only possible conclusion from this testimony was entirely proper.

The question of the origin of the fire was one of the issues of fact in the case, to be determined by the jury from the evidence. The opinion of the witness must necessarily have been a conjecture, which the jury were as capable of forming as the witness; the matter was properly left to them.

[3] The second exception imputes error in refusing to allow the witness May to answer the question:

"If that pipe had been properly installed, how ought it to have gone in there?"

The agreed case contained the statement:

"The witness then as an expert testified what would have been a proper way to have put the pipe in the chimney."

This covered any possible error that may have been committed.

[4] The third exception contains three distinct propositions, with no specification of error to any one of them, in violation of rule 5, § 6, Supreme Court Rules (90 S. E. vii), and will not be considered.

[5] The fourth exception imputes error in allowing in evidence the printed portion of the contract containing the guaranty, which appeared below the signature of the plaintiff. The guaranty was upon the same sheet, and became a part of the contract regardless of the particular point upon the paper where the signature appeared.

[6] The fifth exception imputes error in the admission of the testimony of two witnesses, who testified to a paper test they had made, to ascertain whether the heat of the pipe would be sufficient to ignite inflammable material at a point about 11 feet from the furnace. The contention of the plaintiff was that the pipe set fire to a wooden sill about 4 inches from the end of the pipe at the point where it entered the chimney. The testimony of the witnesses was to the effect that they made the paper test upon a furnace larger than the plaintiff's, the paper being tied on the pipe and left there 3½ hours with the register red hot, and that it did not ignite. The testimony was clearly admissible.

[7] The sixth exception imputes error in refusing to allow the attorneys in the case to accompany the jury in an inspection of the premises; a matter within the discretion of the presiding judge.

[8] The seventh exception is obnoxious to rule 5, § 6. We may say, however, that the circuit judge was exceedingly particular to protect the plaintiff from any possible inference that, in contracting to furnish a suitable chimney, the defendants were absolved from the duty of exercising due care under the circumstances. He charged the jury:

"So, if you conclude that the heating plant caused the fire, you next ascertain from the evidence whether or not there was negligence and carelessness on the part of the defendants in putting it in. Did they put it in so as to bring the heat in contact with, or so near, the timber as to communicate fire to the timber and then set fire to the house? Was there a piece of timber there, and by the exercise of due care could they have found out that it was there? These are questions of fact which you are to decide from the evidence, and the plaintiff must show you these facts by the greater weight of the evidence before he can recover."

[9] The eighth exception is a repetition of the foregoing grounds, except the specification that the verdict was in the singular, "For the defendant," instead of in the plural, which calls for no remark.

The judgment of this court is that the judgment of the circuit court be affirmed.

GARY, C. J., and WATTS and FRASER, JJ., concur.

(118 S. C. 44)

STATE v. ELDERS. (No. 10765.)

(Supreme Court of South Carolina. Dec. 10, 1921.)

1. Witnesses \S 267—Latitude in cross-examination rests largely in trial judge's discretion.

While a wide latitude is allowed in the cross-examination of a witness, such latitude necessarily rests in a large measure in the discretion of the trial judge.

2. Criminal law \S 163(3)—Appellant must show prejudice from restriction on cross-examination.

It is incumbent on appellant to show that he has been prejudiced by the trial judge's ruling restricting the cross-examination of a witness.

3. Criminal law \S 170½(5)—Witnesses \S 270(2)—Exclusion of question asked prosecuting witness on cross-examination held proper, and not prejudicial.

On a trial for assault and battery, where the prosecuting witness testified that defendant asked him to see if he could identify a horse, a question asked him on cross-examination, "If he was going to kill you over there, what good would your identification have done him?" was properly excluded, and its exclusion was not prejudicial, as the witness' answer would have been conjectural, in the nature of an opinion, and immaterial to the issue being tried.

Appeal from General Sessions Circuit Court of Union County; Edward McIver, Judge.

Palmer Elders was convicted of assault and battery with intent to kill, and he appeals. Affirmed.

Barron, Barron & Barron, of Union, for appellant.

I. C. Blackwood, Sol., of Spartanburg, and John K. Hamblin, of Union, for the State.

WATTS, J. The defendant was tried at the March term of the court for Union county, before Judge McIver and a jury, charged with an assault and battery with intent to kill, and, after conviction and sentence, appeals.

Earl Meadow, prosecuting witness, for the state, testified that the defendant said to him:

"Come over here. I want you to see if you can identify this horse."

On recross-examination by Mr. Barron, attorney for defendant, the question was asked:

"If he was going to kill you over there, what good would your identification have done him?"

This question was objected to, and the objection was sustained by his honor. The exceptions allege error on the part of his honor and seek reversal.

[1, 2] While a wide latitude is allowed in the cross-examination of a witness, that latitude necessarily rests in the discretion of the trial judge, in a large measure, and, when the judge rules, it is incumbent on the part of the appellant to show that he has been prejudiced by the ruling.

[3] If the witness had been permitted to answer the question, his answer would have been conjectural, in the nature of an opinion, and could not have been in any manner material to the issue being tried. His honor was right in sustaining the objection, and the appellant has been in no manner prejudiced by the ruling.

Exceptions overruled, and judgment affirmed.

GARY, C. J., and FRASER and COTH-RAN, JJ., concur.

(118 S. C. 20)

In re TURNER'S ESTATE.

BRABHAM v. TURNER et al.

(No. 10764.)

(Supreme Court of South Carolina. Dec. 10, 1921.)

Executors and administrators \S 221(5)—Finding that board and lodging was not gratuitous warranted, when there is some evidence of declarations of intention to pay.

Where there was evidence of declarations by decedent, who was claimant's wife's aunt, at the time she came to live with claimant and his wife, and afterwards, concerning her intention to pay for her board, a finding was warranted that the board and lodging was not furnished as a gratuity.

Appeal from Common Pleas Circuit Court of Bamberg County; T. J. Mauldin, Judge.

Proceedings on a claim of H. M. Brabham against Mrs. Lura Brabham, as executrix of Sue Turner, deceased, opposed by T. E. Turner. From an order of the circuit court sustaining the allowance of the claim by the

probate judge, T. E. Turner appeals. Affirmed.

The decedent was the aunt of the claimant's wife and had resided with claimant and his wife continuously for several years prior to her death. The claimant's wife testified that there was an agreement when she came to live with them as to paying board; that she said she wanted claimant and his wife to be well paid for providing for her; that the witness had heard her ratify this agreement over and over again; and that at one time decedent gave the claimant a check for board and medical services, stating that it was to go as part payment on what she owed, and that she wished she could pay more. Other witnesses testified to declarations by the decedent that she did not intend claimant to keep her for nothing, but that she had property, and intended him to be paid, and that she could not think of staying with him without paying him. The first three exceptions were to the action of the circuit judge in sustaining the probate court on the grounds (1) that the board and lodging were furnished gratuitously; (2) that there was no express contract between the claimant and deceased as to the payment of board and lodging, and the circumstances did not show clearly that decedent assumed a legal obligation to pay therefor; and (3) that there was no testimony of the payment for board and lodging or of an agreement to pay. The fourth exception was to the holding that the relationship of claimant and deceased was such that the presumption did not apply that the board and lodging were gratuitous.

E. H. Henderson, of Bamberg, and Brown & Bush, of Barnwell, for appellant.

Carter, Carter & Kears, of Bamberg, for respondents.

WATTS, J. This is an appeal from an order of his honor, Judge Mauldin, sustaining the order of probate judge in allowing a claim of Dr. Brabham against the estate of Miss Turner for board and lodging and medical services; the contention being that the claim for board and lodging should not be allowed, as the same were furnished as a gratuity. The exceptions, four in number, are overruled under the authorities of *Dash v. Inabinet*, 53 S. C. 386, 31 S. E. 297, *Wessinger v. Roberts*, 67 S. C. 245, 45 S. E. 169, and *Kaminer v. Kaigler*, 113 S. C. 225, 102 S. E. 20.

Judgment affirmed.

GARY, C. J., and FRASER and COTH-RAN, JJ., concur.

HAWKS v. MOORE. (No. 12237.)

(27 Ga. App. 555)

(Court of Appeals of Georgia, Division No. 1.
Nov. 16, 1921.)

(Syllabus by the Court.)

1. Appeal and error \S 1033(5)—Trial \S 228 (1)—Instruction as to owner's right to sell held favorable to him; instruction not erroneous because not embracing another proposition appropriate in connection therewith.

The court did not err in charging as complained of in the fourth ground of the motion for a new trial.

2. Brokers \S 46—Preliminary discussion or tentative agreement between owner and prospective purchaser does not defeat broker's right to commissions.

The portions of the charge referred to in grounds 6, 7, and 8 of the motion for a new trial are not erroneous for any reason alleged.

3. Sufficiency of evidence.

There is evidence to support the verdict.

(Additional Syllabus by Editorial Staff.)

4. Brokers \S 46—"Selling" by owner as affecting broker's right to commissions contemplates a mutually binding and enforceable contract.

A mere preliminary discussion between the owner and prospective purchaser, or a tentative agreement looking to sale, will not deprive an agent of his right to commission, as the word "selling," used in Civ. Code 1910, \S 3587, providing that "the fact that property is placed in the hands of a broker to sell does not prevent the owner from selling unless otherwise agreed," contemplates that the owner and purchaser have entered into a mutually binding and enforceable contract.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Sell.]

Error from Superior Court, Madison County; W. L. Hodges, Judge.

Action by J. L. Moore against G. F. Hawks. Judgment for plaintiff, and defendant brings error. Affirmed.

Gordon & Gordon, and Berry T. Moseley, all of Danielsville, for plaintiff in error.

W. M. Smith and John J. Strickland, both of Athens, for defendant in error.

BLOODWORTH, J. Moore sued Hawks, alleging that he had a written contract to sell a described tract of land belonging to Hawks, and that during the term of his agency he found a purchaser for the land "who was ready, able, and willing, and who actually offered, to buy the land in question on the terms stipulated by the defendant;" that the defendant himself, during the term of the agency of the plaintiff, sold the land to other parties, and refused to pay petitioner his commission. In his plea the defendant

denied that he ever signed any agency contract giving to plaintiff the right to sell the land, and alleged that he sold it in good faith before the plaintiff brought the purchaser found by him (the plaintiff) before him, and owed the plaintiff nothing. The trial resulted in a verdict for the plaintiff. The defendant made a motion for a new trial, which was overruled, and he excepted.

[1] In the light of the entire charge, the judge did not err in telling the jury that—

"There is no reservation in this contract to the effect that Hawks, the owner of the land, did not have the right to sell. That is conceded under the terms of the contract to be the truth."

This charge was favorable to the defendant. Nor was it erroneous because it "was not full enough." In *Lucas v. State*, 110 Ga. 756(1), 36 S. E. 87, it was held:

"A portion of a charge wherein a complete, accurate, and pertinent proposition is stated is not, in and of itself, erroneous simply because it fails to embrace an instruction which would be appropriate in connection with that proposition."

See, also, *Conley v. State*, 21 Ga. App. 134, 94 S. E. 261, and cases cited.

Counsel for the plaintiff in error do not argue the fifth ground of the motion for a new trial, but state in their brief that it was stricken by the court.

[2] The portions of the charge referred to in grounds 6, 7, and 8 of the motion for a new trial are not erroneous for any reason alleged.

[4] The word "selling" as used in section 3587 of the Civil Code 1910, in regard to a broker's right to a commission, where this section says, "The fact that property is placed in the hands of a broker to sell does not prevent the owner from selling unless otherwise agreed," contemplates that the owner of the land and the purchaser have entered into a contract that is mutually binding and enforceable. A mere preliminary discussion between the owner and the prospective purchaser, or a tentative agreement looking to the sale, under the evidence, will not deprive the agent of his rights to his commission "when, during the agency, he finds a purchaser ready, able, and willing to buy, and who actually offers to buy on the terms stipulated by the owner."

[3] The evidence is sufficient to support the finding of the jury, which has the approval of the trial judge, and this court will not interfere.

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(89 W. Va. 559)

ELY et al. v. PHILLIPS et al. (No. 4292.)

(Supreme Court of Appeals of West Virginia. Nov. 22, 1921.)

(Syllabus by the Court.)

1. Logs and logging \S 3(1)—Facts stated held not to justify finding of delivery.

The signing and acknowledgment, by two of three owners of a tract of land of a deed purporting to convey the timber thereon, with right to cut and remove the same within four years, for and in consideration of a large sum of money, payable partly in cash and partly in installments, on account of which a sum less than the cash payment was paid, the placing the same in the hands of the vendees, or one of them, for only an instant, the return thereof to the grantors, the transmission of it by one of them to his wife, for her signature and acknowledgment, and subsequent transmission thereof to the third owner for execution, are not sufficient to justify a finding of delivery of the deed.

2. Frauds, statute of \S 117—Executed deed, though not delivered, is sufficient "memorandum."

A deed, fully and completely signed and acknowledged, though not delivered, is a sufficient memorandum of a contract for the sale of land within the meaning of the statute of frauds.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Memorandum.]

3. Frauds, statute of \S 117—Delivery of memorandum of contract for sale of land not required.

Being in derogation of the common law, and therefore subject to the rule of strict construction, limiting its scope of operation by its terms, the statute of frauds does not require the delivery of a memorandum of a contract for the sale of land.

4. Contracts \S 35—Signers of contract prepared for their and other persons' signatures held not bound until all have signed.

Persons signing a contract prepared for signatures of others to be affixed along with theirs, and intended, as shown by proof, to be signed by all of the parties named in it, are not bound, until all have signed it, and incur no obligation if any of those who were to have signed it have refused to do so.

5. Frauds, statute of \S 115(1)—Memorandum of contract of sale by two or more must be signed by all.

A memorandum of a contract of sale of real estate by two or more persons, to be sufficient under the statute of frauds, must be signed by all of them.

Appeal from Circuit Court, Upshur County.

Suit by Ralph H. Ely and others against Ernest Phillips and others. Decree for the plaintiffs, and the defendants appeal. Reversed, and bill dismissed.

Brannon, Stathers & Stathers and Linn Brannon, all of Weston, for appellants.

Young & McWhorter, of Buckhannon, for appellees.

POFFENBARGER, J. The appellants in this cause, two of three tenants in common of a tract of land, seek reversal of a decree requiring specific performance of an alleged contract for conveyance by them of their interests in the timber on the land to the appellees. They own three-fourths of the land, Ernest Phillips one-fourth, Claude Burr one-half, and a stranger to the suit, J. C. McCoy, the remaining one-fourth.

There is no substantial controversy as to the facts. The appellees, Ralph H. Ely and Lloyd C. Wamsley, proposed to buy the timber on the 285-acre tract of land owned as aforesaid, for \$5,000, of which \$1,666 was to be paid in cash and the residue in 6 and 12 months, respectively, from the date of the deed, in equal installments bearing interest. Their negotiations were had with Phillips and Burr only, McCoy not being present, and the proposition was accepted and a deed prepared and executed by Phillips and Burr and their wives, and then sent to McCoy, who had been advised of the price at which his associates were willing to sell, and who, it was supposed, would promptly execute it, he having previously expressed satisfaction with the price. For some reason he declined to do so. At the date of execution of the deed by Phillips and Burr, the former accepted a \$300 payment on the timber. The bill and decree in this cause are based upon the theory of right in the appellees to have a conveyance of such title as Phillips and Burr can convey, and an abatement of the purchase money proportionate to McCoy's interest in the timber, which it is impossible to obtain.

[1] There is some conflict in the evidence as to whether the deed was delivered by Phillips and Burr, before it was sent to McCoy. Even though it may have been handed to one or both of the plaintiffs the circumstance is not conclusive of delivery, nor strongly probative thereof. It was admittedly handed back for transmission to Burr's wife and to McCoy and its return argues nondelivery with as much force as the other circumstance indicates delivery. Besides, it was incomplete. McCoy had not executed it, nor had Burr's wife. Less than one-fifth of the cash payment had been made. At that time, partial purchase was not considered by any of the parties, as the deed then prepared indicates and the parol evidence proves. The plaintiffs were not then willing to pay \$5,000 for three-fourths of it, and are not proposing to do so now. There are no arbitrary rules by which to determine whether a deed has been delivered. Ordinarily, delivery is a question of fact, dependent upon the intention of the parties. *Adams v. Baker*, 50 W. Va. 249, 40 S. E. 356; *Delaplain*

v. Grubb, 44 W. Va. 612, 30 S. E. 201, 67 Am. St. Rep. 788. The circumstances here disclosed make it clear that neither a delivery nor an acceptance of the deed in question was intended on the occasion of its preparation and acknowledgment by two of the owners.

[2, 3] If the deed had been signed by all three of the owners, but not delivered, it would have been a sufficient memorandum of the contract of sale, under the statute of frauds. *Parrill v. McKinley*, 9 Grat. (Va.) 1, 58 Am. Dec. 212; *Bowles v. Woodson*, 6 Grat. (Va.) 79; *Moore, Keppel & Co. v. Ward*, 71 W. Va. 393, 76 S. E. 807, 43 L. R. A. (N. S.) 390, Ann. Cas. 1914C, 263. Although the correctness of the first two of these decisions has been questioned, there is no good reason for doubting it. The statute does not forbid parol contracts. It merely enables a person who has made such a contract respecting any one of certain things to escape from it by prescription of a rule of evidence. It does not say any kind of a contract shall be void if not in writing. It merely denies remedies for enforcement of certain kinds of contracts if pleaded, unless they are in writing, or there are written memoranda of them. The writing need not be the contract, nor the only evidence of it. A memorandum of the terms of a verbal contract, signed by the party to be charged, suffices. Such a memorandum in whosoever hands found, whether delivered by the signer or not, manifestly complies with this requirement. Being in derogation of the common law, the statute is subject to the rule of strict construction, limiting the scope of its operation by its terms. Requirement of delivery of the memorandum would be beyond its terms, and, for reasons already stated, beyond its spirit and purpose as well.

Although the bill alleges a verbal sale of all of the timber, by Phillips and Burr, and the plaintiffs claim it in their testimony, they admit their knowledge of McCoy's interest in the land, expectation of his joinder in the deed, their preparation of a deed providing for his joinder therein, and the transmission of the same to him for acknowledgment by his cotenants. On the other hand, the defendants, in their answer and testimony, deny any purpose or intent on their part to convey the timber without joinder of their cotenant in the deed, and very positively assert intention on the part of all of the parties to the transaction to have consummation thereof by joinder of all of the vendors in the conveyance. The position taken by the defendants is much more consistent with the nature of the subject-matter of the negotiation than that assumed by the plaintiffs. Though a purchase was to be effected by a deed, the subject thereof was not title to a tract of land in fee simple. It was a mere estate in the timber, at the most, as the deed clearly indicates. It pur-

ports a conveyance of all of the timber on the tract of land, with certain exceptions, but it contemplates severance and removal thereof within four years from its date. Manifestly, therefore, the plaintiffs sought right to go upon the land and begin the cutting of the timber, soon after the execution and delivery of the deed. Under a conveyance of undivided interests in the timber, they could not have done so. McCoy's right and title extended to every tree on the land, although it was only a fractional interest. *Russell v. Tennant*, 63 W. Va. 623, 631, 60 S. E. 609, 129 Am. St. Rep. 1024. A deed for the timber, executed only by Phillips and Burr, would have made the plaintiffs tenants in common thereof with McCoy. That relation and title would have conferred upon them no right to cut the timber without his consent. *Hardman v. Brown*, 77 W. Va. 478, 88 S. E. 1016. Necessarily cognizant of lack of authority in Phillips and Burr to convey his interest in the timber, and also of the embarrassment incident to a grant of a temporary privilege or right upon the tract of land, which he could render practically unavailing and useless to them, the plaintiffs must have contemplated his joinder in the deed.

[4] The authorities are uniform in the holding that persons signing a contract prepared for signatures of other persons, to be affixed along with theirs, and intended to be signed by all of the parties named in it, are not bound until all have signed it, and incur no obligation, if any of those who were to have signed it refuse to do so. *Herndon v. Meadows*, 86 W. Va. 490, 103 S. E. 404; *Bean v. Parker*, 17 Mass. 591; *Wood v. Washburn*, 2 Pick. (Mass.) 24; *Howe v. Peabody*, 2 Gray (Mass.) 556; *Russell v. Annable*, 109 Mass. 72, 12 Am. Rep. 665.

This rule, like most others, has its exceptions, founded upon differences in circumstances and purposes as disclosed by the evidence. In the absence of testimony showing that execution by all of the parties was intended, or that prejudice to those executing it by reason of the failure of the others to join, if compelled to perform it, or some other reason or consideration calling for joint execution, the signatures of part of those named in the instrument bind them. *Mattoon v. Barnes*, 112 Mass. 463; *Naylor v. Stene*, 96 Minn. 57, 104 N. W. 685; *Dillon v. Anderson*, 43 N. Y. 231; *Whitaker v. Richards*, 134 Pa. 191, 19 Atl. 501, 7 L. R. A. 749, 19 Am. St. Rep. 684; *Russell v. Freer*, 56 N. Y. 67; *Hodges v. Hodges*, 56 Mass. (2 Cush.) 460; *Underhill v. Horwood*, 10 Ves. Jr. 209; *United Nickle Copper Co. v. Dominion Nickle Copper Co.*, 11 D. L. R. (Can.) 88. Positive testimony, as well as facts and circumstances, makes it obvious that this case falls within the general rule, not the exception.

[5] That a contract of sale of real estate by two or more persons, to be sufficient under the statute of frauds must be signed by all of them, has been judicially affirmed on more than one occasion. *Snyder v. Neefus*, 53 Barb. (N. Y.) 63; *Reynolds v. Dunkirk, etc., Ry. Co.*, 17 Barb. (N. Y.) 614; *Johnson v. Brook*, 31 Miss. 17, 66 Am. Dec. 547; 29 Am. & Eng. Ency. L. 858. The reason for this holding is that until signed by all of the parties, the contract is incomplete. As a memorandum stands in the place of the contract and performs its function, when the contract is verbal and only a memorandum is relied upon, it must necessarily be governed by the same rule. Lacking the signature of McCoy, the deed is not a sufficient memorandum of the verbal contract claimed, if, indeed, there ever was a complete verbal contract. As none of the parties were authorized to bind McCoy, there does not seem to have been such a contract.

These principles and conclusions make it apparent that the plaintiffs are not entitled to the relief sought by their bill; wherefore the decree complained of will be reversed and the bill dismissed.

LIVELY, J., absent.

(89 W. Va. 553)

WILSON v. FLEMING et al. (No. 4263.)

(Supreme Court of Appeals of West Virginia.
Nov. 22, 1921.)

(Syllabus by the Court.)

1. Appeal and error \S 977(3) — Judgment awarding new trial reversed only for manifest error.

A judgment awarding a new trial of an action will not be reversed unless it is manifestly erroneous.

2. Damages \S 24 — For future permanent consequences for personal injury must be certain, not remote or speculative.

To form the basis of a legal recovery for the future permanent consequence of the wrongful infliction of a personal injury, it must appear with reasonable certainty that such consequences will result from the injury. Possible or probable future injurious effects are too remote and speculative.

3. Highways \S 184(2) — Testimony as to how an automobile was being driven just before collision held admissible.

Where the speed and manner in which an automobile is driven when a collision occurs is one of the issues to be determined by a jury upon conflicting evidence, testimony tending to show that one of the colliding cars was being driven on a public road in a dangerous or uncertain manner, or at an extraordinary rate of speed, a few minutes before the collision, should, when offered, be submitted to the jury.

4. Negligence ⚡125—Evidence of former acts incompetent.

Evidence of former and remote negligent acts is incompetent to prove whether a person did or did not do the same or similar act of negligence on another particular occasion.

5. Time ⚡5—Where process is returned on first Monday of March, a declaration filed on first Monday in June is in time.

If a process duly executed is returned at March rules, 1917, to the office of the clerk who issued it, the declaration is filed in time within the meaning of section 7, chapter 125, Code (sec. 4761), if delivered to the clerk and filed by him June 4, 1917; March 5 and June 4 being respectively the first Monday of each of these months in 1917.

6. Evidence ⚡83(1)—Presumed that a public officer has performed his duty.

Unless the contrary clearly appears, the presumption ordinarily is that a public officer performs the duties required of him by law.

7. Evidence ⚡83(6)—Where circuit court clerk does not dismiss suit where declaration is not filed in time, the presumption is that he received it within statutory limit.

If a circuit court clerk does not dismiss a suit, as he is required to do, if a declaration is not filed in his office within the time prescribed by section 7, chapter 125, Code (sec. 4761), and if it be questionable whether he received and filed it within the time so required, the presumption is that he did receive and file it within the statutory time limit; there being no clear and convincing proof that it was not so received or filed.

(Additional Syllabus by Editorial Staff.)

8. Appeal and error ⚡699(2)—Cross-assignments as to instructions not in the record or bill of exceptions cannot be considered.

Cross-assignments, questioning court's action upon instructions, cannot be considered where not in the record and not made a part of the bill of exceptions, where Code Supp. 1918, c. 131, § 23 (sec. 4930b), as amended by Acts 1921, c. 68, even if applicable, was not in force when the case was tried.

9. Appeal and error ⚡692(1)—Record should show purport of excluded testimony.

Without an avowal of the purport of an answer contemplated, it does not appear whether appellant proponent was prejudiced by the ruling preventing the witness from answering.

Error to Circuit Court, Harrison County.

Action by George W. Wilson against Boyd S. Fleming and another. A verdict for the plaintiff was set aside, and the plaintiff brings error. Affirmed and remanded for retrial.

James C. McManaway and J. Philip Clifford, both of Clarksburg, for plaintiff in error.

Homer W. Williams, Carl W. Neff, and Melvin G. Sperry, all of Clarksburg, for defendants in error.

LYNCH, J. George W. Wilson sued to recover damages for injuries sustained in a collision of an automobile in which he was riding with another, operated by an agent of defendants, Boyd S. Fleming and Lloyd W. Groves, doing business as Auto Livery Company. The trial court having set aside as excessive a verdict for \$6,000, plaintiff brings the case here for review.

At the time of the accident, Wilson, in company with Claude Maxwell and two men named Williams, were driving from Clarksburg on the West Milford turnpike; their purpose being to examine some standing timber, which plaintiff proposed cutting for Maxwell. The machine in which they were riding had originally been a five-passenger touring car, but prior to the accident was converted into a light truck, the body and top having been removed, and a wooden truck body and two bucket seats substituted. Maxwell, the owner and driver, occupied one of these seats and plaintiff the other, the two Williams brothers being seated on the gasoline tank at the rear end of the truck body.

The collision occurred at a sharp turn in the highway, at a point where, because of a high bank, neither driver could see a great distance ahead. The evidence is contradictory as to which, if either, of the drivers was at fault. Maxwell and his companions testify that they were as near the right edge of the road as safety in making the turn would permit, and that their speed could not have been more than 8 to 10 miles per hour, that defendants' car negligently cut in towards them when the automobiles were but a few feet apart, and that it crashed into them at a speed of from 20 to 30 miles an hour. Defendants, on the other hand, insist with equal emphasis that Maxwell's car was not in a condition to be driven upon the highway, and in fact was so much of a wreck that even its appearance was notice to a passenger of its unsafe condition; that their driver, not Maxwell, was driving at a moderate rate of speed, about 12 miles per hour, when Maxwell "whipped the car around the corner," when it was too late to avoid the accident by driving between Maxwell's car and the bank on their right.

However contradictory the testimony as to the negligence of the drivers may appear to be, the car in which plaintiff was riding was damaged by the impact, and plaintiff was thrown violently to the ground, thereby sustaining injuries more or less severe and for which the jury compensated him in an amount which the trial court deemed excessive and unwarranted by the evidence.

As upon this point the case is to be considered and determined it is necessary to dwell upon the injuries sustained by plaintiff. Immediately following the collision, he "seemed to be doing an awful lot of complaining about

his breathing. He could not hardly get his breath, and when he did get it he hallowed." Some one assisted him in walking to a nearby house, and shortly afterward carried him in another automobile to a hospital in Clarksburg. There an examination by Dr. Haynes, a witness in the case for plaintiff, disclosed that—

"He had a fracture of one or more ribs. The upper part of the left side of his chest * * * and lung tissue evidently had been punctured by the ribs more or less at least, and [he] coughed and spit up blood, as I recollect it."

His lungs were congested within a few hours after the accident and in a day or two he developed pneumonia, with a temperature of 104½. After eight or nine days in the hospital he removed to a hotel, where he remained an additional two weeks, still under the care of a physician, at the expiration of which time he was so far recovered as to permit of his return to his home in Richwood. There he resided one week, after which, with his wife and two children, he removed to the farm of Claude Maxwell near Clarksburg. This was in the fall of 1916, and he continued at Maxwell's throughout the winter, or, according to Maxwell, until corn-planting time. During this period he did light work at intervals, feeding cattle, husking corn, etc., but the chief value of his presence, if we may credit Maxwell, arose from the service of plaintiff's wife, who cooked for other employees upon the premises. Subsequent to his residence on Maxwell's farm, plaintiff's place of abode and ability to work are disputed. That he did little, however, seems fairly well established, but whether this abstinence was due, as he claims, to physical disability produced by the accident or, as defendants allege, to natural aversion and indisposition to work, the evidence is inconclusive.

Assuming, however, that his inactivity was the result of the injuries, was not the verdict an inordinate amount? It was shown in the proof that the plaintiff, prior to this collision, was accustomed to receive a wage of \$50 to \$60 per month. At this rate, the impairment of his earning capacity during the three years between the date of the accident and the trial could not have caused him a loss of more than \$2,200. What then as to the balance of the jury's verdict? True, one injured by the fault of another is entitled to some recompense for suffering and inconvenience, but the facts warrant no such finding on that account. There is, as we see it, but one explanation, that is, that there was an attempt to compensate plaintiff for injuries believed by the jury to be of a permanent character. Can such belief be supported by any proper construction of the facts?

[1] At this point and before answering the query, it is proper to recall the doctrine long since recognized by this and other courts,

that an order setting aside a verdict is entitled to peculiar respect. *Miller v. Insurance Co.*, 12 W. Va. 116, 29 Am. Rep. 452; *Black v. Thomas*, 21 W. Va. 709; *Reynolds v. Tompkins*, 23 W. Va. 229; *Coalmer v. Barrett*, 61 W. Va. 237, 56 S. E. 385. As it is the province of the trial court alone to view the appearance and conduct of the jurors, parties, and witnesses in the trial, the soundness of the above rule is obvious. See *Shipley v. Virginian Ry. Co.*, 87 W. Va. 139, 104 S. E. 297. In view of this well-established practice it is therefore necessary in reaching our conclusion to respect the order of the trial court.

[2] Analysis of the evidence as to the effect of the injury upon plaintiff's physical condition suggests that plaintiff probably relied largely upon the answers to two questions, one directed to Dr. Wilson, and the other to Dr. Haynes. The first of these elicited information as to whether the impairment of the lung tissue was permanent; the answer to which was:

"I should think so. It has existed now for about nine months, according to my (X-ray) pictures."

The other, directed to Dr. Haynes, was:

"Do you consider this plaintiff so disabled and so afflicted with tuberculosis as that he is unable to work?"

The answer was:

"I have seen people working that has more tuberculosis than he has, but I do not consider him able to take a hard job and keep it."

The latter opinion, though frank, is of little consequence. The tuberculosis with which it was testified plaintiff was afflicted at the time of the trial was of the kind characterized by the physician as "latent," a malady not uncommon amongst "a great majority of people daily seen on the street." That its existence was the result of the injuries of which plaintiff complains is conjectural. The disease may, in some instances, be caused by injuries to the lung tissues, such as plaintiff is alleged to have suffered, but whether such was actually the case here it is not proper to hazard a guess. While at the time of the accident he "looked to be a man of good nutrition and muscular" and "better nourished" than at the date of the trial, there is nothing to enlighten us as to the existence or nonexistence of the disease, later discovered to be present. The evidence, therefore, is insufficient to establish a causal connection between the collision and the subsequent tubercular inoculation.

As Dr. Wilson's examination of plaintiff was admittedly superficial, his opinion that the impairment of the lung tissue was of a permanent character must have been, as he says, predicated upon the continuation of the condition, as shown by his X-ray pictures, the

(109 S.E.)

first taken in January, 1919, and the second in the next ensuing September, a few days prior to the trial. The testimony of the two expert witnesses, Drs. Wilson and Haynes, and especially that of the former, was speculative and uncertain in quality, due no doubt to the meager opportunity to acquaint him self with plaintiff's condition three years after the date of the injury. If he and Dr. Haynes, two competent physicians and surgeons, were unable after a treatment by one of them, and a more or less casual examination by the other, to discover an immediate connection between the injury and a disqualification of a permanent character to perform labor such as plaintiff had been able to perform before the injury, how could the jury reach such a conclusion as would warrant a verdict for permanent injuries, based solely upon the expert evidence? These witnesses exhibited on their examination commendable caution, qualifying their answers when pressed to express in positive terms their conviction as to the cause and probable continuation and growth of the tubercular infection. Their silence as to the extent the impaired condition of the lung tissues would or might affect the plaintiff's health or earning power is suggestive. This omission, when considered with other testimony, seems insufficient to establish even an approximate conception of an enduring disqualification for manual labor, and therefore sufficient to sustain the trial court's action upon defendant's motion for another trial.

According to an abundance of authority:

"The future effect of an injury upon the earning capacity of the person injured must be shown with reasonable certainty to authorize a recovery of damages for a permanent injury. A mere conjecture or even a probability does not warrant the giving of damages for a future disability which may never be realized." *Louisville Sou. Ry. Co. v. Minogue*, 90 Ky. 369, 14 S. W. 357, 29 Am. St. Rep. 378; *Missouri Pac. Ry. Co. v. Mitchell*, 75 Tex. 78, 12 S. W. 810; *Block v. Milwaukee Street Ry. Co.*, 89 Wis. 371, 61 N. W. 1101, 27 L. R. A. 365, 46 Am. St. Rep. 849; *Chicago, etc., Ry. Co. v. Lindeman*, 143 Fed. 946, 75 C. C. A. 18; *Howard v. Beldenville L. Co.*, 129 Wis. 98, 108 N. W. 48; *St. Louis, etc., Ry. Co. v. Bird*, 106 Ark. 177, 153 S. W. 104; *Breen v. Iowa Cent. Ry. Co.*, 159 Iowa, 537, 141 N. W. 410; *Marshall v. Wabash Ry. Co.*, 171 Mich. 180, 137 N. W. 89; *United R. & E. Co. v. Dean*, 117 Md. 686, 84 Atl. 75; *Allen v. St. Louis & S. F. Ry. Co.*, 184 Mo. App. 492, 170 S. W. 455; *Ongaro v. Twohy*, 49 Wash. 93, 94 Pac. 916; *Filer v. N. Y. C. Ry. Co.*, 49 N. Y. 42; *Chicago, R. I. & P. Co. v. McDowell*, 66 Neb. 170, 92 N. W. 121; *McBride v. St. Paul City Ry. Co.*, 72 Minn. 291, 75 N. W. 231; *Ford v. City of Des Moines*, 106 Iowa, 94, 75 N. W. 630; *Ohio & Miss. Ry. Co. v. Cosby et al.*, 107 Ind. 32, 7 N. E. 373; *Chicago & N. W. Ry. Co. v. De Clow*, 124 Fed. 142, 61 C. C. A. 34.

Testimony as to what might happen as the result of an accident is not competent.

Briggs v. New York, etc., Ry. Co., 177 N. Y. 59, 69 N. E. 223, 101 Am. St. Rep. 718. That plaintiff may suffer as a consequence of an accident is too broad as a basis of a recovery as for a permanent injury (*Melone v. Sierra Ry. Co.*, 151 Cal. 113, 91 Pac. 522), as he may be "liable to suffer" (*Green v. Catawba P. Co.*, 75 S. C. 102, 55 S. E. 125, 9 Ann. Cas. 1050). Reasonable certainty that future pain and suffering or loss of capacity to work will follow must be proved to warrant a verdict based on injuries of a permanent character. *Great Western Ry. Co. v. Bailey*, 9 Kan. App. 207, 59 Pac. 659; *Hardy v. Milwaukee Street Ry. Co.*, 89 Wis. 183, 61 N. W. 771; *Sanders v. O'Callaghan*, 111 Iowa, 574, 82 N. W. 969; *Hall v. Cedar Rapids, etc., Ry. Co.*, 115 Iowa, 18, 88 N. W. 739.

"Future consequences, which are reasonably expected to follow an injury, may be given in evidence for the purpose of enhancing the damages to be awarded. But to entitle such apprehended consequences to be considered by the jury, they must be such as in the ordinary course of nature are reasonably certain to ensue. Consequences which are contingent, speculative, or merely possible are not proper to be considered in ascertaining the damages. * * * To entitle a plaintiff to recover present damages for apprehended future consequences, there must be such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury." *Sedgwick, Damages* (9th Ed.) § 172, citing *Strohm v. New York, L. E. & W. Ry. Co.*, 96 N. Y. 305.

[3, 4] As one of several cross-errors assigned by defendants, they urge that the court erred in refusing certain evidence as to the condition of Maxwell's automobile. This evidence consisted of testimony relative to the presence and condition of such equipment as fenders, dashboard, cutout valve, fan, lights, horn, speedometer, springs, etc., apparatus with which automobiles are generally equipped. In view of the court's actual rulings on the admission of the testimony, we regard this contention as unfounded. True, certain statements concerning the absence or defective condition of some of the parts mentioned were excluded, but as it was not shown in what way, if any, their presence or absence was of importance so far as the collision was concerned, we see no error in their rejection. As it is well known that the external appearance of an automobile is a very uncertain test of its running condition, defendants' theory of imputed negligence has little application. The court did admit the testimony of Harris as to the condition of the brakes and springs, in so far as the operating of the car was affected thereby, and granted defendant express permission to recall plaintiff's witnesses and question them on the subject, which opportunity had formerly in part been denied. While not detailing each of the points raised, we are not of opinion

to disturb the court's rulings on this line of the evidence. If, however, it shall appear upon a retrial of the case that there is some causal relation between the infliction of the injury and the condition of the Maxwell automobile, as affecting the power of the driver to control it or to give the required warning of its approach, its condition may properly become a subject of proof. Such an instrument when driven, as often as they are, with a reckless disregard of the rights of others lawfully on a highway, is a source of grave danger.

Defendants further insist upon their claim of right to introduce evidence tending to show Maxwell's reputation as a reckless driver. That evidence of this character is incompetent is so well established as to admit of little comment. Evidence of negligence on former occasions is inadmissible for the purpose of proving whether a person did or did not do a particular act in question. *Pugley v. Tyler*, 130 Ark. 491, 197 S. W. 1177; *Luiz v. Falvey*, 228 Mass. 253, 117 N. E. 308; *Todd v. Chicago City Ry. Co.*, 197 Ill. App. 544; *Noonan v. Maus*, 197 Ill. App. 103; *Louisville Lozler Co. v. Sallee*, 167 Ky. 499, 180 S. W. 841; 22 C. J. 749, title, Evidence, § 838, note 66. In all the cases cited, the testimony in question related to the customary conduct of automobile drivers in regard to their observance of various rules of prudent driving, and in all of them the appellate courts discountenanced such evidence, in so far as its bearing upon a particular act was concerned.

Defendants also charge as error the rejection by the trial court of the evidence of Frank M. Powell, who testified that he, also driving an automobile, passed the Maxwell car about one-half mile from the place of the accident, at which time Maxwell either "could not steer it very good or it was a big car going around the turn there, and he ran pretty close to the Ford in which I was riding, and he was running at—I would not like to say right now—I suppose 30 miles an hour. * * *" This testimony having been heard in the jury's absence, the court excluded it as irrelevant.

This ruling deserves and requires more than passing scrutiny. While the fact, if fact it be, that Maxwell was driving in a dangerous manner or at an excessive rate of speed, while a half mile distant from the scene of the collision, does not prove, or indeed create a presumption of, the fact that he was driving in a similar way when the accident occurred, nevertheless the inference which the jury might properly have drawn from such conduct is of sufficient probative value to justify its admission. *Davies v. Barnes*, 201 Ala. 120, 77 S. 612; *Wigginton's Adm'r v. Rickert*, 186 Ky. 650, 217 S. W. 933. As there was evidence also that Maxwell's car was driving very rapidly when

the cars collided, the relevancy of the testimony becomes more apparent. *Tyrrell v. Goslant*, 93 Vt. 63, 106 Atl. 585; *Wellman v. Mead*, 93 Vt. 322, 107 Atl. 396. See, also, *Portsmouth Street Ry. Co. v. Peed*, 102 Va. 662, 47 S. E. 850, and *Hilary v. Minneapolis Street Ry. Co.*, 104 Minn. 432, 116 N. W. 933. Although questions as to the remoteness or relevancy of testimony are generally within the trial court's discretion, there are instances where the circumstances are such that the act in question, while perhaps somewhat remote, is not sufficiently irrelevant to render it inadmissible as a matter of law, and it may have such probative value and legal relevancy that the inferences which may be drawn therefrom are clearly proper for the jury. Evidence which tends "in an appreciable degree to sustain a material issue of facts" is admissible. (*Lyons v. Fairmont Real Estate Co.*, 71 W. Va. 754, 77 S. E. 525), and "the safer and more satisfactory rule is for the court to admit whatever is relevant, and leave the question of weight for the jury." *State v. Yates*, 21 W. Va. 761. The testimony given by Powell as to the operation of the automobile only a few minutes before the collision was pertinent and admissible under the circumstances proved.

[5-7] Among other cross-assignments of error is the adverse ruling of the trial court upon defendants' motion to dismiss the action, because the plaintiff failed to file the declaration within three months after the return of the process executed as required by section 7, chapter 125, Code (sec. 4761), under penalty of dismissal, if not so filed in the office of the court's clerk within that time. The sheriff served the process soon after it was issued and returned it on March 5, 1917, or the first Monday of that month. Plaintiff delivered the declaration to the clerk, and the clerk filed it at the rules held June 4, 5, and 6. As the process was by its command returnable to March rules, it was necessary to return it on the first rule day, or March 5. To ascertain the termination of the three-month period, within which a declaration must be filed, or the action dismissed at rules by the clerk, the number of days in the intervening months or part of a month is to be disregarded, and the time is to be computed from a date in one month to a corresponding date in another, intended by the statute. *Bank v. Baird*, 72 W. Va. 716, 79 S. E. 738. As the clerk did not dismiss the suit as he should have done had the declaration not been filed in obedience to the direction of the section, it must be assumed that he filed it on June 4, the presumption being that a public officer discharges the duties required of him by statute. The court did not err in the ruling.

[8] Another cross-assignment questions the action of the court upon instructions. These we cannot consider, because they are not in-

the record, and not made part of it by a bill of exception, and section 23, chapter 181, Code 1918, as amended by chapter 68, Acts 1921, even if applicable, not being in force when the case was tried.

[8] Finally, the defendants cross-assign as erroneous the refusal to permit an answer to a question propounded to Claude Maxwell to elicit information as to a release by plaintiff of his claim for damages as a result of the accident. Without an avowal of the purport of the answer contemplated, it does not appear whether the proponents were prejudiced by the ruling.

As there appears to be no error in the judgment, it is affirmed, and the case is remanded for retrial.

(89 W. Va. 339)

BROWN v. BROWN et al. (No. 4433.)

(Supreme Court of Appeals of West Virginia.
Oct. 25, 1921. Rehearing Denied
Dec. 9, 1921.)

(Syllabus by the Court.)

1. Appeal and error \S 150(3)—Trustee holding legal title may appeal from decree affecting beneficiary's rights.

A trustee holding the legal title to lands, or an interest in lands, has the right to prosecute an appeal from a decree affecting the rights of his cestui que trust.

2. Injunction \S 23, 35(1)—Will not be granted where plaintiff's interest is remote and great hardship would be inflicted on others.

An injunction will not be granted where it appears that the interest of the plaintiff which is sought to be protected is very remote, and almost beyond the realm of possibility, and that to grant the relief would inflict great hardship upon the parties against whom it is sought.

Appeal from Circuit Court, Jackson County.

Suit by C. L. Brown against E. W. Brown and others. Injunctions granted, and the defendants appeal. Reversed, injunction dissolved, and cause remanded, with instruction to dismiss the bill.

Chas. G. Peters, of Union, Morton & Mohler, of Charleston, S. P. Bell, of Spencer, and Somerville & Somerville, of Point Pleasant, for appellants.

J. L. Wolfe and M. C. Archer, both of Ripley, for appellee.

RITZ, P. Robert S. Brown died in the year 1891, leaving a considerable estate, consisting of real property located in the county of Jackson, which by his will he provided should be divided among his three sons, each taking a life estate in the land assigned to him, with remainder to the heirs of his

body lawfully begotten living at the time of his death, and, should there be no such lawfully begotten heirs, then to the other two sons for their respective lives, with remainder to the heirs of their bodies. The defendant E. W. Brown, under the provisions of the will, received a tract of land containing several hundred acres. The plaintiff, C. L. Brown, was assigned a like tract of land adjoining that of E. W. Brown, and the other brother, W. J. Brown, took the remainder of the land. This controversy arises out of an attempt of E. W. Brown and his children to dispose of part of the land devised to them.

The bill avers that E. W. Brown has nine living children, all of whom are adults, and most of whom are married and have children. It appears that some time since E. W. Brown, together with his children, secured a loan of \$12,000 from the Virginian Joint Stock Land Bank, and executed a mortgage to secure the payment of the same. This debt was not paid and suit was brought in the circuit court of Jackson county for the purpose of subjecting the said real estate to sale in satisfaction of said lien. Pending this suit E. W. Brown and his children entered into a contract with the Bowman Land Company by which that company agreed to lay off in town lots a small part of the said land, consisting of 25 to 40 acres, and sell the same for a sufficient sum of money to pay off all the liens; the said E. W. Brown and his children agreeing to convey the same to the purchasers by deeds with covenants of general warranty. The Bowman Land Company, acting under this contract, went upon the land and laid off the tract proposed to be sold into lots, streets, and alleys, and advertised a sale of the same to be made at public auction. The plaintiff then filed his bill in the circuit court of Jackson county, averring that he is a brother of the said defendant E. W. Brown, and that as such he has a contingent remainder in the said land, which will become vested in case E. W. Brown survives all of his descendants, and also averring that E. W. Brown has cut some timber off of said land, and was then committing waste thereon by cutting saplings and removing the same; and prayed that the said E. W. Brown and his nine children, who are made defendants to the bill, be enjoined from making any sale of the land in parcels, but that any sale made by them be limited to their interest in the whole tract, and that said E. W. Brown also be enjoined from committing any acts of waste upon said land by cutting or removing the timber therefrom, which injunction was granted, and was afterward extended to include a larger territory upon an amended bill being filed. The defendant E. W. Brown, upon notice to the plaintiff, moved the circuit

court of Jackson county in session on the 24th of August, 1921, to dissolve the injunctions granted as aforesaid, which motion the court overruled, and from the decree refusing to dissolve said injunctions, or either of them, this appeal is prosecuted.

[1] It is first insisted that we should not entertain the appeal, for the reason that E. W. Brown does not appear to have such an interest in the subject-matter as warrants him in prosecuting the same. It appears that under the will of his father E. W. Brown took a life estate in the tract of land, a small part of which is involved here, with the remainder to the heirs of his body surviving him; and, in case he died without having surviving heirs of his body, then the same should go to the plaintiff, C. L. Brown, and his brother W. J. Brown for their lives, with remainder to the heirs of their bodies surviving them. Some time since the defendant E. W. Brown made a deed attempting to convey his life estate to his wife, and it is contended that because of this deed he has no such interest remaining as justifies him in prosecuting this appeal. It is quite well settled in this jurisdiction that by the deed conveying his estate direct to his wife he parted with his entire equitable interest in the property, but the legal title thereto still remains in him. He is a trustee holding that legal title for the benefit of the owners of the equitable estate. It is true he is a naked trustee, but an action of unlawful detainer to recover possession of the property would have to be instituted in his name because the legal title is in him. A trustee in a deed of trust without any interest whatever in the subject-matter may prosecute an appeal for the purpose of vindicating the rights of his cestui que trust. *Hall v. Bank of Virginia*, 14 W. Va. 584; 3 C. J. 656. E. W. Brown has just as much interest in the subject-matter here as the trustee in such a deed of trust. It is true he cannot sell the property and cannot convey the legal title without the authority of the cestui que trust, neither can the trustee in a deed of trust given to secure a debt, but he has the right, and under some circumstances it may become his duty, to prosecute such legal proceedings as may be necessary and appropriate to vindicate the rights of the cestui que trust.

[2] It is further insisted that the motion to dissolve the injunctions was properly overruled, for the reason that none of the defendants answered the bill except E. W. Brown, and that the court should not dissolve the temporary injunctions upon the answer of one joint defendant. This might be entirely true if the motion to dissolve was based upon the denial of the allegations of the bills. The motion here, however, is based upon the insufficiency of the bills for the granting of the injunctions. If it should turn

out that the injunctions should not have been granted in the first instance, they should be dissolved upon the motion of any proper party to the suit.

And this brings us to a consideration of the substantial question involved, and that is whether from the bill it appears that the plaintiff, C. L. Brown, is likely to suffer any injury from the acts complained of, such as will justify injunctions against the defendants at his instance. It is quite true that a court of equity will in some instances enjoin the commission of waste at the suit of a contingent remainderman, but it must be borne in mind that courts of equity will not make use of the extraordinary writ of injunction to preserve mere doubtful or possible rights. There must be some reasonable apprehension of loss to the plaintiff before the court will interfere. *High on Injunctions*, §§ 9 and 10; *Joyce on Injunctions*, §§ 17 and 24; 14 R. C. L. title "Injunctions," § 57. Upon the facts in this case, does C. L. Brown have such a contingent interest as justifies the interposition of a court of equity to prevent E. W. Brown and his children from dealing with their estate? It appears that E. W. Brown is now 66 years of age; that he has nine living children, all of whom are adults, and most of whom are married and have children. The only possible contingency upon which C. L. Brown can ever have any interest in this property is that E. W. Brown will outlive all of his nine children and all of his numerous grandchildren or great grandchildren, should any be born prior to his death. To enjoin E. W. Brown and his children from cutting up part of this land into town lots and selling the same, it sufficiently appears, would work serious injury to them. By the onward march of progress part of the property has become valuable as urban real estate, and from a few acres of it enough money can be realized to discharge all of the liens against the whole tract of land. The plaintiff seeks to prevent the accomplishment of this purpose, and why? Because, as he says, he wants to keep the large landed estate of his father in the same condition that it was when his father died, so that it might pass on to himself in the possible contingency that his brother E. W. Brown will survive all of his children and grandchildren, and he survive that brother, and then pass it on to his only daughter as an entire estate. Such sentimental reasons may have weight with particular individuals, but they do not justify a court of equity in inflicting a serious inconvenience and injury upon other interested parties. We are of opinion that the possibility of injury to C. L. Brown from the acts complained of is so remote and so inconsequential, if he should ever become vested with any interest, and the injury to E. W. Brown and his children would be so substan-

tial, that a court of equity would not be warranted in granting any relief upon the bills filed.

We will therefore dissolve the injunctions and remand the cause to the circuit court of Jackson county, with instructions to dismiss the bills.

MILLER, J., absent.

(89 W. Va. 652)

GROVE et al. v. LONG. (No. 4268.)

(Supreme Court of Appeals of West Virginia.
Nov. 29, 1921.)

(Syllabus by the Court.)

1. Trusts \S 244—Legal title in trustees descends to trustees' heirs before completion of trust.

Legal title to land, vested in trustees to hold for the benefit of a corporation, with right in it to full beneficial use of the property and power to direct transfers and conveyances thereof, and fill vacancies occasioned by resignation or death of any of the trustees or their successors, descends to the heirs of the trustees, on the death of all of them, before disposition of the land and in the absence of a revocation of the trust.

2. Injunction \S 118(2)—Bill held sufficiently to allege equitable title in plaintiffs.

If an allegation of ownership of land by the plaintiffs in a bill in equity, accompanied by an exhibited deed tending to contradict it by reason of irregularity or defect in the execution thereof, is supplemented by allegations of a purchase of the land for a valuable consideration by the plaintiffs and willingness of the grantor to execute to them such further conveyances or assurances as may be necessary to pass such title as he has, the bill sufficiently alleges equitable title in the plaintiffs.

3. Injunction \S 36(2)—Equitable title may be protected by injunctive relief, even though disputed.

As the owner of a merely equitable title to real estate cannot be entertained in a court of law for vindication thereof or redress of wrongs done to it, he may resort to equity for injunctive relief, under circumstances warranting such relief, even though his title is disputed, without an allegation of the pendency of an action at law to determine the question of title or intention to commence it.

4. Injunction \S 118(2)—General allegation of ownership sufficient for final injunction.

In such a bill, a general allegation of ownership of the land by the plaintiffs will suffice for an injunction by way of final decree, wherefore a demurrer thereto on the ground of insufficiency of statement of title ought to be overruled.

5. Injunction \S 144 — Allegations failing to show perfect title insufficient for preliminary injunction.

But such an allegation, unaided by an affidavit stating facts sufficient, if proved, to make out a case of perfect title by deraignment from the state or a common source, by adverse possession or otherwise, does not constitute a sufficient basis for award of a preliminary injunction.

Appeal from Circuit Court, Hampshire County.

Suit by John W. Grove and others against Jacob W. Long. Bill dismissed on demurrer, and temporary injunction dissolved, and plaintiffs appeal. Affirmed in part and reversed in part, and remanded.

J. S. Zimmerman, of Romney, for appellants.

John J. Cornwell and Ira V. Cowgill, both of Romney, for appellees.

POFFENBARGER, J. On the ground of lack of disclosure of sufficient title in the plaintiffs, the bill in this cause, seeking an injunction to prevent the cutting and removal of timber from land they claim, was dismissed on demurrer, and the temporary injunction awarded thereon, dissolved by the decree from which they have appealed.

The bill does not fully nor clearly disclose the origin of the controversy, but enough appears on its face to indicate a dispute founded upon an interlock between conveyances or an uncertainty as to the location of a boundary line. Defendant's claim of right is admittedly based upon a purchase of timber from a third person, who is likely the owner of land adjoining that claimed by the plaintiffs, although his entry upon the premises with his sawmill is denominated a bare trespass in the bill.

If, as it seems, the plaintiffs have only equitable title to the land, if any, it will be unnecessary to examine the bill with reference to the rules applicable to equity jurisdiction by injunction against the cutting of timber in violation of the rights of the holder of legal title to land. In that class of cases, there are limitations upon the right of access to the equity forum, if any issues of fact are disclosed. *Freer v. Davis*, 52 W. Va. 1, 43 S. E. 164, 59 L. R. A. 556, 94 Am. St. Rep. 895; *Curtin v. Stout*, 57 W. Va. 271, 278, 50 S. E. 810; *Pardee v. Lumber Co.*, 70 W. Va. 68, 73 S. E. 82, 43 L. R. A. (N. S.) 262.

The plaintiffs have equitable, but not legal, title to the 104-acre tract, a part of which is in controversy. The title, as far as pleaded, begins with a deed from John S. Winslow, trustee for the Mount Savage Iron Company, to Franklin H. Delano and James Roosevelt,

as trustees for the Union Mining Company, dated June 29, 1872. That deed placed the equitable title in the Union Mining Company and the legal title in the trustees. It imposed upon the trustees no active duty, and may be said to have created a mere dry trust. They were to permit their *cestui que trust* to have the full beneficial use of the property and to transfer and convey it or any part of it to such person or persons as the company should direct, in a prescribed manner, and not otherwise to dispose of it. In case of a vacancy by death or resignation of either of the trustees or any successor, the company was authorized to fill it by appointment. By deed dated January 24, 1910, the Union Mining Company, without joinder of the trustees, who died prior to the date thereof, conveyed the surface of the land to John W. Grove, Joseph T. Davis, Thomas D. Davis, and Chas. S. Swisher. It retained the minerals, together with extensive mining privileges and rights. By a deed dated January 29, 1912, the Davises conveyed their interest to Grove, and, by another deed, dated November 11, 1913, Swisher conveyed his interest to Grove and Irvin B. Michael, the plaintiffs in the bill.

[1] Nothing perceived in the nature of the trust created by the deed of Winslow takes it out of the general rule as to the duration thereof. Intention that it should continue during the existence of the corporation, or until the property should be disposed of by them, at its instance, is so clearly and positively expressed as to leave no room for doubt about it, and, while it continued, the trustees held the legal title. At the date of the deed the property had not been disposed of by them and their *cestui que trust* was still in being, and its purposes not fully accomplished. An allegation of the amended bill impliedly says it is still in existence. On the death of a trustee, without termination of the trust, the legal title held by him descends to his heirs. *Blake v. O'Neal*, 63 W. Va. 483, 61 S. E. 410, 16 L. R. A. (N. S.) 1147. Of course, the deed, if validly executed, passed the equitable title of the corporation.

[3] Clothed with such title the plaintiffs have clear right of access to a court of equity for vindication of it and redress of wrongs done in respect thereof. It is not necessary for them to show inadequacy of the legal remedies, for a court of law cannot entertain them at all in respect of their title to that land. As, in the opening paragraph of their bill, but not elsewhere, they allege their joint ownership of the land, they have made a showing of title that would suffice in a bill for ordinary relief, such as acquisition of the legal title and removal of cloud therefrom. But this bill does not seek relief of that class. It invokes the extraordinary remedy of injunction, wherefore the vital inquiry is whether it alleges title with sufficient partic-

ularity to subserve the purposes of a prayer for injunction.

An injunction by way of final decree is not essentially different in principle from any form of ordinary relief. It is not awarded until after a full hearing upon the merits, and general allegations of title may be reduced to absolute certainty by the proof. If, in a bill for such relief, the defendant is apprised, in general terms, of the plaintiff's cause of action he has reasonable notice of the nature thereof, and nothing more is required. *Zell Guano Co. v. Heatherly*, 38 W. Va. 409, 18 S. E. 611; *State v. McEldowney*, 54 W. Va. 695, 47 S. E. 650.

But a preliminary injunction is a drastic remedy, restraining, forbidding, or commanding action on the part of the defendant, in advance of a hearing and determination of the controversy. It operates as a restraint upon his liberty and alters the condition of things existing at the date of award thereof. For remedies of that class a more definite and particular showing should be made in some way, and, if the bill alone is relied upon as the basis of the application therefor, as it is here, it should allege the facts clearly showing the grounds of relief, including title, when it is an essential element thereof. A mere general allegation of title or ownership may be untrue and misleading, and, if allowed as a sufficient basis of award of a preliminary injunction, the defendant's liberty of action is taken away, his position changed, or his right wrongfully invaded, until he disproves it. Such a result is inconsistent with the theory of extraordinary remedies. An observation made in *Peerless Carbon Black Co. v. Gillespie*, 87 W. Va. 441, 460, 105 S. E. 517, 524, classing preliminary injunctions with attachments and receiverships, is believed to be sound in principle. In view of the discretion and power of the court to modify or dissolve an injunction, it may not be so drastic in its operation as an attachment, but they are of the same nature, because each goes into operation and effect in advance of the adjudication on the merits.

Here, as elsewhere, it is held that, to obtain a temporary injunction against a trespass upon real estate, the plaintiff must establish a perfect title in himself, and that the bill must allege it. To avail, the title must be not only good but undisputed, unless the injunction is sought in aid of an action at law to vindicate it, pending or intended to be instituted. *Schoonover v. Bright*, 24 W. Va. 698; *Cox v. Douglass*, 20 W. Va. 175; *Kemble v. Cresap*, 26 W. Va. 603; *Watson v. Ferrell*, 34 W. Va. 406, 12 S. E. 724; *Western M. & M. Co. v. Coal Co.*, 10 W. Va. 250; *McMillan v. Ferrell*, 7 W. Va. 223; *Freer v. Davis*, 52 W. Va. 1, 43 S. E. 164, 59 L. R. A. 556, 94 Am. St. Rep. 895. In most of these cases all of which involved preliminary injunctions the jurisdiction

failed for reasons other than defective statement of title; but, in all of them, allegation of good and undisputed title, with the exception above noted, was required. That can only mean precaution against disturbance of existing conditions, in the absence of a showing of clear prima facie right to the extraordinary relief sought. It is obvious that a mere general allegation of title, omitting the facts upon which it is based, if permitted, would often result in what this rule is intended to prevent. It can only be avoided by requirement in the bill of allegations substantially conforming to the essential elements of proof required of the plaintiff in an action of ejectment. In the absence of an allegation of a common source of title, facts requisite to title by adverse possession, or some other exonerating circumstance, the bill should deraign title from the state. Nothing less can amount to a statement of facts from which the court can see prima facie title in the plaintiff. A preliminary injunction cannot rightfully stand upon a bill that does not set forth the facts essential to perfect title. If they are not in the bill, they must appear in an affidavit filed in aid and elaboration of an allegation of title in general terms. *Ex parte Lund*, 6 Ves. Jr. 782; *Whitelegg v. Whitelegg*, 1 Bro. Chy. 57. Confirmation of this conclusion is found in observations made in *Thomas v. Nantahala, etc., Co.*, 58 Fed. 485. Deraignment of title was excused there, only because the bill alleged pendency of an action at law to determine the question of title, and, further, because the defendant had waived sufficiency of the bill by answering without having demurred to it. In *Fitzpatrick v. Childs*, 2 Brewst. (Pa.) 365, the court held that, in order to obtain an injunction, the plaintiff should set out his title particularly. In this respect, there can be no difference between an equitable title and a legal one. In either case it is a mere matter of compliance with the rule requiring clearness, certainty, and definiteness of statement of the grounds of an application for the award of an extraordinary writ operative in advance of an adjudication of right between the parties.

The bill does not in any way excuse its

failure to deraign title from the state, and it relies upon paper title only. The deeds exhibited do not show complete title. Possession is alleged, but the duration thereof is not given, nor are the elements of title by adverse possession set up. Sufficiency of allegation of such title is not claimed. If allegations of actual possession in the plaintiff and total lack of title in the defendant would suffice, the bill admits that the defendant claims the timber by virtue of a sale made to him by Carter, and thus discloses on its face a conflict of claims respecting title.

[4, 5] Our conclusion is that the bill is not sufficient for the purpose of a preliminary injunction and that the injunction awarded on it was properly dissolved, upon the motion made for dissolution thereof; but that it is sufficient for the purposes of an injunction by way of final decree, if it sufficiently alleges equitable title to the land.

[2] This is denied in argument, on the ground that the deed from the Union Mining Company, exhibited with the bill and purporting to be a muniment of the title averred, contradicts the general allegation of title by an affirmative showing that it was not validly executed by that company. It recites authority given to H. Crawford Black, by the corporation, to acknowledge the deed, as its attorney in fact. He executed it as president, in an informal way, affixed the seal of the corporation, and acknowledged the deed in due form. It also recites a consideration of \$2,000 paid, and the amended bill alleges willingness on the part of the corporation now to execute any further conveyances or assurances that may be necessary to pass such title as it has. This amply suffices to establish equitable title by executory contract executed on the part of the plaintiffs, if not by their vendor. From this conclusion, it is apparent that the demurrer to the bill should have been overruled.

For the reasons stated, the decree will be affirmed in so far as it dissolved the injunction, and reversed in all other respects, the demurrer to the amended bill overruled, and the cause remanded.

Affirmed in part, reversed in part, and remanded.

(89 W. Va. 629)

SINNETT et al. v. GOFF et al.(Supreme Court of Appeals of West Virginia.
Nov. 29, 1921.)*(Syllabus by the Court.)***1. Guardian and ward ¶84—Guardian ad litem necessary in summary proceedings to lease land of ward for production of oil and gas.**

In a summary proceeding prosecuted by a guardian, as provided in section 12, c. 83, Code (sec. 3972), to lease the land of his wards for the production of oil and gas, the appointment of a guardian ad litem is necessary, and, when so appointed, he, as well as the infants, if over 14 years of age, should answer the petition on oath in proper form.

2. Infants ¶92—Answer of guardian ad litem held sufficient in form.

An answer by "J. M. Harper, guardian ad litem," is sufficient when it is otherwise in the usual form, and commits the interests of the infants to the care and protection of the court and the court files, and throughout the proceeding recognizes and acts upon it as the answer of the infants by the guardian ad litem.

3. Guardian and ward ¶105(1)—Inconsequential irregularities in answer of guardian ad litem held not reversible upon bill of review.

Court orders in such a proceeding, authorizing and confirming a lease of infants' land, made by a guardian pursuant to such orders, are not reversible upon a bill of review by an infant within six months after he attains his majority, where the only basis for the review is an inconsequential irregularity in the caption or signature to the answer of the guardian ad litem.

4. Infants ¶113—That decree is for or against infant does not change its legal effect.

There is no legal difference in effect between a decree in favor of or against an infant and a decree in favor of or against an adult, as neither can impeach or invalidate it except for fraud, collusion, or error in its procurement.

Case Certified from Circuit Court, Roane County.

Proceedings by Lula A. Sinnett and others against Lee Goff and others. A demurrer to the bill was sustained, and case certified. Affirmed.

Thos. P. Ryan, of Spencer, for plaintiffs.
S. P. Bell and Grover F. Hedges, both of Spencer, for defendants.

LYNCH, J. J. M. Simmons, by his will duly probated, devised 44 acres of land and other property in Roane county to his widow, Minnie B. Simmons, and his three infant children, Earl, Susan, and Lula Ann, and appointed his widow their guardian. Subsequently, on the 17th day of April, 1912, Minnie B. Simmons conveyed her one-fourth in-

terest in the 44 acres to Lee Goff and A. S. Heck, and in May of the same year, as guardian, filed her petition in the circuit court, seeking by a summary proceeding to lease for oil and gas purposes the three-fourths interest of the children. Notice was given, as required by section 12, c. 83, Barnes' Code 1918 (Code 1913, sec. 3972), and by order of the court J. M. Harper was appointed guardian ad litem for the infants. Answers were filed by them and by the guardian at litem, and on May 23, in pursuance of the court's direction, the guardian executed a lease of the interests of the infants to Goff and Heck, who later assigned the lease to Cabot, also named defendant. The lease was confirmed and ratified by a final order in the cause, with the provision that the proceeds from the infants' interests in the land should be invested for their benefit.

Lula A. Sinnett (née Simmons) having attained her majority within six months prior to the institution of the suit, and H. Brooks Sinnett, her husband, filed their bill praying that the decree in the said summary proceeding be reviewed, reversed, and set aside. They allege as errors in the proceeding certain defects in the answer filed by the guardian ad litem in behalf of the infant children, of whom plaintiff, Lula A. Sinnett, was the youngest. Two answers were filed to the petition, both of which appear in the record. The first purports to be the "joint and several answer" of the three minor children, naming them, and bears their signatures. The other, styled "The answer of J. M. Harper, guardian ad litem of the infant defendants Earl Simmons, Susan Simmons and Lula Ann Simmons," is signed "J. M. Harper, guardian ad litem," and it is the alleged insufficiency of this answer which forms the basis of plaintiffs' complaint. The trial court sustained the demurrer to the bill, which ruling is now certified to this court for review.

[1] Plaintiffs register no objection to the subject-matter of the answer, which is fully responsive to the averments of the bill, but merely to the form of its execution. The gist of their position is that the expression, "J. M. Harper, guardian ad litem," is not the signature of J. M. Harper acting in behalf of the infant children, but is the signature of J. M. Harper individually, and therefore insufficient to satisfy the provisions of section 3, c. 83, Code (Code 1913, sec. 3963), which requires that—

"To every such infant or insane defendant there shall be appointed a guardian ad litem, who as well as the infant (if over fourteen years of age) shall answer the bill on oath in proper person."

This argument plaintiffs support by reference to a number of cases in which the

signers of promissory notes and those against whom executions and judgments are directed are bound in their individual rather than representative capacities. Decisions of this character are not controlling in proceedings such as this one is. Investigation of the authorities indicates that the present case should be governed by a rule of agency, thoroughly fundamental and by no means contradicted by the decisions upon which plaintiffs rely. We refer to the doctrine expressed by Dr. Mechem as follows:

"In determining whether a given form of execution is sufficient to bind the principal, the primary consideration is, What is the true intention of the parties as expressed in this contract? In settling this question it must be borne in mind that no particular form of words is required, and that the intention is to be gathered from the whole instrument, and not from any isolated portion of it." Mechem, *Agency* (2d Ed.) § 1166, cases cited.

Manifestly, the courts have shown no disregard for this principle in ruling that notes and judgments in which no person is disclosed as the object of their operation, save the one specifically named by the signature as the maker or in the caption as party defendant, should not readily be construed as binding upon a principal, concerning whom the subject-matter of the writing sheds no light and affords no information.

[2] The answer considered discloses its office with particularity. In the approved statutory form, Harper addresses the court as the guardian ad litem of the infants named, and avers:

"That he is advised and believes that his said wards have material interest in the matter and things alleged in said petition; that he has no personal knowledge thereof, but upon information and belief he says that such allegations are true; that his said wards are under the age of 21 years and he commits their interests to the care and protection of the court," etc.

From the four corners of this instrument does there appear any reasonable question that Harper, who signed and verified it "J. M. Harper, guardian ad litem," acted otherwise than in his duly authorized representative capacity? We think not, and the authorities support such a conclusion.

"The answer filed by the guardian ad litem of the infant purports to be the answer of the infant by his guardian ad litem, but it is signed by the latter, * * * and a careful reading will show that it is in fact his answer. It is the opinions, statements and responses of the guardian that are given; and however the judge or clerk may have regarded or termed it in the hurry and confusion of the court, it has the same effect as if it were formally designated and filed as the answer of the guardian in his

proper person." *Durrett v. Davis, Guardian, et al.*, 24 Grat. (Va.) 302.

"A defendant in equity is charged as executrix and as devisee of a decedent; in the caption of her answer she professes to answer only as executrix; but, in the body of her answer, she in fact answers as devisee. Held, such answer places her before the court in her character of devisee." *Kinney's Ex'rs v. Harvey & Worth et al.*, 2 Leigh (Va.) 70, 21 Am. Dec. 597.

Defendants in their brief cite as "conclusive" *Thompson v. Land & Coal Co.*, 77 W. Va. 782, 88 S. E. 1040. There this court held it to be immaterial whether a guardian ad litem signs the infant's name as "by" himself, as guardian ad litem, or signs his own name first as guardian ad litem "for" the infant. We were concerned in that decision with a more superficial question of agency, the mere form of an agent's signature, and the conclusion does not control the present case. It is, however, representative of a principle applicable here in arriving at a proper result, namely, that—

"Notwithstanding the character of the proceeding, it is remedial, and the statute authorizing it is liberally construed." *French v. Pocahontas Coal & Coke Co.*, 87 W. Va. 226, 104 S. E. 554.

[3,4] In that case the court reviews the character of proceedings for the disposal of infants' property, citing *Frantz v. Lester*, 82 W. Va. 328, 95 S. E. 945, 2 A. L. R. 1558, in which it was carefully shown that any disposition of such property is the court's disposition, not the act of an individual, though the court does act through its appointed representative. Such being the case, as an appellate tribunal, our inclination is to sustain such sales rather than avoid them for irregularities which do not affect the merits of the action or defeat the ends of justice. See *Zirkle v. McCue et al.*, 26 Grat. (Va.) 517. Indeed, under the authorities we seem bound to this position.

"An infant can impeach a judgment or decree only upon the grounds which would invalidate it in case of another person, such as fraud, collusion, or error. He is, as a rule, as much bound by a decree against him as an adult. The law recognizes no distinction between a decree against an infant and one against an adult." *Harrison et al. v. Wallton's Ex'r et al.*, 95 Va. 721, 80 S. E. 372, 41 L. R. A. 703, 64 Am. St. Rep. 830; *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262; *Hare v. Hollomon*, 94 N. C. 14; *Joyce v. McAvoy*, 31 Cal. 273, 89 Am. Dec. 172; *Ralston v. Lahee*, 8 Iowa, 17, 74 Am. Dec. 291; *Sites v. Eldredge*, 45 N. J. Eq. 632, 18 Atl. 214, 14 Am. St. Rep. 769.

There is no error in the ruling certified.

LIVELY, J., absent.

(89 W. Va. 641)

SWARTZ et al. v. KAY et al. (No. 4153.)(Supreme Court of Appeals of West Virginia.
Nov. 29, 1921.)*(Syllabus by the Court.)***1. Evidence ⚡269(1)—Declarations of customers admissible in action for injury to business.**

In an action for conspiracy to injure and destroy another's business, by withdrawing and inducing others to withdraw their patronage, by false and malicious reports concerning him and the conduct of his business, it is competent to give in evidence the declarations of such customers to others as to their reasons for their actions, providing such reasons are shown to have connection with the false and malicious reports promulgated by the accused.

2. Conspiracy ⚡19—Declarations of defendants in action for injury to business held admissible.

And upon the same principle, but with stronger reason, the declarations and representations of defendants themselves, accused of so conspiring, and of such false and malicious reports concerning the business of another, may be given in evidence by witnesses to whom they were made, such evidence not being incompetent as hearsay.

3. Conspiracy ⚡8, 22—Gist of action is injury done; verdicts against those conspirators contributing to injury to plaintiffs' business proper.

In a case of this character the gist of the action is the injury done to plaintiff's business, not the conspiracy, and if those accused, or any of them, are shown to have done the acts complained of, the verdict may be against such of them as may have done or contributed to the injury, the fact of the conspiracy in such cases being simply to aggravate the damages and to render what was done by any of the actors the act of all.

4. Conspiracy ⚡19—Acts and statements of conspirators admissible to show conspiracy.

In cases of alleged conspiracy courts are quite liberal in the admission of evidence and will allow the fact of such conspiracy to be made out by the declared acts and statements of the individual conspirators, and where several persons have similar or identical grounds of complaint against another and by their acts and utterances endeavor to injure or destroy his business, each being aware of the feelings and doings of the others and approving the result, such conduct often affords sufficient evidence to sustain a verdict against them all.

5. Conspiracy ⚡8—Plaintiffs' disloyalty does not justify conspiracy to ruin his business.

The fact that one may be suspected or accused of disloyalty and in sympathy with an alien enemy at war with his country, will not justify or warrant another citizen in combining with others to circulate false reports about the accused's business with the object of destroying it, so as to injure and damage him thereby.

6. Pleading ⚡327—Defective declaration curable by bill of particulars.

If in such an action for conspiracy to destroy or injure another's business, the declaration does not set forth with sufficient certainty the fact or acts done in furtherance of the conspiracy, the defect may be cured by a proper bill of particulars, in accordance with the rule announced in *Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611, 622, 40 S. E. 591, 56 L. R. A. 804, 88 Am. St. Rep. 895, point 5 of the syllabus.

Error to Circuit Court, Jackson County.

Action by L. H. Swartz and others against D. A. Kay and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

Lewis H. Miller, of Ripley, Charles E. Hogg, of Point Pleasant, and T. J. Sayre and Warren Miller, both of Ripley, for plaintiffs in error.

J. L. Wolfe, of Ripley, for defendants in error.

MILLER, J. This action was to recover from defendants damages for wrongfully and unlawfully conspiring together to injure and destroy the business and property of plaintiffs, who owned and operated a flour mill in Jackson County, known as the Mt. Alto Mills, which they alleged was worth in production capacity at least \$5,000.00 per year, and that the plant itself was worth at least the sum of \$15,000.00.

The allegations of conspiracy in the first count are that the defendants, in the months of May and June, 1918, maliciously and wickedly contriving and intending to injure plaintiffs and ruin their business and render their plant and mills worthless, and deprive them thereof, did confederate and conspire together and with each other to prevent all persons producing and raising wheat in said county and in the adjoining county of Mason, where the patronage of said mills had extended, from bringing their wheat to said mills, and from buying flour or meal from said plaintiffs, and from trading or dealing in any manner with them, the defendants or either of them not being owners or operators of any mills, nor in any way engaged in any business in competition with plaintiff; and that the acts of defendants in so counseling and advising and conspiring to prevent the former customers of plaintiffs, who at that time and theretofore had traded with them, and had brought their wheat to them to exchange for flour, and had bought flour from them, from dealing with them, were wanton and malicious, and not done by right of competition or under cover of friendly and neighborly counsel, but in pursuance of said conspiracy and solely for the purpose of injuring plaintiffs in their said business and property.

And after setting out the manner and means

of so conspiring, this count further avers that because thereof a very large number of the patrons and persons who had been accustomed to trade with and patronize plaintiffs, quit doing so, specifying a number of such persons and others who had been so induced; and in furtherance of their object it is averred that defendants tried to procure the arrest of plaintiffs by federal authorities, for being German by descent, they were falsely accused of being unfriendly to and not in sympathy with the United States, all of which was untrue and done by defendants in furtherance to injure and destroy plaintiffs' business.

The second count is substantially the same as the first, except that in describing the time of the unlawful and malicious acts and conduct of defendants, it is averred that they were done during the spring and summer of 1918.

On the trial there was a verdict and judgment against defendants for six hundred dollars, of which they complain in this court.

The first error alleged and relied on for reversal is that the court over defendants' objection admitted certain evidence characterized as hearsay, and for that reason incompetent. This characterization is applied to two classes of testimony: First, the declarations of some nine former customers, named in the bill of particulars called for by defendants and given in evidence by plaintiffs and others, as to the reasons assigned by them for withdrawing their custom from plaintiffs' mill, to the effect that plaintiffs were pro-German, disloyal to the United States in the war with Germany, and that they were putting poison in their flour and ground up glass in their meal; and that they were not, as they represented themselves to be, engaged in the manufacture of flour and feed for the United States government: Second, the declarations of sundry witnesses, merchants in the county and former customers of plaintiffs, as to what customers of theirs gave as reasons for refusing to buy from them flour and feed manufactured by plaintiffs at their said mills, to the effect that one or more of the defendants had told them that plaintiffs were pro-Germans and disloyal citizens of the United States and were putting poison and broken up glass in their flour and meal, and other false reports derogatory to their character, and that they ought to be shot, etc.; and that they would not buy liberty bonds or war savings stamps or contribute to the Red Cross society; and that they had tried to wreck a train.

[1] An argument made by counsel for defendants applicable to both these classes of testimony is that they amounted only to hearsay, and that the declarations were not made in the presence of defendants, wherefore they are incompetent. One of the principal facts which the plaintiffs were called upon to es-

tablish was that the persons named in their bill of particulars actually ceased to trade with them and with the merchants who bought and sold their products, and the reasons they gave for doing so. If they ceased for causes in no way connected with defendants or their false reports about plaintiffs and their business, of course defendants would in no way be responsible for damages for the loss of their trade and business. *Leech v. Farmers' Tobacco Warehouse Co.*, 171 Ky. 791, syllabus 2, 188 S. W. 886. In cases of this kind the rule seems to be that declarations of customers or workmen quitting trade or employment are competent to prove the facts and motive for their conduct, not the prior fact that defendants were responsible for the false reports put in circulation. The fact of defendants' guilt, if true, may be shown by other competent testimony. *Elmer v. Fessenden*, 151 Mass. 359, 24 N. E. 208, 5 L. R. A. 724, and cases cited; *Starkie on Evidence*, § 89, and note. In one of the cases cited in the note, an action for enticing away the servant of the plaintiff, it was held that evidence of the declaration of the servant at the time he left, as to the motive which influenced him was admissible. *Hadley v. Carter*, 8 N. H. 40. Other cases referred to in the note will be found to illustrate the application of the same principle. In 2 *Jones on Evidence*, sec. 300 (303), quoting 1 *Greenleaf on Evidence*, sec. 100. It is said:

"It does not follow because the writing or words in question are those of a third person, not under oath, that therefore they are to be considered as hearsay. On the contrary it happens, in many cases, that the very fact in controversy is whether such things were written or spoken, and not whether they were true; and, in other cases, such language or statements, whether written or spoken, may be the natural or inseparable concomitants of the principal fact in controversy."

In 3 *Wigmore on Evidence*, sec. 1729 (2), it is said:

"A declaration of a present existing motive or reason for action is admissible,—assuming, of course, that the declarant's motive is relevant. So far as concerns accused persons, this use is later considered (post, § 1732). In other cases, the typical instances in which motive becomes material are actions for loss of service or of custom, in which it is necessary to show that the customer's or servant's abandonment of the plaintiff was motivated by the defendant's persuasion or threats; and actions in which the reliance of a person on another's representations becomes a part of the issue. The use of declarations of this sort is fully recognized in numerous precedents."

See also illustrative cases cited in note. The Supreme Court of the United States, in *Lawlor v. Loewe*, 235 U. S. 522, 536, 35 Sup. Ct. 170, 59 L. Ed. 341, applied this rule of evidence to the introduction of newspapers for

the purpose of showing publicity in places and directions where the facts were likely to bring home notice to the defendants, to prove intent and detrimental consequence of the principal acts complained of; and also to letters from customers of a boycotted manufacturer, as reasons for ceasing to deal with him. In the case of *Moores & Co. v. Bricklayers' Union No. 1*, 10 Ohio Dec. 665, affirmed *Bricklayers' Union No. 1 v. Moores & Co.*, 51 Ohio St. 605, where a business firm sued a labor union for losses charged to a malicious conspiracy, it was decided that plaintiff might show declarations made by its customers, at the time they withdrew their trade, as to their reasons for its withdrawal. The objections to this class of testimony were general, and not limited; and being good for the purpose indicated, the general objections were properly overruled.

[2] It follows with greater reason, that all the evidence of these witnesses as to declarations by defendants to them directly respecting plaintiffs and the conduct of their business, was also admissible to connect them with the main fact—their responsibility for the false accusations, and consequent loss of customers.

The next question is, whether a conspiracy to impair and destroy plaintiffs' business, and resulting substantially as alleged, is established by the evidence. On the trial the defendants submitted to the jury three interrogatories. Of these, the first and second, and the jury's answers thereto, are as follows:

First. "Did the defendants enter into a conspiracy as to how they could injure plaintiffs by getting the patrons of plaintiffs' mills to cease trading with and doing business with plaintiffs at their mills?" Answer: "Yes." Second. "If defendants did enter into such conspiracy, (a) when, (b) where, and (c) how was such conspiracy formed?" Answer: (a) "Spring of 1918;" (b) "In the vicinity of Mt. Alto, W. Va.;" (c) "By holding secret meetings and circulating false reports concerning the Swartz Brothers, calculated to ruin their business."

In answer to the third interrogatory, the jury answered that plaintiffs lost their custom in the spring and summer of 1918, and this was the fact as alleged in the second count: that the cause was the false reports of defendants, warning the patrons of plaintiffs not to trade with them nor to have anything to do with them; and that these acts so calculated to injure the plaintiffs were committed by D. A. Kay, G. J. Polsley, J. E. Wilson, Ruben Smith, A. A. Shinn and Edwin Calhoun, omitting the names of the defendants S. S. Webster and N. D. Webster, though finding their verdict against all the defendants sued including the Websters. The answers to these interrogatories may not be wholly conclusive of the rights of the plain-

tiffs, but they were submitted by defendants and the answers not being inconsistent with the general verdict, but sustaining it, are binding upon them as to the facts found, if sufficiently supported by the evidence. That meetings were held at which all the defendants except S. S. Webster were present at some or all of them, and at which the plaintiffs and their business were considered and derogatory speeches made by one or more of defendants, substantially as alleged, is not denied, nor is it controverted that the false accusations were made to various persons, customers and former friends of plaintiffs throughout the community from which plaintiffs drew their trade; that these accusations were repeated to agents of the United States government, and an investigation secured by one of such agents, who after investigating them reported that the accusations were groundless and unwarranted by the facts; that even after this report, some of the defendants continued to repeat the same falsehoods, to the injury and damage of plaintiffs. As to S. S. Webster, the evidence was that, while not shown to have attended meetings, he was active in several instances, in spreading some of the false reports originating with the other conspirators. It is quite clear from the record that both the Websters were engaged in circulating the propaganda of their confederates, to the detriment and injury of plaintiffs, wherefore, no doubt the jury included them properly, we think, in the verdict. As to the accusations of pro-Germanism, disloyalty to the government, and failure to buy liberty bonds and war savings stamps, and to support the Red Cross society, the fact is that plaintiffs were liberal purchasers of bonds and savings stamps, and did support in the same way the Red Cross, more liberally than most, if not all, their accusers; that they were loyal to the government in the operation of their mill and the distribution of their products, while some of the defendants were disposed to induce plaintiffs to violate the law, and then thereby incurred their displeasure. We can not go into the details of the evidence, but it satisfies us that the findings of the jury were more than justified, and that a much larger verdict would have been justified by the evidence.

[3] In a case of this character the gist of the action is the injury done plaintiff, not the conspiracy, and if defendants or any of them be shown to have done the acts complained of, the verdict and judgment may be against such or all of them as are proved to have done or contributed to the injury; if a conspiracy to do the injury is shown, the effect is to aggravate the damages and to make what was done by one or more of the conspirators the act of all, and to warrant a verdict and judgment against all. *Porter v. Mack*, 50 W. Va. 581, 40 S. E. 459; *Ellis v. Dempsey*, 4 W. Va. 126; *Leech v. Farmers*

Tobacco Warehouse Co., *supra*; Democrat Printing Co., v. Johnson (Okla.) 175 Pac. 737. See, also, cases digested in First Decennial Digest Conspiracy, §§ 13, 14.

[4] Because of the fact that it is often difficult to establish a conspiracy by direct evidence, the courts are quite liberal in the admission of evidence, and will allow the fact of conspiracy to be made out by the declared acts and statements of the individual conspirators; and the fact that several persons have similar or identical grounds of complaint against another, and by their acts and utterances endeavor to injure or destroy the business of another, each being aware of the feelings and doings of the other and approving of the result accomplished, often affords evidence of a confederation or common purpose sufficient to sustain the verdict. *Gilman v. People*, 178 Ill. 19, 52 N. E. 967; *Webb v. Drake*, 52 La. Ann. 290, 26 South. 791.

As was held in *Leech v. Farmers' Tobacco Warehouse Co.*, *supra*, where persons combine to affect injuriously or destroy the business of another person or corporation, and to that end cause to be circulated false and damaging reports concerning such person or his business, and the effect thereof is to accomplish the object intended, they will be individually and jointly liable for the damages sustained. One of the means adopted by defendants to accomplish the manifest purpose to do injury to plaintiffs and their business was to circulate the false reports, for which it is not shown there was the slightest foundation in fact, and to spread abroad in the community such false accusations. These reports, as they were intended, reached the ears of customers, and drove them away from plaintiffs' mills. The reasons such customers gave for withdrawing their trade from plaintiffs and refusing to buy their products from merchants to whom they sold goods, were the reports disseminated in the community by defendants. As already shown, the reasons given by such customers for withdrawing their trade becomes in such cases proper evidence to go to the jury on the fact of injury and damage resulting from the acts of defendants. *Elmer v. Fessenden*, *supra*, *Cooke v. Weed*, 90 Conn. 544, 97 Atl. 769.

The second point of error urged for reversal is the giving to the jury of the eight several instructions propounded by plaintiffs' counsel. We have examined these, and so far as we observe they propound correctly the law applicable to the facts in the case. The main criticism of defendants' counsel is that the first and fourth are amenable to the law against assumption of the facts in controversy, and for not submitting the facts to the jury. The first defines conspiracy and does submit to the jury the question of fact on the evidence. The fourth instruction assumes no fact as proven, but submits to the

jury the question of the fact of conspiracy or combination by defendants. And as applying to all the instructions it is complained that the evidence did not justify the giving of any of them to the jury because, as counsel contend, no evidence was offered to justify them. As already indicated, we think they were all warranted by the facts proven.

[5] The third point of error assigned is the denial by the court of instructions numbered 8, 9, 10, 17 and 20 proposed by defendants' counsel, the only ones rejected out of the twenty-five requested. Those given, it seems to us, cover every conceivable phase of the defendants' case, in some instances more liberally than they were entitled to; and for this reason, if for no other, those rejected were properly rejected. The eighth and ninth instructions were predicated on the theory that plaintiffs, between April 6, 1917, and May 26, 1918, and subsequently, made statements or gave expressions reasonably conveying to plaintiffs, or some of them, that they were sympathizers with the German government and were disloyal to the United States, and would have told the jury that if they so believed, the defendants had the right to give publication to such facts without rendering themselves liable to plaintiffs for any injury or damage resulting to them or their business or to their standing in the community. In the first place we find nothing in the evidence warranting the theory of plaintiffs' pro-Germanism or disloyalty. In the second place, their supposed pro-Germanism or disloyalty, if proven, would not have justified the false representations proven, that plaintiffs were engaged in introducing into their flour and meal ground glass and poison. These instructions were binding ones, and would have told the jury to find for defendants the facts assumed therein. Even after defendants were advised by the representative of the United States that their accusations were unfounded, the evidence shows that they did not cease from spreading the false reports.

The tenth instruction was properly rejected because it was predicated on the theory that customers of plaintiffs may have quit dealing with them without any reason and not by reason of anything said or done by defendants, or either of them, and would have told them if they so found, they should find for defendants. True, one has the right to withdraw patronage from another's business without any cause, but he has no right to conspire with others to destroy his business, by circulating false reports concerning the same, and thereby to maliciously and wrongfully injure and damage him. *Leech v. Farmers' Tobacco Warehouse Co.*, *supra*, syllabus, point 4, and authorities cited, 171 Ky. at page 797, 188 S. W. 886.

Instruction number 17 would have told the jury that the holding of meetings to ascertain

who were pro-German and disloyal citizens and reporting their names to federal authorities did not constitute a conspiracy, and that if the jury found defendants, or any of them, had attended any such meeting they were not guilty of any wrong of which plaintiffs could complain. This instruction was properly rejected; first, because it was covered by instruction number 15 given; and, second, because it does not state the whole of plaintiffs' case. While the meeting and reporting the names of disloyal citizens would not constitute conspiracy, yet if, as the evidence shows, defendants at the same time conspired to destroy plaintiffs' business, and following the time of holding the meetings gave out false and scandalous reports as to the conduct of plaintiffs' business, doing the injury and damage, they would be liable therefor. This instruction, furthermore, was liable to mislead the jury as to the real issue in the case.

The twentieth instruction was rightly rejected for the reason, among other things, that it would have told the jury if they found from the evidence that plaintiffs were disloyal to the United States, and German sympathizers, they had the right, and it was their duty, to withdraw their patronage and induce others to do the same. As already stated, there was no evidence justifying the theory of such disloyalty and German sympathy, and besides, it was neither the duty nor the right of defendants by falsehood and deceit to do injury to plaintiffs' business and property.

The fourth, fifth and sixth grounds urged in support of defendants' motion for a new trial are; (a) that S. S. Webster was not present at any of the meetings; and (b) that N. D. Webster, though present at one or two of these meetings, took no part in spreading the propaganda of his confederates. But S. S. Webster was shown to have been closely related to N. D. Webster and some of the other defendants, and to have been unfriendly to plaintiffs, and to have made false representations about the manufacturing of flour and feed by the plaintiffs for the United States, and engaged in spreading the pro-German talk about them, calculated to do injury to them. We think the evidence justified the jury in finding against the Websters as well as the other defendants. As already observed, the conspiracy charged was not the gist of the action, but the injury and damage done plaintiffs by false reports concerning them and their business.

[8] The seventh, and last, ground assigned for reversal, not included in defendants' petition for the writ of error, but urged in the brief of their counsel, is that the declaration was insufficient; (1) because a conspiracy is not per se actionable; and (2) because the facts in furtherance of the alleged conspiracy were not set forth with certainty as

required. Citing for this proposition 5 R. C. L. § 41, page 1090, and *Porter v. Mack*, supra. If there is any merit in this point, it was cured by the bill of particulars called for by defendants and actually filed by plaintiffs. This was good practice and answers the criticism that the cause of action was too generally stated. *Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611, 622, 40 S. E. 591, 53 L. R. A. 804, 88 Am. St. Rep. 895, point 5 of the syllabus.

Finding no substantial error in the rulings of the trial court, we are of opinion to affirm the judgment.

LIVELY, J., absent.

(89 W. Va. 635)

STATE v. PLYMALE. (No. 4106.)

(Supreme Court of Appeals of West Virginia.
Nov. 29, 1921.)

(Syllabus by the Court.)

Homicide \Rightarrow 300(9)—Instruction as to justification of assault by deceased upon accused held error as not supported by evidence.

In a prosecution for murder, where the accused relies on self-defense, and the evidence shows that the deceased was committing an aggravated assault upon him with a dangerous and deadly weapon at the time the fatal shot was fired, it is error to instruct the jury that such assault was justified if they believe from the evidence that the deceased had reason to believe, and did believe, that he was in danger of death or great bodily harm at the hands of the accused, when the evidence does not show, or tend to show, an assault, either real or threatened, upon the deceased by the accused.

Error to Circuit Court, Logan County.

Ballard Plymale was convicted of murder in the second degree, and he brings error. Reversed, and new trial granted.

E. L. Hogsett, of Huntington, for plaintiff in error.

E. T. England, Atty. Gen., and R. A. Blessing, Asst. Atty. Gen., for the State.

LIVELY, J. Defendant Plymale was convicted of murder in the second degree in the circuit court of Logan county, and on the 27th day of October, 1919, was sentenced to confinement in the penitentiary for five years; from which judgment he prosecutes this writ of error.

The defendant was postmaster at Christian in the county of Logan, was 62 years of age, and weighed from 135 to 150 pounds. The deceased, Sanford Morgan, owned a small stock of goods at Christian, and there were some business transactions between him and Plymale which necessitated the keeping of

mutual accounts. On the 1st day of October, 1919, Morgan went to the post office, where he was asked by Plymale if he was ready to make settlement, and Morgan replied, "I will settle with you and I will pay you all I owe." At that time Gas Blankenship was in the post office with Morgan, but his evidence was not taken upon the trial. As Plymale started to procure his book of accounts so as to compare it with Morgan's book, it appears that Morgan made an assault upon him with his fists and knocked him down and began beating him assisted by Blankenship. Several persons hearing the noise of the affray came on the scene and attempted to take Morgan off of Plymale and separate them, but for a time were prevented from so doing by Blankenship, who was armed with a stick or club and who insisted that no one should interfere until there was a cry of "enough." Finally the men were separated, Plymale having been beaten up considerably, there being wounds on his face and behind his ear which was bleeding, and Morgan was told to go away by a Mr. Blamire, a man who seemed to be in authority in the village or collection of houses at the lumber plant. Before going, however, he procured Plymale's book of accounts and took the same with him to the grade of the railroad about 155 feet from where the post office was located. Plymale, after regaining his feet, seemed to be incensed at Blankenship and drew a knife and chased him away, and one or two of the witnesses said that he took the stick or club, with which Blankenship had kept back the crowd that desired to separate the combatants, and made some futile efforts to strike Blankenship with the stick. Blamire then pacified Plymale and insisted that he should go and wash away the evidence of the affray. In 10 or 15 minutes after Plymale had washed, he discovered that his book of accounts was gone; and presuming it had been carried away by Morgan, who was down on the grade, started in that direction.

Three witnesses, Marion Harless, Bill Toller, and Ott Cook, were present and saw the difficulty between Morgan and Plymale down on the railroad grade where the fatal shooting occurred, and were all examined as state's witnesses. There is very little discrepancy in their testimony, and it is not materially different from the testimony of the defendant. These witnesses testify that they were near Morgan; that he was sitting on the grade, or near the grade, of the railroad, and observed Plymale approaching leisurely and with his right hand in his front trousers pocket. Upon observing his approach Morgan arose and remarked, "There comes that old man Plymale," and then started to move down the railroad grade, and Plymale walked in the same direction, but a little

behind Morgan. Plymale, in an ordinary tone of voice, asked for the return of his book, and Morgan replied, "It is not your book." Some further colloquy occurred between the men about the return of the book, Plymale firmly insisting that it was his book and for Morgan to look inside and see. One of the witnesses says that Morgan picked this club up after he had walked down the grade some feet, having in the meantime picked up a rock which he discarded when he found the club. Neither of the other two witnesses saw him pick up the rock, nor did the defendant himself. It is further in evidence by two of the witnesses that when Morgan refused to give up the book, he told Plymale to go on away or he would hurt him "a damn sight worse than he had." It appears that all this while Plymale kept his right hand in his trousers pocket but made no demonstration or any effort whatever which would indicate that he was going to assault Morgan. On the contrary, he told Morgan he was not going to touch him, but that he wanted the return of his book. Then it appears that Morgan circled, or, as some of the witnesses say, "maneuvered," and got back on a higher piece of ground on the grade and about six or ten feet away from Plymale, who was facing him. At this point, the two men having gone back up the grade, Morgan suddenly sprang at Plymale and struck him over the head with this club. He continued striking him with the club, and Plymale was throwing up his left hand to prevent his being hit on the head, and after being struck several times, the witnesses saying from three to six times, with the club, Plymale drew his revolver out of his pocket and fired one shot down into the ground, as he (Plymale) says, to scare Morgan. Morgan then caught Plymale's right hand, in which he had the revolver, and shoved his arm up in the air and continued to hit him with the stick or club, which he (Morgan) had in his right hand. Plymale twisted loose from the hold on his wrist and quickly fired two shots through Morgan's breast which caused him to fall on the ground. A short time thereafter he expired. Plymale then turned around and started back up towards the post office and in the direction of his dwelling, but faintness overcame him before he got there, and he sank down on the ground and was afterwards assisted to his house by a Mr. L. A. Marsh. He was examined a short time afterwards by Dr. Thornsbury, who found two bruises on the left side of his head, one of which, just over his ear, was swollen to the size of a hen's egg; he had a small cut place over his left eye and a bruised place across the left side of his neck, and his left arm was bruised along on the bone between the wrist and the elbow. His neck was swollen some,

and a cut on his head was about one-half inch long but not very deep; his left leg was bruised, and also he had a bruise on his hip. He was sitting on the bed when the doctor came in, but got into his chair and had his wounds dressed. It appears that Plymale was rather slimly built and had not been in robust health for several years; while it appears from Dr. Thornsbury's testimony that Morgan was a strong, symmetrically built man and weighed about 180 pounds.

There appears to have been no prior ill feeling between these two men. Plymale testified that he had the revolver in his pocket at the time of the first assault at the post office and that he was in the habit of carrying this revolver because he handled considerable money at the post office and always kept some on hand for the purpose of accommodating workmen in the neighborhood by cashing checks for them. He said that he had no intention of using this revolver when he went out to recover his book and that he had no particular ill feeling towards Morgan, and went out solely for the purpose of securing the return of his property; that not only Morgan's account was therein, but that it contained his accounts with various other persons. Evidence introduced on the part of the defendant was to the effect, and tended strongly to establish the fact, that Plymale was a good citizen and peaceful and quiet in the neighborhood and was never known to be in a difficulty before. On this evidence, and under the instructions of the court, the jury returned a verdict of second degree murder.

Error is predicated on the refusal of the court to set aside the verdict and grant a new trial: (1) Because the evidence does not sustain the verdict; (2) because instruction No. 3 given by the state was improper and misleading.

A consideration of the evidence as it appears from this record is very persuasive that it is not sufficient to sustain a verdict of murder in the second degree. However, the jury has the right to pass upon the credibility of the witnesses and to weigh the testimony, and it must be a very clear case before a court will interfere on the ground that the evidence is not sufficient. The jury and the trial court have peculiar advantages over an appellate court in such matters, in that they have the witnesses before them and can observe their appearance and their demeanor while giving their testimony. It may be observed, although the point is not made, that the trial was had soon after the crime, if any, was committed. The fatal shooting occurred on the 1st of October, and on the 27th of the same month the sentence was pronounced. It may be that the fact that there had been a violent killing in the

neighborhood at so recent a date before the trial had a material tendency to create a demand that there should be retribution; that some one should suffer for it. The world-wide conception of primitive times which blossomed out in the old Mosaic law that there should be "an eye for an eye and a tooth for a tooth," "and he that killeth any man shall surely be put to death," has left its imprint on modern civilization and its influence is yet to be reckoned with. There should be calm and deliberate and well-considered investigation of all such occurrences. There should be deliberate haste. We feel it unnecessary to say whether or not the evidence is sufficient to support the verdict.

However, we are of the opinion that the instruction complained of is improper under the evidence and circumstances of this case. That instruction is as follows:

"The court instructs the jury that if they believe from the evidence, beyond a reasonable doubt, that the prisoner, Ballard Plymale, armed with a deadly weapon, approached the deceased, Sanford Morgan, while he, the said Sanford Morgan, was peaceably standing or sitting on or near some railroad ties or railroad grade, in such a manner as to give the deceased reasonable cause and ground to apprehend a design on the part of the prisoner to do him, the said Sanford Morgan, some great bodily injury, or to kill him, and reasonable cause to believe and apprehend that there was imminent danger of such design being accomplished, and if the jury believe that said Sanford Morgan did then and there have such apprehension and belief, then the deceased had then and there a right to procure a club, or use one he then had upon the prisoner and even to kill the prisoner in order to save his own life or to protect him from great bodily harm at the hands of the prisoner, and if the prisoner under such circumstances kills the deceased, he cannot be acquitted upon the plea of self-defense. But of all the facts and circumstances the jury are to judge from all of the evidence before them."

This instruction is relied upon as having been given and approved in the case of *State v. Hatfield*, 48 W. Va. 561, 37 S. E. 626. In approving this instruction in the *Hatfield* Case, the opinion says it was justified under the evidence of that case. While there is no statement or summary of the facts given in the *Hatfield* decision, it is apparent from reading the whole case that a feud existed between *Hatfield* and his victim, *Ellis*; that *Hatfield* had threatened to kill *Ellis* at the first opportunity, which threats had been communicated to *Ellis*, and both were armed with Winchester rifles. *Hatfield* had gone to take some letters to the post office, carrying his rifle with him; *Ellis* was on the steps of a railroad car, either alighting from the train or entering it, which the opinion does not state; *Hatfield* approached him. "That *Hatfield* provoked a quarrel with *Ellis* for the sole purpose of killing him, if he could

succeed in having him resent his insults, there can be no question," so states the opinion. The opinion continues:

He stood with "his gun pointed down with his hand on the lock and a part of the time at least the gun cocked, and which could be raised in position to shoot quite as quick as a flash of lightning; it was nothing short of a malicious assault on Ellis, yet defendant's counsel contend that it amounted to nothing but words. If Ellis had ever happened in an unguarded moment to put his hand toward his pocket, he would have been killed in a second of time; the gun could scarcely have been in a more threatening position if it had been pointed at his breast."

As will be seen from the other instructions in the Hatfield Case, the evidence was that Hatfield not only sought out Ellis to kill him, but began the quarrel and made a malicious and deadly assault upon his victim by cocking his rifle and presenting it in immediate readiness to carry out his design. Under such evidence and circumstances, the instruction, taken in connection with the other instructions, was proper and could not have misled. It is clear that under such circumstances Ellis would have been justified in believing his life was in imminent danger. His assailant had declared he would kill him on the first opportunity. He approached with threatening words, with a deadly weapon cocked and presented. Here were overt acts, an assault, not abusive, insulting words alone. Had Ellis killed his assailant under such facts and circumstances, he would have been justified in killing in order to save his own life; and Hatfield could not take advantage of his own wrong and escape under the plea of self-defense, unless he had first declined the combat and retreated to the wall, and then the fatal shot must have been fired in order to preserve his own life or protect himself from great bodily harm. Here there are no such circumstances from the case made out by the state's witnesses, or from any witness.

Morgan began the assault at the post office, and, after severely whipping Plymale, went into the office and took away the account book, the property of Plymale, containing evidence of the accounts of Plymale against him, and against various other persons, and when approached peaceably a short time thereafter with a request for the return of the book in an ordinary tone of voice, he refused to return it to its rightful owner. He began the quarreling and threats, and began to make preparation to carry out his threats. There is no evidence whatever that Plymale made any attempt to draw his pistol

until after he had been severely beaten with the club; he had committed no overt act tending to indicate an assault, unless the fact that he had his hand in his pocket could be so construed. One of the state's witnesses, Browning, testified that Plymale usually had one or both hands in his pockets, a habit he had. Could the fact that he approached Morgan and asked for the return of his book, and followed him a few steps insisting on the return of his property, be construed as indicative of an assault, or as an overt act evidencing a purpose to kill? He had a revolver, which he says he usually carried about his person, as he carried considerable money and was in the habit of cashing checks at the post office. This revolver he says was in his pocket at the first assault at the post office, and he did not use it until he thought his life was in danger from the blows of the club. There is nothing to contradict this statement, except inferentially, the evidence of one witness that he had seen, before that time on his visits to the post office, a pistol hanging on the wall near the safe in the post office.

The state's instruction No. 3 is not applicable to the facts and is misleading. From it the jury could infer that it was not necessary for Plymale to commit an overt act of violence, or begin the affray if he had his hand in his pocket, or that within 10 or 15 minutes after having been whipped by Morgan and not having recovered from the beating he approached Morgan with a pistol in his pocket in order to request the return of his property. It may have been unwise to do so, discretion might have been the better part of valor and dictated a request at a later and more propitious time; but would such action indicate an intention to renew the affray, and be construed as an overt act of violence, as this instruction might be interpreted to hold as a matter of law?

Moreover, it must be remembered that Morgan was not without fault. He began the assault at the post office, then carried away Plymale's property without any right to do so, and refused its return to the owner when requested in a proper manner, accompanying such refusal by threats of violence. A prompt return of the book would likely have ended the matter, if he apprehended great bodily harm from the approach of Plymale.

We think it was error to give this instruction, and for that reason reverse the judgment, set aside the verdict, and award defendant a new trial.

Reversed.

(89 W. Va. 634)

**STATE ex rel. SHOWN v. O'BRIEN,
Judge, et al. (No. 4407.)**(Supreme Court of Appeals of West Virginia.
Nov. 29, 1921.)*(Syllabus by the Court.)*

1. Bastards \Leftrightarrow 75—Conviction on confession at one term cannot be annulled at a subsequent term.

A circuit court is without authority to annul at one term a judgment of conviction upon confession of the accused in a bastardy proceeding, and for the periodical payments of money to the county court for the maintenance and support of the child for whose paternity he is responsible, entered at another and different term.

2. Attorney and client \Leftrightarrow 182(2) — Attorney has lien on judgment in bastardy.

An attorney, who prosecutes or assists in the prosecution of a bastardy proceeding to final judgment in favor of the mother of the child, upon an agreement with her or her next friend for an interest in the amount of the recovery, has a lien on the judgment for fees for services rendered by him in her behalf.

3. Attorney and client \Leftrightarrow 189 — Fraudulent agreement between parties to judgment in bastardy cannot deprive attorney of fees.

Where a lien for the fees of an attorney who prosecutes or assists in the prosecution of a bastardy proceeding attaches to final judgment of conviction against the putative father of the child, and for the payment of money for its support for a specific term of years, the mother, in person or by her next friend, and the accused cannot, by a fraudulent agreement after judgment, deprive the attorney of fees for the services so rendered by him.

4. Attorney and client \Leftrightarrow 190(4) — Attorney claiming fraudulent release of judgment defeating lien has burden of proof.

The burden of proof to show fraudulent procurement of a release of a judgment in a bastardy proceeding rests upon the attorney.

5. Compromise and settlement \Leftrightarrow 15(1) — Rights of all parties must be regarded and respected.

The rule that the courts favor compromise settlements by parties to prevent vexatious and expensive litigation only applies where the legal and equitable rights and interests of all parties concerned in a judgment are regarded and respected in good faith.

6. Bastards \Leftrightarrow 78—Mother held to have beneficial interest in judgment for support of child.

Although the mother of the illegitimate child, or her next friend if she is a minor, or the county court if the judgment in a bastardy proceeding is payable to such court for the support of the child, may in a sense hold the fund so derived in trust for the benefit of the child, yet she has a beneficial interest in the fund, as she remains liable for its nurture and maintenance within the limit of her ability to

bear that burden, aided by the compulsory contribution of the putative father.

Original proceeding in prohibition by the State, on the relation of Stella M. Shown, against W. H. O'Brien, Judge, etc., and others. Writ awarded.

Thos. P. Ryan, of Spencer, for relator.

LYNCH, J. In a complaint duly verified and filed with a justice of Roane County, Stella M. Shown, a minor and unmarried, charged Earl Bowers with being the father of a child born unto her and on May 12, 1919, he appeared in person and by counsel in the circuit court of the county and confessed the truth of the accusation, H. C. Furgeson being present, and representing the county court, and Thomas P. Ryan, an attorney at law, the mother of the child. Acting upon the complaint and confession, the circuit court entered judgment against Bowers for \$45, which amount he then paid, and required him to pay monthly thereafter \$7.50, and to enter into a bond, which he did, in the penalty of \$1,000, with sufficient surety and conditioned upon the prompt compliance with the order.

Some time prior to May 18, 1921, he having in the meantime paid the monthly installments, Bowers notified the child's mother and the county court of his intention to move the circuit court on that day to vacate the judgment and exonerate him from the burden of the payment so required. The grounds alleged for the motion were his inability to pay the amounts because of the impairment of his health, and his improper conviction upon the complaint made against him, notwithstanding the confession. This motion he made May 18, 1921, and counsel for the mother appeared that day, pursuant to the notice served on her and resisted the motion, and the further hearing was continued from time to time, until upon a petition by her next friend, J. A. Shown, a writ issued by this court prohibited further proceeding upon the notice and motion. Nevertheless, the mother and putative father, either in person or by representative, arrived at some arrangement in the nature of a compromise of the judgment, and she moved to dismiss the prohibition proceeding. Ryan thereupon filed his petition alleging fraud in the procurement of the agreement, the purpose of which, he says, was to delay and defraud him in the collection of fees for his services as her legal advisor in the bastardy proceeding, she, according to the petition, having agreed to allow him one-half of the judgment as compensation. The prayer of his petition is that it may be filed in the prohibition proceeding, "that said action may be allowed to proceed to final deter-

mination in the name of the said parties for his benefit, and that his said rights and his said (attorney's) lien may be protected and enforced," and for other further and general relief.

To the petition of the mother's next friend the persons prohibited have not appeared, and the petitioner appeared only to move its dismissal, and on that motion no action has so far been taken, and the Ryan petition remains unanswered.

In this jurisdiction there is and can be no question as to the equitable right of an attorney to claim and have his fees secured to him out of a judgment or recovery he has been instrumental in securing for his client in a particular suit, he, to that extent, being regarded as an equitable assignee of the judgment or decree. *Benick v. Ludington*, 16 W. Va. 378; *Bent v. Lipscomb*, 45 W. Va. 183, 31 S. E. 907, 72 Am. St. Rep. 815; *Hazeltine v. Keenan*, 54 W. Va. 600, 46 S. E. 609, 102 Am. St. Rep. 953; *Fisher v. Mylius*, 62 W. Va. 19, 57 S. E. 276. If the client does not obstruct the prosecution of the action or suit, and a judgment or decree in his favor results, the attorney, generally, may readily protect the lien for his services. But if, by fraud, collusion, or deception, the client attempts to defeat the lien before judgment or decree, the attorney may and should, as a matter of right, for his own protection, continue for his benefit the prosecution of the action in the name of the client whom he represents. *Burkhart v. Scott*, 69 W. Va. 694, 72 S. E. 784. There may be and are instances warranting an independent judicial proceeding for the protection and enforcement of such a lien, as in *Bent v. Lipscomb*, cited.

There are authorities that criticize as inaccurate the use of the term "lien" in a case of this kind. They prefer rather to treat what is thus described as the claim of an attorney to the equitable interference of the court, having jurisdiction of the parties and the judgment, to hold and control it as a security for his protection, because of his official relation to the court. This is the definition given by Baron Parke in *Barker v. St. Quentin*, 12 M. & W. 441, 152 Reprints, 1270. That term, however, is the one ordinarily used in most decisions.

[3-5] In this case as already remarked, Ryan in his petition alleges a collusive and fraudulent settlement of the judgment he was one of the active agents in procuring, the design and effect of the settlement being, he says, to defeat the collection of his fees, payment of which is secured by a lien on the judgment sought to be annulled, after the adjournment of the term at which it was rendered. Courts favor and encourage settlements between parties to a controversy to avoid the vexation and expense of litigation,

but look with disfavor, as in other cases, upon a settlement procured by fraud or imposition, and particularly when designed to delay, hinder, or defeat enforcement of the rights of others vitally interested in the subject-matter of the controversy. The rule favoring compromise settlements does not apply in furtherance of a fraudulent design, but only where the rights and interests of the parties immediately concerned, whether legal or equitable, have in good faith been observed and respected. *Weeks v. Wayne County Circuit Judges*, 73 Mich. 256, 41 N. W. 269. The case cited is only one of many which sanction both rules, judicial encouragement when the compromise is just and fair, and condemnation when it injuriously affects the rights and interests of others not parties to the compromise agreement, and whose rights are not regarded or respected in the settlement. So numerous and universal are the decisions declaring these just and equitable principles that it is necessary to cite but few of them. For others see *Desaman v. Butler Brothers*, 118 Minn. 198, 136 N. W. 747, Ann. Cas. 1913E, 642, listing, among others, besides England and Canada, one each from Arkansas, Connecticut, Georgia, Idaho, New Hampshire, South Carolina, and Wisconsin, and many from other state courts. In *Peterson v. Struby*, 25 Ind. App. 19, 56 N. E. 733, 57 N. E. 599, the court said:

"The law which recognizes an attorney's right to a lien upon a judgment, to secure his fees for services rendered in its procurement, rests upon the equitable rule that the party who has reaped the benefit of his services should not be allowed to run away with the fruits of such services without satisfying the legal demands of his attorney, by whose industry, sagacity, and learning, and in many cases at whose expense, those fruits are obtained."

Rooney v. Second Avenue R. Co., 18 N. Y. 368, says:

"The judgment being under the control of the court, and the parties within its jurisdiction, it will see that no injustice is done to its own officers."

It matters not that in some jurisdictions there are statutes regulating liens for attorneys' fees. The rule is the same in this state where there is no such statute upon the subject except the general provision found in section 13, chapter 119, Code (sec. 4711), authorizing contracts between attorney and client for fees, and in the absence of such contract the right of the attorney to have the reasonable value of his services; and, although some authorities question the existence of a common-law rule upon the subject of such liens, they have been allowed and enforced as if authorized in England from a remote date. The suit or action

must, however, proceed to decree or judgment in favor of the client before the lien for the attorney attaches. Until that stage is reached the lien is inchoate, and may not attach or become complete. Whether in that event the parties may compromise without incurring a liability for the fees of an attorney we do not pretend to decide, except in so far as held in *Burkhart v. Scott*, cited, where the case had proceeded to a verdict but not to a judgment when the compromise agreement was made.

[2, 6] Another question arises, Can there be a lien for attorneys' fees upon a judgment in a bastardy proceeding? The authorities answering that question are few. Counsel cite none, and but two were found in this investigation, *Costigan v. Stewart*, 76 Kan. 352, 91 Pac. 83, 11 L. R. A. (N. S.) 630, and note; *Taylor v. Stull*, 79 Neb. 295, 297, 112 N. W. 577. The decision in the *Taylor-Stull* Case, however, depended upon the proper construction of a general statute providing for liens of attorneys upon giving notice of the lien to the parties interested in the result of the litigation. Each of the two cases deal with liens in bastardy proceedings, and they concur in sustaining the liens as in other litigated controversies. The contention in both was that the mother was not the owner of the judgment or of any interest in the fund it represented if paid into the treasury of the court, but was a mere trustee, the child being the beneficiary. This argument was countered in this way in *Taylor v. Stull*: It is doubtless true that in a measure she acts in a trust capacity, and a judgment awarded in such a case is largely for the benefit and for the support of the bastard child, but the mother in such proceeding has a beneficial interest in the judgment. She is liable for the support of the child, and to the extent that she recovers from the father her burdens are lessened etc. The money represented by the judgment here involved, however, was to be paid, and until the date of the compromise agreement was paid, to the county court for repayment to the mother for the support and maintenance of the

child and that court is not here asserting an interest in the fund or the right to receive and disburse any balance within its control or any amount due and unpaid on the judgment. But if otherwise the county court would have no right or interest not possessed by the mother. She would still be liable for the maintenance of the child if able to bear that burden. There does not appear to be a substantial or meritorious difference in law or principle between this and the other two decisions.

[1] By what authority not applicable to judgments obtained in any other form of action or judicial proceeding may a circuit court, on motion of either party, alter or annul a judgment obtained in a bastardy proceeding after the end of the term at which the judgment was rendered, as in this case? Although a court may at any time during the term set aside a judgment rendered within the term, there is no authority for doing so after the expiration of the term, except upon motion as provided by section 5, c. 134, Code (sec. 4979), or by bill of review for fraud or for correction of clerical errors in some circumstances (*Manlon v. Fahy*, 11 W. Va. 482; *Morris v. Peyton*, 29 W. Va. 201, 11 S. E. 954), or by an independent bill charging fraud in the judgment or decree. It is evident, therefore, that the motion to dismiss the proceeding in bastardy for the annulment of the judgment or for the discharge of the rule in prohibition is not allowable upon the theory on which the motions are predicated. It is fair to say, however, though already remarked, that the circuit court has not ruled upon either of the first two motions, and cannot rule on the third, as it is not addressed to him.

As it is not within the province of this court to hear and determine in the first instance matters arising upon the petition of Thomas P. Ryan, our order will make the rule in prohibition absolute, leaving open for trial in the circuit court such issues upon the question of fraud in the Ryan petition as may seem appropriate in view of the principles of law herein set forth.

(182 N. C. 725)

(109 S.E.)

FARR v. BABCOCK LUMBER & LAND CO.
(No. 594.)

(Supreme Court of North Carolina. Dec. 21, 1921.)

1. Appeal and error \S 80(6)—Order overruling motion for nonsuit as to some of the causes of action not appealable as a final order.

An order sustaining a motion for nonsuit as to one cause of action and overruling it as to other causes of action held not appealable by defendant, not being a final order or an order of such character as to deprive defendant of any substantial right, the defendant having a right to preserve its exception until final judgment.

2. Master and servant \S 369—Compensation Act of Tennessee held not to preclude servant employed in Tennessee from suing in North Carolina.

The Workmen's Compensation Act of Tennessee does not preclude an employee who was employed in Tennessee, but who was injured while working in North Carolina, from bringing action in county in which he was injured for injuries, on the grounds that employer failed to keep a physician at the camp to attend employee after he was injured, that employer employed an incompetent physician, and that employer was negligent in failing to provide employee transportation to his home.

Exceptions and Appeal from Superior Court, Graham County; Harding, Judge.

Action by Ernest Farr against the Babcock Lumber & Land Company. Order overruling motion for nonsuit as to some of the causes of action and defendant excepts and appeals. Appeal dismissed.

The plaintiff is a resident of Graham county, and the defendant is a foreign corporation engaged in the manufacture of lumber, with plants in Tennessee. The defendant owned timber lands in Graham county, and operated a railroad for hauling logs from Graham to its plants. The defendant had camps, a hospital, and an office in Graham county. The plaintiff, an employee of the defendant, was injured while in the prosecution of the work assigned him. The complaint states four causes of action: (1) Defendant's failure to provide for plaintiff a safe place in which to work; (2) defendant's failure to keep a physician at the camp to attend plaintiff after he was injured; (3) defendant's employment of an incompetent physician; (4) defendant's negligent failure to provide plaintiff transportation to his home from the junction on the road of defendant and Knoxville Power Company. Plaintiff alleged that defendant had undertaken to provide for the plaintiff and other employees a competent physician and surgeon when needed, and made a monthly

charge or assessment which was deducted from the employees' wages.

The defendant denied the plaintiff's material allegations and alleged that the contract of employment was made in Tennessee and subject to the provisions of the Workmen's Compensation Act (Laws 1919, c. 123) passed by the General Assembly of Tennessee on April 15, 1919, and made effective from July 1, 1919.

The defendant contended that, upon the face of the pleadings—it having been agreed that the contract of employment had been made in Tennessee—the court had no jurisdiction. The court sustained the motion, as to the first cause of action, and overruled it as to the second, third, and fourth. Upon the intimation of the court the plaintiff submitted to a nonsuit as to the first cause, and did not appeal. The court further adjudged that the trial should proceed upon the second, third, and fourth causes. The defendant excepted and appealed.

Merrimon, Adams & Johnston, of Asheville, for appellant.

R. L. Phillips and T. M. Jenkins, both of Robbinsville, for appellee.

ADAMS, J. [1] His honor held that the court had no jurisdiction of the first cause of action, and retained the second, third, and fourth causes for trial by jury. The defendant thereupon excepted and appealed. The order appealed from was not final or of such character as to deprive the defendant of any substantial right, and for this reason the appeal was premature. The defendant can preserve its exception until a final judgment is rendered. In numerous cases this court has held that a premature or fragmentary appeal will not be considered. *Hailey v. Gray*, 93 N. C. 196; *Lane v. Richardson*, 101 N. C. 182, 7 S. E. 710; *Piedmont Co. v. Buxton*, 105 N. C. 74, 11 S. E. 264; *Emry v. Parker*, 111 N. C. 261, 16 S. E. 236; *Ry. v. King*, 125 N. C. 454, 34 S. E. 541.

[2] We are requested, however, to review so much of the judgment as retains for trial the second, third, and fourth causes of action. As now advised, especially in the absence of an opposing interpretation by the Supreme Court of Tennessee, we are of opinion that the sections of the Workmen's Compensation Act cited and relied on by the defendant do not purport to interfere with the jurisdiction of the superior court of Graham as to the second, third, and fourth causes of action stated in the complaint, and that there was no error in his honor's order that these causes be retained for trial.

Appeal dismissed.

WALKER, J., concurs only in dismissal of appeal.

(182 N. C. 632)

FOSTER v. WILLIAMS et al. (No. 510.)

(Supreme Court of North Carolina. Dec. 14, 1921.)

1. Acknowledgment §6(3)—Wife's deed to husband void for lack of proper examination and certificate.

Under C. S. § 997, relative to acknowledgment of conveyances, etc., by a married woman and section 2515, providing that to render a contract between husband and wife valid it shall appear, on the examination of the wife separate and apart from the husband, to the satisfaction of the officer that the wife freely executed the contract, and that it is not unreasonable or injurious to her a conveyance by a married woman to her husband was void for lack of the examination and certificate required by section 2515, though she was a free trader; and on her death the land descended to her heirs subject to the husband's estate by the curtesy.

2. Acknowledgment §47—Validating statute held inapplicable to deed from wife to husband.

C. S. § 3351, validating deeds by married women who were at the time free traders, though executed without privy examination and without written assent of the husband, applies only to deeds to third persons, and not to a deed to the husband executed without the examination and certificate required by section 2515.

3. Infants §31(1)—Entitled to disaffirm deed and sue for partition within 3 years after maturity.

One who was only 19 years old when she joined with her father in conveying land in which she had an interest as the heir of her mother was entitled, in a suit for partition within 3 years after becoming of age, to assert her interest and ownership.

4. Infants §31(1)—Right to avoid deed and have division of land not affected by rights of purchaser without notice.

The right of an infant to avoid her deed to land in which she had an undivided interest within 3 years after becoming of age and to have a division of the property as of right by sale or actual partition was not affected by reason of the adverse interest of one purchasing without notice, and a decree denying a sale or partition and giving her only a lien for the market value of her interest was erroneous.

Appeal from Superior Court, Wilkes County; Shaw, Judge.

Action by Mrs. Annie McGlammery Foster against E. V. Williams and another. From a judgment for plaintiff for insufficient relief, all parties appeal. Reversed on plaintiff's appeal, and affirmed on defendants' appeal.

From the facts and admissions properly presented, it appears: That on the 9th day of December, 1907, Mrs. Nancy C. McGlammery, then wife of L. M. McGlammery,

owner of the land in controversy, and who had been properly constituted a free trader, pursuant to the statute undertook to convey said land, by written deed to her husband. Said deed was in due form to convey real estate, containing the usual covenants, and with acknowledgment and privy examination taken in ordinary form, but without certificate, as required by C. S. § 2515 (Revisal, § 2107), to the effect that the conveyance was not "unreasonable or injurious to her." That on December, 27, 1907, said Nancy C. McGlammery died leaving five children of the marriage, her heirs at law, and subsequently one of the children, Vernon McGlammery, died without issue. That on the 10th day of February, 1915, L. M. McGlammery and his second wife, Hettie, and the four surviving children, including Annie Lizzie McGlammery, since intermarried with — Foster, conveyed the land by deed, with full covenants to defendant E. V. Williams for the purchase price of \$8,000, the consideration being paid to the father, L. M. McGlammery except \$1,000 evidenced by note to L. M. McGlammery, and as to payment of said note there is now a dispute pending between the administrator of L. M. McGlammery and E. V. Williams. That on the 31st day of August, 1918, said E. V. Williams, by written deed with full covenant conveyed the property in dispute to defendant Branson Benton for \$10,000, of which \$3,000 was paid and the balance secured by deed of trust on the property in favor of the vendor, E. V. Williams, and that at the time of the purchase of said land by said Benton and the payment of the \$3,000 thereon the taking of the deed referred to vendee Benton was without notice or knowledge of any infirmity in the title by reason of the claims of plaintiff. On the hearing it was further admitted that plaintiff, Annie Lizzie McGlammery, now Foster, at the time of signing the deed to E. V. Williams, was living on the lands in the house with her father, L. M. McGlammery; that the delivery of the deed was by said L. M. McGlammery, and the settlement was made with him, and that no part of the purchase money was paid to her; that the day after the execution of the deed to Mr. Williams said Annie L. McGlammery, then aged 19, was married to her present husband, — Foster, and since that time has resided in West Virginia. It further appeared that plaintiff, said Annie McGlammery, within 3 years after arriving at the age of 21, instituted the present suit, seeking a partition of the property in accord with her interest in the tract presented to-wit, one-fourth of all the lands contained in the deed of her mother, Nancy C. McGlammery, except 95 acres, in which said mother owned only an undivided half interest and

as to the plaintiff a one-eighth interest; and it is admitted by the parties that if plaintiff has any interest in the land it is one-fourth of all the lands embraced in the deed from her mother, except the 95-acre tract, and in this plaintiff has a one-eighth interest. Upon these facts the court declared his conclusions of law as follows:

"That Annie Lizzie McGlammerly Foster is the owner of a one-fourth interest in and to all the lands described in the complaint, and the defendant Branson Benton is the owner of the other three-fourths, except Annie McGlammerly Foster owns only a one-eighth interest in 95 acres of said land, which boundary is described as the fourth tract in the deed from Nancy C. McGlammerly to L. M. McGlammerly and referred to as the Jesse McGlammerly home place and the said Branson Benton is the owner of the other seven-eighths interest therein. E. V. Williams having conveyed said land to Branson Benton before the commencement of this action, and the said Branson Benton having purchased said land without notice that Annie McGlammerly Foster was under age at the time she executed the deed to E. V. Williams, and, having paid \$3,000 and still owes \$7,000 of the purchase price, the court is of the opinion, and so holds, that the said lands cannot be actually partitioned by reason of the conveyance as aforesaid to Branson Benton. The defendant having agreed that Branson Benton is still due E. V. Williams \$7,000 on the original purchase price of said land, the court is of the opinion, and so holds, that the plaintiff is entitled to recover of the defendants the present market value of her undivided interest in and to the lands described in the complaint, together with her pro rata part of the annual rental value of said land from August 26, 1917, to May 30, 1921, with interest on said annual sum, less her pro rata part of the annual taxes on said land during said period, and that said sum should be paid to her out of the remainder of the purchase price due by Branson Benton to E. V. Williams. That the defendants are not liable for rents on the said lands up to August 26, 1917, the date of the death of L. M. McGlammerly, for that the said L. M. McGlammerly was entitled to the possession of his wife's land during his life as tenant by the courtesy. The defendant Branson Benton having purchased the lands as described in the complaint for the price of \$10,000, and having paid \$3,000 of the purchase price before notice that plaintiff was a minor at the execution of the deed to E. V. Williams, the court is of the opinion, and so holds, that the defendant Branson Benton was to that extent an innocent purchaser for value and without notice of the plaintiff's right, and that the land cannot therefore be actually partitioned. As to the remaining \$7,000 of the purchase price, the defendant Branson Benton is not an innocent purchaser for value and without notice of the plaintiff's rights"

—and thereupon adjudged that the plaintiff was the owner of the one-fourth and one-eighth interests, respectively; that she was not entitled to actual partition by reason of

the fact that defendant Branson Benton had bought the land and paid \$3,000 thereon before action commenced and before notice that plaintiff was a minor at the time of the execution of the deed; that plaintiff be awarded the present market value of her interest, together with her proportion of the rents from the time of her father's death, less a proper deduction for taxes, etc.; that the amount awarded her be declared a lien on the balance due for purchase-money, etc.

Hayes & Jones, of Wilkesboro, for plaintiff.

R. N. Hackett and Chas. G. Gilreath, both of Wilkesboro, for defendant Williams.

F. B. Hendren, of Wilkesboro, for defendant Benton.

HOKE, J. [1-3] Our decisions have very insistently and uniformly held that, in order to a valid conveyance of a married woman's real estate, there must be the written assent of her husband and her privy examination had pursuant to the law appertaining to the question. 1 C. S. § 997; *Stallings v. Walker*, 176 N. C. 321, 97 S. E. 25; *Warren v. Dall*, 170 N. C. 406, 87 S. E. 126; *Smith v. Bruton*, 137 N. C. 79, 49 S. E. 64; *Scott v. Battle*, 85 N. C. 185, 39 Am. Rep. 694. And when the conveyance is from the wife directly to the husband it is essential that, in addition to her private examination in ordinary form, that there shall appear the certificate of the officer taking the probate that the conveyance is not unreasonable or injurious to her, as required by C. S. § 2515. *Butler v. Butler*, 169 N. C. 584, 86 S. E. 507, Ann. Cas. 1918E, 638; *Wallin v. Rice*, 170 N. C. 417, 87 S. E. 239; *Kearney v. Vann*, 154 N. C. 311, 70 S. E. 747, Ann. Cas. 1912A, 1189. And in the interpretation of the regulations appertaining to the subject, it is further held that the requirements of the law are in no wise affected by the fact that the wife is, at the time of the conveyance, a properly constituted free trader. *Council v. Pridgen*, 153 N. C. 443, 69 S. E. 404. It is urged for the defendant that, while these and other like decisions may express the rule ordinarily applicable, the same should not prevail in the present case by reason of a statute appearing in C. S. § 3351, purporting to cure defective executions of deeds of married women free traders at the time and prior to 24th of September, 1913. Our decisions on the subject being to the effect that an attempted conveyance by female covert without the private examination and certificate as required are absolutely void, there is doubt if same could be rendered valid by statutes subsequently passed, but, if it be conceded that the defect comes only from a lack of proper probate, and same is subject to curative legislation as against heirs at law, etc.; the grantor and others holding only as trustees. Under

the principle applied and approved in the recent case of *Sluder v. Lumber Co.*, 181 N. C. 69, 106 S. E. 215, the question is not presented on the present record, as, in our opinion, the statute referred to affects, and is only intended to affect, the deeds of married women to third persons, and not those she has attempted to make directly to her husband. The statute provides that deeds by a married woman, free trader, from September 24, 1913, "taken without privy examination and without written assent of the husband," shall be valid and effectual to convey her land, thus showing clearly that only deeds of third persons were contemplated and provided for. This being the law appertaining to the question, the alleged deed of Mrs. McGlammery to her husband is void for a lack of proper examination and certificate, and on her death the land descends to her children and heirs at law subject to an estate by the curtesy in her husband. And he having died, and it appearing from the admitted facts that the present plaintiff was only 19 years of age at the time of the conveyance of the husband and children to defendant Williams, and the present action having been instituted within 3 years from her arrival at maturity, we are of opinion that on the facts presented the plaintiff is entitled to maintain the action in the assertion of her interest and ownership in all of the lands in possession and control of defendants contained in the alleged deed from Mrs. McGlammery to her husband, to wit, one-fourth thereof, except the 95-acre tract, in which she is entitled to one-eighth undivided interest. *Hogan v. Utter*, 175 N. C. 332, 95 S. E. 565; *Chandler v. Jones*, 172 N. C. 574, 90 S. E. 580; *Baggett v. Jackson*, 160 N. C. p. 31, 76 S. E. 86; *Gaskins v. Allen*, 137 N. C. 430, 49 S. E. 919; *Weeks v. Wilkins*, 134 N. C. p. 522, 47 S. E. 24.

[4] The question sometimes presented as to whether, in actions of this kind, based on avoidance of his deed, an infant is required to restore the consideration, is not raised in this record, as it appears by admission of the parties that no part of the consideration was paid to the present claimant, but all of it was received by the father except \$1,000, and that was evidence by note to him. And the authorities are to the effect also that the right of an infant to avoid his deed within 3 years after his becoming of age is not affected by reason of the adverse interest of one purchasing without notice, but the claimant is entitled to the land, or his interest in it that the facts may disclose. *Jackson v. Beard*, 162 N. C. 105-110, 78 S. E. 6; *Searcy v. Hunter*, 81 Tex. 644, 17 S. W. 372, 26 Am. St. Rep. 837; *Richardson v. Pate*, 93 Ind. 423, 47 Am. Rep. 374; *Sims v. Smith*, 86 Ind. 577; 22 Cyc. 551. Plaintiff, then, being a tenant in common to the ex-

tent of her established interest, is entitled to a division of the property as of right, either by sale or actual partition as the facts may appear, and the portion of the decree by which this right has been denied her will be reversed. *Holmes v. Holmes*, 55 N. C. 334; *Purvis v. Wilson*, 50 N. C. 22, 69 Am. Dec. 773. *Freeman on Cotenancy*, 424. This will be certified, that the cause may be proceeded with in accordance with this opinion.

Plaintiff's appeal reversed. Defendants' appeal affirmed.

(182 N. C. 779)

PICKENS & BRADLEY v. WHITTON et al.

(Supreme Court of North Carolina. Dec. 14, 1921.)

1. Justices of the peace ⇨202(1)—Petition for recordari held barred by laches.

To enable an appellant from a justice court, who has not docketed his appeal as required by C. S. § 1532, at the first term of the superior court beginning not less than 10 days after the appeal, to bring up the appeal by recordari, he must move at the earliest possible moment, and where judgment was rendered June 4, and the next term began two days thereafter, the next on July 11, and the next August 1, a petition for recordari on August 13, was barred by laches.

2. Justices of the peace ⇨202(2)—Petition for recordari, alleging meritorious defense in general terms, insufficient.

A petition for recordari to bring up defendant's appeal held not to show a meritorious defense, alleging such defense in general terms, but not setting forth sufficient facts to show it.

3. Justices of the peace ⇨194(2)—Appellee, not moving for affirmance for delay, not barred from objecting to recordari.

An appellee, not availing himself of C. S. § 660, permitting him to docket an appeal from justice court not docketed in time by appellant and move for affirmance, did not waive right to object to appellant's petition to bring up the appeal by recordari.

4. Justices of the peace ⇨197(1)—Right to recordari held not to apply in case of laches.

C. S. § 660, providing that the writ of recordari may issue in cases heretofore allowed by law intends those cases where the party has lost his right to appeal otherwise than by his own default.

Appeal from Superior Court, Buncombe County; Adams, Judge.

Action by Pickens & Bradley against G. V. Whitton and C. M. Herring, before a justice of the peace, and from a judgment for plaintiffs rendered June 4, 1921, they appealed to the superior court, but, not having docketed the appeal in time, defendant C. M. Herring on August 13, 1921, applied to the superior

court for writ of recordari, and on refusal of the petition he appeals. Affirmed.

The petition for the writ of recordari and the findings of the court follow:

Your petitioner, C. M. Herring, one of the defendants above named, respectfully sheweth the court: That ——— Pickens and ——— Bradley, trading under the firm name of Pickens & Bradley, obtained a judgment against the defendants, before B. L. Lyda, a justice of the peace of said county, on the 4th day of June, 1921, for the sum of two hundred (\$200.00) dollars and costs.

Your petitioner further sheweth that the cause of action was as follows: The plaintiffs introduced into court a promissory note, or paper writing, which the defendant, C. M. Herring, your petitioner, had never seen until last above-mentioned date, which note was dated March 15, 1920, due May 15, 1920, in the sum of \$200, payable to Pickens & Bradley, and signed "Whitton & Herron, by G. V. Whitton." That incorporated in the note, on its face, was the following: "This note is given for part payment of one 10 H.P. portable International engine. I agree that the title thereto, and to all repairs and extra parts furnished, shall remain in said company, its successors and assigns, until this and all other notes given for the purchase price shall have been paid in money. If I fail to pay this note when due, or if said property is misused or seized for my debts, the holder of this note may seize and sell the same at public or private sale, with or without notice, pay all expenses thereby incurred, and apply the net proceeds upon this note and other notes given for the purchase price thereof, whether due or not due, and retain all payments before made as rent for the use of said property. I expressly agree to pay any balance on this note remaining unpaid after such property is sold, or if the same be burned, or otherwise damaged, or destroyed after its delivery to me."

That this defendant, your petitioner, spells his name H-e-r-r-i-n-g and not H-e-r-r-o-n; that at the alleged time of the making of this note, to wit, March 15, 1920, there was no partnership between your petitioner and G. V. Whitton, nor was there a partnership between your petitioner and G. V. Whitton at any time prior to March 15, 1920; that if the name H-e-r-r-o-n was intended for your petitioner, it was not only wrongly spelled, but was placed on the note entirely without any authority or direction, or knowledge of your petitioner; that at the date of the rendition of judgment before the said magistrate, the engine, so far as your petitioner is advised and verily believes, had never been seized by the plaintiffs, nor sold by them, as expressly provided in the note as a condition precedent to any personal liability attaching to the maker of said note, but this petitioner expressly denies that he was a maker of this note, and his liability thereon in any event.

That your petitioner, on the trial before the aforesaid magistrate, denied all liability on the note, and still denies all liability thereon, and any knowledge of the existence of the note prior to a short time before the trial and rendi-

tion of judgment on June 4, 1921, as aforesaid.

That your petitioner is informed and verily believes that he has a good and meritorious defense, and that the plaintiffs' claim against him is not a just and meritorious claim, and if judgment is allowed to stand against this defendant, it will work a grave miscarriage of justice.

That this petitioner lives nine miles out of the city of Asheville; that shortly after the rendition of judgment he duly executed his bond in the sum of \$300, the amount fixed by the plaintiffs, to stay execution, which bond was signed by himself as principal and R. E. Carmichael as surety, and filed within the time prescribed by law, with the aforesaid magistrate, and that the sum of 90 cents was paid the said magistrate by him, through his attorney, within the time prescribed by statute, covering both the magistrate's fee and the costs for docketing the return of appeal in the superior court, with a request that the magistrate duly docket the summons, proceedings in the case, and return on the appeal, with the clerk of the superior court, within the time prescribed by statute, which the said justice agreed to do. That the attorney and counsel for your petitioner was out of the county during a portion of the time following the rendition of judgment, and that your petitioner, being in business in Weaverville, nine miles out of the city, as aforesaid, comes into Asheville only at long intervals of time. That the proceedings in the above-entitled cause have not been filed with the clerk of the superior court, nor placed upon civil issue docket for trial; that your petitioner feels that it was not in any way through his neglect or negligence, but through the negligence, oversight, and neglect of the magistrate, that this case was not duly filed.

Wherefore, your petitioner prays that he be granted a writ of recordari, to be directed to the sheriff of the said county, commanding him to go, in proper person, to B. L. Lyda, the aforesaid magistrate, and have recorded and filed with the clerk of the superior court, the summons, judgment, return of appeal, and all other proceedings in the above entitled action, and have said case placed upon the civil issue docket for trial.

Considering the petition of the defendant C. M. Herring duly verified, the affidavits of Mr. Campbell, attorney for said Herring, and B. F. Lyda, justice of the peace, the court finds the following facts:

(1) That the note upon which the plaintiff's cause of action is based is signed by Whitton & Herron by G. V. Whitton; that the summons was served on the defendant G. V. Whitton and the defendant C. M. Herring; that the defendant G. V. Whitton appeared in person before the said justice of the peace, and C. M. Herring appeared in person and by counsel, and made a general denial of plaintiff's cause of action, which was entered upon the record of the justice.

(2) That the said justice of the peace rendered judgment in favor of the plaintiffs and

against the defendants on the 4th day of June, 1921.

(3) That the defendant C. M. Herring gave notice of appeal to the superior court in open court.

(4) That the justice of the peace was paid his fees for sending up the appeal and fee for docketing in the superior court; that thereafter the defendant C. M. Herring executed an undertaking to stay execution pending said appeal.

(5) That the term of the superior court of Buncombe county first convening after the trial before the justice of the peace began at the courthouse in Buncombe county on the 6th day of June, 1921; that the second term of the superior court of Buncombe county convened July 11, 1921, and that the third term of the superior court of Buncombe county convened on August 1, 1921; that the term convening June 6, was for the trial of civil actions, the term convening July 11, for criminal and civil actions, and the term convening August 1, for civil actions.

(6) That the petition for the recordari in this case was filed in the superior court of Buncombe county on the 13th day of August, 1921, during the third term which convened next after the trial before the said justice, and not at the first term which began more than 10 days after the trial before the justice of the peace.

Upon the foregoing finding of facts, the court is of opinion that the appellant, C. M. Herring, is not entitled to a writ of recordari, as prayed in his petition, and the same is therefore denied.

Ruffner Campbell, of Asheville, for appellant.

W. P. Brown, of Asheville, for appellees.

PER CURIAM: [1] The justice of the peace rendered judgment against the defendants June 4, 1921. The next term of the superior court began within two days thereafter, and it was not incumbent upon the appellants to docket the appeal at that term, it being within less than 10 days, though they could have done so if they had chosen. But the appeal was required to be docketed at the next term of the superior court which began on July 11, being for the trial of both civil and criminal causes. *Barnes v. Saleeby*, 177 N. C. 258, 98 S. E. 708; *Abell v. Power Co.*, 159 N. C. 348, 74 S. E. 881; *Peltz v. Balley*, 157 N. C. 166, 72 S. E. 978; *Blair v. Coakley*, 136 N. C. 405, 48 S. E. 804, and other cases cited under C. S. § 1532. The next term thereafter began on August 1, 1921, and was for the trial of civil actions only. The appellants took no action until towards the close of this term, when on August 13, they applied for recordari, which was refused.

To enable an appellant who has not docketed his appeal within the time required by the statute (C. S. § 1532), i. e., at the first term of the superior court beginning not less than 10 days after the appeal was taken, to

bring up his appeal by recordari, he must show both (1) a lack of laches on his part; (2) a meritorious defense. An inspection of the court's findings of fact in this case shows that the defendant has not brought himself within the rule in either particular.

1. The petitioner must move for the writ of recordari at the earliest moment, and his failure to do so will defeat his right thereto. *Boing v. Railroad*, 88 N. C. 62; *Hahn v. Guilford*, 87 N. C. 172.

[2] 2. The petitioner has not shown a meritorious defense. *Tedder v. Deaton*, 167 N. C. 479, 83 S. E. 616; *Hunter v. Railroad*, 161 N. C. 503, 77 S. E. 678; *Marler v. Clothing Co.*, 150 N. C. 518, 64 S. E. 366; *Pritchard v. Sanderson*, 92 N. C. 41. It is true that the defendants allege in general terms that they have a meritorious defense, but they do not set forth sufficient facts to justify the court in so holding.

[3] The defendants contend that C. S. § 660, provides:

"If the appellant fails to have his appeal docketed as required by law, the appellee may, at the term of court next succeeding the term to which the appeal is taken, have the case placed upon the docket, and upon motion the judgment of the justice shall be affirmed"

—and argues that failure to do so is a waiver of objection on the ground that the appellants failed to docket the appeal at the first term of the court, beginning more than 10 days after the judgment was taken before the justice of the peace. But this court has often held that this remedy, like that of docketing and dismissing appeals to this court under rule 17 (66 S. E. vii), is optional with the appellee, and that a failure to exercise such right cannot avail an appellant who has not brought up his appeal in apt time. *Davenport v. Grissom*, 113 N. C. 38, 18 S. E. 78, and other cases cited under C. S. 660.

It is absolutely necessary that there should be a regular order of procedure within the courts. The right to appeal is not an absolute right, but dependent upon the observance of prescribed regulations. If that were not so, at least half of the time which the courts can apply to the trial upon their merits of appeals which have been brought up by those diligent to observe the procedure of the court will be devoted to the consideration of excuses by those who have not been careful to do so.

[4] The defendants further contend that C. S. § 660, provides that the writ of recordari may issue in cases heretofore allowed by law, but those cases are "where the party has lost his right to appeal otherwise than by his own default." *Marsh v. Cohen*, 68 N. C. 283. See instances cited under C. S. 630, under heading "Recordari."

The motion for recordari was properly de-

nied. Barnes v. Saleeby, 177 N. C. 256, 98 S. E. 708, and cases there cited.

Affirmed.

ADAMS, J., did not sit.

(182 N. C. 484)

SPRINGS v. SPRINGS et ux. (No. 442.)

(Supreme Court of North Carolina. Nov. 23, 1921.)

1. Wills \Rightarrow 675—Wish that devisee should will property to certain person held not to create trust.

Under a will giving testator's entire estate to a sister, by stating that it was testator's wish that she should make a will and leave all of her property to a certain nephew, held to give the sister absolute title in fee, and that no trust was created; the expressions of "wish," "desire," etc., not being construed as creating trusts in the absence of a clear indication of such intent.

2. Wills \Rightarrow 597(1)—No words necessary to enlarge devise into absolute fee.

No words are necessary to enlarge an estate devised or bequeathed into an absolute fee, but restraining expressions must be used to confine the gift to the life of a devisee or legatee.

Appeal from Superior Court, Mecklenburg County; Harding, Judge.

Action by Alice V. Springs against John L. Springs and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

This is an action to remove a cloud upon title submitted upon the pleadings and agreed statement of facts. Richard A. Springs, of Charlotte, died in 1879. On June 28, 1870, he wrote and signed the following paper writings, which were admitted to probate in Mecklenburg superior court on July 5, 1879, the whole of said writings being in testator's own handwriting, except the signature of Jno. F. Orr as a witness, to wit:

"Charlotte, N. C., June 28, 1870.

"To Whom It May Concern: Knowing the uncertainty of life and wishing to have my worldly goods disposed of according to my wishes, I make my last will and testament.

"I will first that all my debts be paid. Secondly, I will, devise, give and bequeath all my real and personal estate and valuables of every kind to my sister, Alice V. Springs, and I wish Gen. Robert D. Johnston to act as trustee for her until her twenty-third birthday. Given under my hand and seal this the 28th day of June, 1870. R. A. Springs. [Seal.]

"Witness: John F. Orr."

"To my Sister Alice: When you are made acquainted with the contents of this will it is my wish that you make a will immediately and leave all of your property to our nephew John M. Springs. Should you marry afterward you

can then tear up the will. My object is to have my property given to you first, but should you die without children, I wish you to leave your property to Johnny Springs.

"Very affectionately, your brother,

"R. A. Springs."

The testator had never married and left him surviving five sisters, one of whom is the plaintiff, the other four being then married, one brother, and the children of a deceased brother, who had left a widow and five minor children; the defendant John L. Springs being next to the youngest of them and the only boy. The testator left an estate, real and personal, including a half interest in fee simple in a lot in Charlotte described in the complaint; the whole valued at that time at about \$13,300. At the date of the paper writing and at the death of the testator, the plaintiff had property, estimated to be worth \$2,000 or \$2,500 inherited from her father.

The only question involved in this appeal is whether under the will of Richard A. Springs the plaintiff was seized of an absolute fee-simple title to the property in question to the exclusion of the defendants. The court below so held, and the defendants appealed.

Cochran & Beam, of Charlotte, W. B. Council, of Hickory, and John M. Robinson, of Charlotte, for appellants.

Cansler & Cansler and Clarkson, Taliaferro & Clarkson, all of Charlotte, for appellee.

CLARK, C. J. [1] The defendants contend that the will and the lower script having been probated in common form, the lower script has been adjudicated to be a part of the will. We do not deem it essential to discuss this point, for taking it to be true that it has been so adjudicated, we think that the words in the script are simply precatory and not mandatory. It would seem that the appended letter was not intended to operate as a part of the will, but as merely a private letter of recommendation; but passing that by, and taking it to have been proven as a part of the will, still it seems to us that the effect is not at all different.

The will itself, excluding the script, is a devise absolute in terms, and it will not be impressed with a trust by reason of words of "request" or "desire" contained in the subsequent and independent clause. The words used in the will proper are unequivocal and clearly vested a fee simple absolute in the plaintiff and did not create a trust. The words of the script, taken as a part of the will, should be taken as having been used in their usual and commonly accepted sense, and in the absence of clear indication of a contrary intent, expressions of

"wish," "hope," etc., are not to be construed as creating a trust.

The will was complete in itself and disposed of all his property absolutely in his sister the plaintiff. It is given under his hand and seal and is witnessed. While the seal was not necessary, it indicates an intention of making it his solemn act, and as such he had it duly witnessed, and it is directed to the public generally. The script appended on the same sheet is evidently an intimate letter addressed "To My Sister Alice," and has no seal nor witnesses. The first line of this script states to his sister that when she is made acquainted "with the contents of this will," it is his wish that she would make a will leaving "all your property" to their nephew John M. Springs. These words embrace the property which he knew the plaintiff had already inherited from her father, as well as that which she would take by virtue of this will. This indicates that it was a mere wish, for he had no power to require her to devise "all" her property to the nephew. He further states in this note to his sister that if she should marry after making such will she could tear it up, notwithstanding the request that he had made, and he further states that his object is to give his property to her first, but that if she should die without children he wished her to leave "your property to Johnnie Springs," and he signs this script, "Very affectionately, your brother."

The broad and comprehensive terms of the devise to the plaintiff made her the sole beneficiary. No logical reason has been assigned why, if the testator desired to make the contents of his affectionate note to his sister a limitation on his absolute devise to her, he did not incorporate it in the will as signed, sealed, and witnessed at the same time. The fact that he did not do so is conclusive evidence that he did not intend the letter to operate as an imperative testamentary command imposed as a charge upon his devise of all his property to her. Indeed, he suggests in his note, not only that she should devise all her property which would include that which she already had, as well as that which he had given her, but he adds that if she should marry she could tear up the will, thus indicating that her compliance with his request was not absolute or imperative.

Had the testator desired and intended to place an obligatory burden upon the devise to his sister whereby, in the event of her death without children, his property should go to their nephew, he would certainly have written, "But should you die without children my property (or the property herein devised) shall go to John Springs." And, furthermore, he would have included a provision of such importance in the will proper which he had signed, sealed, and caused to

be witnessed; whereas there was no witness or seal to the script. It is significant that his request to his niece is one which he knew could not be obligatory, for it is the expression of a wish that she should devise all "her" property to the nephew which he knew was not binding upon her, for he was aware that she already had independent property of her own and points out that if she desired she could afterwards tear up the will if so made.

It is true that under the old English decisions, which were followed by a few of the early cases in this country, the expression of a wish by the testator, like that of a sovereign, was construed as a command; but all the later cases both in England and in this country repudiate the doctrine, and hold that in the absence of a clear indication of a contrary intent, expressions of "wish," "desire," etc., are to be taken as used in their commonly accepted sense and are not to be artificially construed by the courts as a trust. In this state to this effect, *Alston v. Lea*, 59 N. C. 27; *Batchelor v. Macon*, 69 N. C. 545; *Young v. Young*, 68 N. C. 309; *St. James, etc., v. Bagley*, 138 N. C. 384, 50 S. E. 841, 70 L. R. A. 160; *Hayes v. Franklin*, 141 N. C. 599, 54 S. E. 432; *Fellows v. Durfey*, 163 N. C. 305, 79 S. E. 621; *Carter v. Strickland*, 165 N. C. 69, 80 S. E. 961, Ann. Cas. 1915D. 416; *Hardy v. Hardy*, 174 N. C. 505, 93 S. E. 976; *Laws v. Christmas*, 178 N. C. 359, 100 S. E. 587; *Waldroop v. Waldroop*, 179 N. C. 674, 103 S. E. 381.

The decisions are to the same effect elsewhere and are summed up 37 L. R. A. (N. S.) 646, notes; Ann. Cas. 1915D. 416, note; 2 Underhill on Wills, 1151 et seq.; 1 Perry on Trusts, 147.

The subject is nowhere better stated than in a review of the cases in this and other states by Mr. Justice Hoke in *Carter v. Strickland*, 165 N. C. 69, 80 S. E. 961, Ann. Cas. 1915D. 416, as follows:

"Some of the earlier English cases, and they have been followed by decisions in this country, are to the effect that a trust will be ingrafted or imposed upon an estate, absolute in terms, or upon its holder, by reason of precatory words in a will whenever 'the objects of the precatory language are certain and the subject of the recommendation or wish is also certain'—a position supposed to best effectuate the intent of the testator. A consideration of the later cases, however, will show that, in the decisions referred to, the principle has been too broadly stated, and it is now the prevailing doctrine, certainly so in this jurisdiction, that such words will be given their ordinary significance, and will not have the effect, as stated, unless from the terms and dispositions of the will and the circumstances relevant to its proper construction it clearly appears that they are to be considered as imperative and that the testator intended to create a trust."

That case has been cited with approval in the subsequent cases on the subject, and

is almost exactly on all fours with this case. In 2 Underhill on Wills, 1156, it is said:

"The current of the decisions both in England and the United States indubitably shows that precatory trusts are not to be favored nor is their extension to be encouraged by the courts."

Indeed, C. S. § 4162, has made this ruling statutory:

"When real estate shall be devised to any person, the same shall be held and construed to be a devise in fee simple, unless such devise shall, in plain and express words, show, or it shall be plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity."

[2] The rule is well settled that in a will no words are necessary to enlarge an estate devised or bequeathed into an absolute fee. On the contrary, restraining expressions must be used to confine the gift to the life of devisee or legatee. *Holt v. Holt*, 114 N. C. 241, 18 S. E. 967; *Jones v. Richmond*, 161 N. C. 553, 77 S. E. 950.

In *Griffin v. Commander*, 163 N. C. 230, 79 S. E. 499, where the testator devised to his wife "all the remainder of my estate, real and personal, with power to give and devise the same after her death, to our beloved children and grandchildren," it was held that she took in fee simple.

In *Fellowes v. Durfey*, 163 N. C. 305, 79 S. E. 621, where after giving the property to the testator's widow in subsequent clauses the will goes into elaborate details and directions as to advancements and in other respects, authorizing her to make provision for their children, the court held that the widow took an estate in fee simple absolute.

The judgment of the court below is affirmed.

WALKER, J. (concurring in result). I concur in the decision of this case, but not altogether in the reason assigned in the court's opinion therefor. The letter of Mr. Springs to his sister, which was written at the same time as the will, was not intended to be a part of the same, but merely a collateral request to his sister which should only suggest his wishes, as to the subsequent disposition of his property by her, but which should not be imperative upon her, but strictly discretionary or optional; that is, a thing she might do or not as she pleased. This is shown by his not incorporating it within his will, as a part thereof, but expressing his wish in the form of a letter to her, without being witnessed by Mr. John F. Orr. As the

letter was probated with the will as a part thereof (which should not have been done, as it was clearly not intended to be any part of the will), I must recognize the principle of law applicable to such a case, that the probate cannot be attacked, except directly, for the usual rule with regard to judgments rendered by a court of competent jurisdiction applies to the decrees of a competent court admitting a will to probate, and to the extent that the same can be attacked only by a proceeding immediately directed to that end, and they cannot be assailed collaterally. *Gardner on Wills* (1903) p. 337; 40 Cyc. 1370-1377, especially the latter page; *Hamp-ton v. Hardin*, 88 N. C. 592; *London v. Rail-road*, 88 N. C. 534; *Edwards v. White*, 180 N. C. 55, 103 S. E. 901; *In re Beauchamp's Will*, 146 N. C. 254, 59 S. E. 687; *Starnes v. Thompson*, 173 N. C. 466, 92 S. E. 259; *In re Thompson's Will*, 178 N. C. 540, 101 S. E. 107.

But, admitting this to be the inflexible rule of the law, it is nevertheless proper to consider the nature or character of the two documents, and the fact that they were prepared and signed at the same time, in passing upon the meaning of the testator, and upon an examination of them in the light of the facts and surrounding circumstances, my opinion is that it was clearly not the intention of Mr. Springs that his language should be considered as imperative, but merely precatory; that is, the expression of a mere wish, without intending to bind his sister at all to its observance. She might comply with it, or not, as she deemed best. The fact that her entire will was revocable by her upon her marriage favors this construction. If it were otherwise, and the letter had been made formally a part of his will—that is, embodied in it—I would be compelled to hold that the words he used were not merely precatory, and the making of her will purely discretionary, but that they would be imperative, or mandatory, upon her, and I have written this opinion to exclude the conclusion that I assented to the statement in the opinion that the words, considered by themselves, are precatory, and not imperative in character.

My opinion is that Miss Alice V. Springs is not compelled to comply with the request contained in the letter, but may do so, or not, as she may choose, and with perfect freedom to act in that way.

Justice HOKE concurs in the opinion of Justice WALKER.

(182 N. C. 727)

ROANE et al. v. McCoy et al. (No. 595.)

(Supreme Court of North Carolina. Dec. 21, 1921.)

1. Boundaries §35(3)—Surveyor's testimony as to location of lines held admissible though some not surveyed by him.

Testimony of a witness who had surveyed all the lines of the grant under which plaintiffs claimed title except the last three, which he stated followed the courses and distances called for, that a certain line would run north of some cut timber, was admissible, his testimony being in effect that, if the lines as to which he testified represented the true location of the grant, timber had been cut inside the boundaries.

2. Boundaries §35(3)—Testimony as to correspondence of witness' plat with plat in evidence held admissible as illustrating testimony as to surveys made.

Testimony of a witness who surveyed the boundaries of a grant before a plat in evidence was made that his plat corresponded therewith, that he could indicate thereon the survey he had made, and that he had found an oak at one of the corners, was admissible as illustrating his testimony as to the surveys he himself had made.

3. Witnesses §269(11)—Testimony on cross-examination as to matter not yet offered in evidence held properly excluded.

In an action for trespass on land, an answer of plaintiffs' witness on cross-examination to a question as to whether he knew the location of the grant under which defendants claimed title was properly excluded, where the latter grant had not been offered in evidence.

4. Appeal and error §1058(1)—Exclusion of evidence afterward admitted not reversible error.

The exclusion of evidence afterward admitted is not reversible error.

5. Trial §295(8)—Instruction as to burden of proof held not erroneous in view of entire charge and admissions in pleadings.

In an action for trespass on land, where the court instructed the jury that the burden was on plaintiffs to establish their title by the greater weight of the evidence, and defendants did not expressly deny plaintiffs' title, but only denied that they were the owners of such part of their grant as lapped on defendants' grant, an instruction that, unless defendants showed by the greater weight of the evidence that the lines of plaintiffs' grant lapped on defendants, the latter's possession outside the boundaries of plaintiffs' grant would not be extended so as to defeat or affect plaintiffs' title, was not erroneous, the instruction being considered as a part of the entire charge, and in connection with the admissions of the pleadings.

Appeal from Superior Court, Macon County; Long, Judge.

Action by C. T. Roane and another against Julius McCoy and another. Judgment for plaintiffs, and defendants appeal. No error.

Plaintiffs claimed title under a grant from the state to themselves, No. 16105, dated December 31, 1903, and registered January 27, 1904.

The defendants alleged:

That on May 20, 1864, the state issued grant No. 2924 to H. H. P. McCoy. That in 1876, or prior thereto, H. H. P. McCoy sold the land described in this grant to D. McDowell McCoy, his brother, and executed a deed in fee which had been lost. That H. H. P. McCoy had delivered to D. McDowell McCoy grant No. 2924, after making the following indorsement, which was signed also by his wife:

"I, H. P. McCoy, do assign the within land to D. McDowell McCoy to have and to hold forever. This Jan. 14, 1875."

That D. McDowell McCoy had died intestate without issue, and his real estate had descended to his brothers, who had agreed to a verbal division of the land. That grant No. 2924 had been allotted to J. J. W. McCoy, and that he had entered into possession. That thereafter, on or about April 3, 1895, deeds had been mutually executed by J. J. W. McCoy and W. L. McCoy, by which J. J. W. McCoy had conveyed all his interest in the estate of D. McDowell McCoy east of a certain described line and W. L. McCoy had conveyed to J. J. W. McCoy all the land described in grant No. 2924, which lies to the west of the line referred to. That J. J. W. McCoy had conveyed this land to the defendant M. M. McCoy, and that said McCoy has been in the adverse possession under color of title more than 21 years.

The heirs at law of H. H. P. McCoy had previously been allowed to interplead and file a complaint alleging that they were the owners of the land in grant No. 2924.

There seems to have been no serious controversy as to the location of grant No. 16105; but the interpleaders and the defendants, claiming respectively to be the owners of the land in grant No. 2924, contended that the junior grant lapped upon or was embraced in the senior grant. The controversy turned upon the location of grant No. 2924; for if this grant and grant No. 16105 did not interfere, there was no ground for denying that the plaintiffs were the owners of the land described in their grant. The interpleaders alleged that neither the plaintiffs nor defendants had title, and alleged that the interpleaders were the sole owners.

The issues and the answers were as follows:

"(1) Are the plaintiffs, Siler and Roane, the owners of the lands described in the complaint,

(109 S.E.)

and within the red lines on the map, designated by the red letters and lines from red A to B, C, D, E, F, G, and back to red A? Answer: Yes.

"(2) Have the defendants Mrs. M. M. McCoy and Julius McCoy unlawfully trespassed upon the lands referred to in the first issue, as alleged in the complaint? Answer: Yes.

"(3) If the defendants have so wrongfully trespassed, what damages, if any, are the plaintiffs entitled to recover of the defendants Mrs. M. M. McCoy and Julius McCoy? Answer: \$10.

"(4) Is the defendant Mrs. M. M. McCoy the owner of the lands embraced under state grant 2924? Answer: —.

"(5) Does state grant No. 2924, under which Mrs. M. M. McCoy and the heirs at law of H. H. P. McCoy claim, include any portion of the lands included in grant 16105; and, if so, what portion thereof, as represented on the map? Answer: —.

"(6) Are the defendants, the heirs at law of H. H. P. McCoy, the owners of the lands embraced under state grant No. 2924, as alleged by them in their interplea? Answer: —.

"(7) What damages, if any, is Mrs. M. M. McCoy entitled to recover of the plaintiffs? Answer: —."

Judgment was entered for the plaintiffs, and the defendants appealed.

Henry G. Robertson, of Franklin, for appellants.

T. J. Johnston and R. D. Sisk, both of Franklin, for appellees.

ADAMS, J. [1, 2] The first five exceptions must be overruled. John H. Dalton, a witness for the plaintiff, testified that he had surveyed all the lines of the grant under which the plaintiffs claimed title, except the last three; that he had prepared the plat; that the last three lines followed the courses and distances called for; and that the red lines represented the land embraced in the grant issued to the plaintiffs. The witness was then permitted to testify over the defendants' objection that the line from E to F "will run north of some cut timber." A. T. Siler, a witness for plaintiffs, testified that he surveyed the boundaries of the plaintiffs' grant in 1893 and in 1894; that he had a record of his surveys showing that his plat corresponded with Dalton's; that he could indicate on Dalton's map the survey he had made; and that he had found an oak at one of the corners. To all this evidence the defendants excepted.

The former witness described the lines he had actually surveyed, and the others which he said indicated the last three calls in the grant, and testified in effect that, if these lines represented the true location of the grant, timber had been cut inside the boundaries; and the examination of the latter wit-

ness was so carefully limited by the court that it could have been understood only as illustrating the testimony of the witness as to the surveys he had previously made.

[3] The plaintiffs called as a witness Julius McCoy, one of the defendants, to prove the alleged trespass. On cross-examination counsel for the defendants asked the witness if he knew the location of the grant under which the defendants claimed title. The grant had not then been offered in evidence, and the answer was properly excluded. His honor, however, explicitly stated that the witness might be examined as to the location, in case the grant should afterward be introduced by the defendants.

[4] The excluded evidence which is the subject of the ninth exception was afterward admitted; and exceptions 8, 10, 11, 12, and 17 were relevant only to the controversy between the interpleaders and the defendants, and, upon return of the verdict for the plaintiffs, became immaterial.

[5] His honor instructed the jury that, unless the defendants and the interpleaders had shown by the greater weight of the evidence that the lines of the plaintiffs' grant lapped upon the grant under which the defendants claimed, the possession of the defendants or interpleaders, or of those under whom they claimed, outside the boundaries of the plaintiffs' grant would not be extended so as to defeat or affect the title of the plaintiffs. The instruction must be considered as a part of the entire charge, and in connection with the admissions in the pleadings. His honor had previously told the jury that upon the plaintiffs rested the burden of establishing their title by the greater weight of the evidence. In their answer the defendants did not expressly deny the plaintiffs' title, but only denied that the plaintiffs were the owners of such part of grant No. 16105 as may lap upon grant No. 2924. It will be observed that the defendants attempted to defeat the plaintiffs' recovery by showing an interference of the two grants. Under these circumstances the charge of his honor as to the burden of proof and as to possession under grant No. 2924 is free from error; and the instruction as to the measure of damages is a substantial compliance with the rule stated in *Whitfield v. Lumber Co.*, 152 N. C. 214, 67 S. E. 512.

The remaining exceptions have received full consideration, and must be disallowed. The controversy between the parties was reduced almost entirely to questions of fact pertaining to the location of the grant under which the defendants claimed, and the jury adopted the contentions of the plaintiff. We find in the record no sufficient cause for disturbing the verdict or the judgment.

No error.

(182 N. C. 894)

STATE v. SLAGLE et al. (No. 534.)

(Supreme Court of North Carolina. Dec. 14, 1921.)

1. Homicide §268—Evidence held to justify denial of nonsuit.

On a trial for homicide, evidence held to justify the refusal to grant a nonsuit against the state.

2. Criminal law §366(2)—Evidence as to deceased's acts two days before homicide and as to tracking him after homicide held admissible as res gestæ.

Where there was evidence that deceased was murdered at a blockade still on Monday, evidence that he came to his home from the direction of the still on the preceding Saturday, that on the Thursday following the murder his tracks to and from the still were followed, etc., held admissible as part of the res gestæ.

3. Criminal law §1169(5)—No reversible error in admitting evidence admissible as to defendant who was subsequently granted nonsuit.

Where evidence that one of the defendants told a witness that another defendant killed deceased was admissible against the defendant making such statement, there was no reversible error in admitting it, where the court expressly confined it to the purpose for which it was admissible and after a nonsuit was granted such defendant told the jury to disregard it.

4. Criminal law §656(6)—Ordering defendant held on another charge not an expression of opinion as to credibility of state's witnesses.

Where the testimony of witnesses for the state on a trial for murder on which the state's case largely depended also showed that one of the defendants as to whom a nonsuit was granted was guilty of distilling, it was not an expression of opinion as to their credibility for the judge, in the presence of the jury, after granting such nonsuit, to order such defendant held for distilling and to require him to give bail.

5. Criminal law §783½—On nonsuit as to one defendant, instruction to disregard evidence competent only against him held proper.

Where the court admitted evidence which was competent only against one defendant as to whom a nonsuit was granted, he properly instructed the jury not to consider it after granting such nonsuit.

6. Criminal law §814(5)—Instruction that contentions supported by evidence should be considered held to protect defendants' rights on disagreement as to contentions.

Where defendants' counsel in questioning the correctness of the court's statement of the contentions of the parties could not himself remember with certainty whether the contention then being stated was supported by evidence, the court sufficiently protected defendants' rights by telling the jury that any contention supported by evidence should be considered.

Appeal from Superior Court, Buncombe County; McElroy, Judge.

Sol Slagle and another were convicted of murder in the second degree, and they appeal. Affirmed.

The state's evidence tended to show that Luther Merrill left his home, 11 miles from Asheville in Buncombe county, about 2 o'clock in the afternoon of Monday, January 31, 1921, in the company of defendant, Sol Slagle. His wife saw him no more until she was taken to the place where was his dead body, on Wednesday afternoon, February 2, 1921. It was lying about 116 yards from the public road and behind a chestnut tree. It had evidently been removed from the place of the killing to the chestnut tree, for his hat and extra pair of shoes were placed near the body and his overcoat was thrown across it. There is evidence of threats made by Sol Slagle that if Luther ever fooled around him he would kill him and do away with him and that they were all at the still last fall at the time this statement was made. He further said that Luther had "turned him up" a time or two. It appeared that Sol Slagle, Charlie Slagle, and Latt Slagle were operating a blockade still with Eli Kilpatrick, not far from Sol's house. It was in a dugout on the back of a branch and covered over with leaves. A large pistol belonging to Latt Slagle was seen by the witness at Sol Slagle's house, where Latt lived a short time before the tragedy. About 400 yards from where the body was found, an officer, Dillingham by name, discovered where a wagon had been turned around and backed against the bank of the road with the prints of the feet of horses appearing to have been standing there some time. A little ravine ran from the road there, and Dillingham followed this ravine up and found the blockade still in a dugout, as hereinbefore mentioned. He described where the still was, and what he did at that place. From the still to where he had discovered the wagon tracks and horse tracks the distance was 238 steps. He pursued the tracks of the horse and wagon, and also examined the ground at the red bank, where the wagon had been backed, and he saw well-defined tracks of a man in the soft earth. He inserted a shoe gotten at Sol Slagle's house into this track and it fitted it. He measured the wagon tracks, and also the wagon at Sol Slagle's, and the width of the tires were exactly the same. The left hind foot of the horse, in the tracks made at the bank, showed two high nails; that is, new nails that had been driven in after the shoe had been put on. The track at the soft place in the earth and the foot of Sol Slagle's horse were identical in size, and Sol Slagle's horse had high nails in his shoes. The witness examined the wagon also, and at the right-hand side found a blood spot that had

run down from the top of the board. It ran down the board and then seeped through where the board comes to the bottom and on the brakes. He discovered other blood spots on the wagon. Dillingham saw the body of deceased at the undertaking establishment. The first shot hit just above the hip bone and went through to the other side, and the other shot was about four inches higher. The upper shot looked as though it had ranged a little downward. The lower shot apparently went straight through. The bullets, after passing through the body, lodged in the clothes of the deceased. They were steel jacketed and in size 45 caliber. He also found a pair of overalls, a jumper jacket, and a pair of shoes at Sol Slagle's, and on the jumper jacket were blood stains. The board with blood stains on it, the shoes, bullets, and overalls were all introduced in evidence.

Onie Kilpatrick and his father, Eli Kilpatrick, both testified that they were eyewitnesses of the killing of Luther Merrill by Latt Slagle and Sol Slagle. Eli testified:

"I was on the other side of the branch from the still, within 25 or 30 yards of it. I saw Sol and Latt and Luther Merrill there at the still. Luther Merrill was sitting down when I first noticed him, and Sol and Luther were arguing somehow or another, I couldn't understand exactly what they were saying; they were arguing, and Luther raised up, and Latt shot him. Luther just raised and began to turn like he was going to run, and, when he did that, why he just lit in shooting at him, Latt did; I saw him until the shooting was over and he fell, and I just went on home; moved pretty fast. I didn't go back up there. I never said anything to either one of the Slagle boys about it. I stayed at home that night."

The first exception was to the admission of this witness' testimony as to the acts of his son on Saturday prior to his disappearance. The second exception was to his testimony that he trailed the tracks of deceased on Thursday after the body was found, the tracks having been made on Saturday. M. L. Merrill testified that on Monday he heard shots in the direction of the still, that deceased came to his house on Saturday to get some corn to go to mill, that he did not see him any more that day, but saw him and had a conversation with him on Sunday. Asked whether deceased had been to the still, he answered, after the court had stopped him when he started to tell what deceased said, that he did not see any tracks or make any examination. The fourth exception was that the court erred in permitting M. L. Merrill to testify to what he did after the body was found, as to the action of the deceased on Saturday before he disappeared on Monday. The fifth exception was to the admission of testimony that Charlie Slagle, who was indicted but obtained a nonsuit,

told the witness that Latt Slagle shot and killed deceased.

J. Scroop Styles, of Asheville, for appellants.

James S. Manning, Atty. Gen., Frank Nash, Asst. Atty. Gen., and A. Hall Johnston, of Asheville, for the State.

WALKER, J. (after stating the facts as above). [1] The theory of the state was that Sol and Latt Slagle killed Luther Merrill at the still and then carried his body to the wagon at the road and thence to the place where it was found on the following Wednesday. With plain and direct evidence of this sort, as to the actual killing of the deceased by the defendants, Sol and Latt, there can certainly be no foundation for defendants' exceptions 5 and 7, to the judge's refusal to give judgment as of nonsuit against the state at the conclusion of the state's testimony and again at the conclusion of all the testimony.

[2, 3] Exceptions 1 and 2 were taken to evidence which detailed circumstances connected with the disappearance of the deceased. Exception 4 was to similar evidence, and in each case it seems that this evidence was material as part of the res gestae. Exception 5 was taken to evidence plainly admissible as to Charles Slagle and confined expressly by the judge to the purpose for which it was admissible, and after Charles Slagle was eliminated, as a defendant, by a judgment of nonsuit in his favor, the judge, again in his charge to the jury, expressly told them that they must disregard this evidence.

[4] The defendants, in their brief, refer to an error which nowhere sufficiently appears in their assignments of error. It is thus set out in the record:

"It is agreed by the attorneys of record, whose names are hereto attached, that, at the time the motion was sustained as to Charles Slagle, as set out in the record, there was no charge of distilling against Charlie Slagle, but the court ordered him held, pending an indictment based upon the testimony given by Jim Lawrence, Oney Kilpatrick, and Eli Kilpatrick, and ordered Charlie Slagle in custody, fixing his bond at \$1,500, and all this was done in the presence of the jury. This may be treated under the defendants' exception No. 6."

But we will discuss it nevertheless.

The right of a nisi prius judge to order a witness, or any one else, into immediate custody for a contempt committed in the presence of the court in session, is unquestioned. But the committing of a witness, in either a criminal or a civil action, into immediate custody for perjury in the presence of the jury, is almost universally held to be an invasion of the rights of the party offering the witness, and as an intimation of opinion on the part of the judge, prohibited by the stat-

ute. *State v. Swink*, 151 N. C. 726, 66 S. E. 448, and the cases there cited. In this case, the charge that Charles Slagle was guilty of "blockading" was dependent upon the testimony of Jim Lawrence and the two Kilpatrick. As it turned out, the state's case against the two defendants, Sol and Latt Slagle, for murder, was also largely dependent upon the credit the jury should give to these witnesses. It seems that this was not an expression of opinion by the judge upon their credibility. In no sense was it a direct attack upon the credit of a principal witness such as there was in *Swink's Case* and the cases similar to it. There was nothing to do in the case of Charles Slagle except to discharge him after the nonsuit, unless there was another charge pending against him, and so this was only an attempt by the judge to hold him to answer to another charge, which arose out of the evidence, and the effect of this was, not to give these witnesses any additional credit, or to express an opinion favorable to the credibility of their testimony, but simply to say that, on the whole case, there was probable cause against Charles Slagle and a necessity to investigate further, which investigation could only be made by a jury in like manner as the pending investigation as to the other two Slagles was being made by a jury.

The course of the presiding judge in demanding bail of Charles Slagle, upon the charge of unlawfully dealing in liquor, commonly called "blockading," which is a violation not only of our statute but of the "Volstead Act" of Congress (41 Stat. 305), did not, in law, prejudice the defendants. The judge did not express any opinion as to whether Slagle was guilty, or as to whether the testimony of the two witnesses was true, or not, but he merely acted upon the supposition that the simple oaths of the two men, as to the fact, were sufficient to show probable cause as to Slagle, and added nothing to the credibility of the other two men; and we are quite sure it was so intended by the judge and not so regarded by the jury. It was one of the ordinary incidents of a trial, and while it may always be better to send the jury out before taking such action, it sometimes becomes necessary for a judge to act with great promptness in such cases to prevent any escape of the offender. *State v. Swink*, supra, cited by the defendants' counsel in support of this alleged exception, is not at all in point. There the court by its action directly impeached the credibility of the party's principal witness by binding him over for perjury, which, of course, would prejudice the defendant for whom he had testified. We doubt if this exception is properly raised in the record; but we have, nevertheless, commented upon it.

[5] The court admitted certain evidence which was competent against Charles Slagle

so long as he remained a defendant, and when he was retired by the nonsuit the judge properly instructed the jury not to consider it.

[8] Several exceptions were taken to the judge's statement of contentions of the parties, but only one was called to the court's attention, and that raised an issue between the judge and counsel as to what the evidence was on the particular point. This relates to the supposed evidence as to defendants' being seen while tracking Merrill and as to whisky being found near the house. The response of the judge was sufficient to protect the rights of the defendants. He told the jury that if there were any contentions supported by evidence to consider them, which implied that those not so supported should not be considered. The counsel could not himself remember with certainty whether the contention then being stated was supported by evidence. He merely said that he did not then recall any such evidence.

There is no merit at all in the other exceptions, and they, therefore, require no separate discussion.

We have carefully reviewed and considered this very long record, and find no reversible error therein. The defendants' counsel safeguarded the rights of the defendants at every point by a very able argument, but there is no reason for disturbing the judgment.

No error.

(182 N. C. 703)

REESE v. WOODS. (No. 597.)

(Supreme Court of North Carolina. Dec. 21, 1921.)

Evidence §271(17)—Declarations of deceased grantor that deed was not delivered are incompetent.

In a suit by the grantee of a decedent to remove as a cloud on his title a deed executed to defendant by his grantor prior to the deed to plaintiff, evidence of declarations by the grantor, made seven years after the registration of defendant's deed, that the deed was not delivered and was not to take effect until defendant agreed to support grantor, were self-serving declarations and inadmissible.

Appeal from Superior Court, Cherokee County; Long, Judge.

Action by J. M. Reese against Worth Woods to remove a cloud on title. Judgment for the plaintiff, and defendant appeals. New trial granted.

The purpose of the action is to have declared void and set aside as a cloud on plaintiff's title an alleged deed from W. L. F. Woods and wife, Laura, to defendant, appearing on the registration books of Chero-

kee county as of December, 1912, on the ground that the said deed had never been delivered to defendant. The cause was before the court on a former appeal by plaintiff from a judgment of nonsuit against him in the lower court, and same will be found reported in 180 N. C. 631, 105 S. E. 337. Pursuant to the opinion in that appeal setting aside the judgment of nonsuit, the cause in the present trial was submitted to the jury on appropriate issues, and there was verdict for plaintiff, Judgment on the verdict, and defendant excepted and appealed, assigning errors.

D. Witherspoon and Dillard & Hill, all of Murphy, for appellant.

J. N. Moody, of Murphy, for appellee.

HOKE, J. On the present trial it appeared that the land in dispute had been the property of W. L. F. Woods, who died on February 24, 1920. Plaintiff, a son of Mrs. Woods by a former husband, put on evidence a deed from said W. L. F. Woods and wife, Laura, to plaintiff, and his wife, Ella, for the land in dispute dated February 27, 1919, registered February 28, 1919, conveying the land in controversy and containing the clause:

"This deed is made upon the consideration that J. M. Reese and wife shall support and provide for W. L. F. Woods and wife, Laura, during their lives and give them a decent burial suitable to their station in life, etc. On full compliance with above conditions, this deed to be in full force and effect; otherwise void."

For the purpose of attacking it, plaintiff introduced the alleged deed from W. L. F. Woods and wife, Laura, to defendant, dated April 1, 1912, registered December 6, 1912, in said county; the same being in regular form with general warranty, covering same land "and without reservations, exceptions, or conditions."

There was evidence on part of plaintiff tending to show that the deed under which defendant claims was never in fact delivered, but, having been signed and acknowledged by grantors, W. L. F. Woods and wife, was withheld until the alleged grantee, Worth Woods, who was a son of W. L. F. Woods by a former wife, should enter into some binding obligation for support, etc., or because such obligation was not expressed in the deed; that same was in the custody and control of said Laura when defendant surreptitiously took it from the bureau drawer where it was kept and had it put on the registry, without any authority therefor from the alleged grantors, or either of them.

On the part of defendant there was evidence offered in support of his alleged deed, among other testimony being declarations of W. L. F. Woods tending to show he had directed the registration of the deed, etc.

In reply, Mr. J. H. McCall, who had been

acting as one of plaintiff's attorneys, having withdrawn from the case as attorney, was offered as a witness by plaintiff, and over defendant's objection was allowed to testify, in effect, that, in a conversation with W. L. F. Woods some time in the spring of 1919, said Woods told witness that the deed to his son had been prepared and acknowledged, but that on ascertaining that the same contained no provision for the support of declarant and his wife, and other things the alleged grantee was to do as part of the consideration, the delivery of the deed was withheld, and same had been taken and put on registry without authority, etc. It will be noted that this declaration is seven years, or near that, after the alleged execution and registry of the defendant's deed, and is clearly a self-serving declaration on the part of declarant in impeachment of defendant's deed and in favor of the declarant's own title, and certainly in favor of the right to support stipulated for in the deed to plaintiff.

In our opinion the exception of defendant to the admission of this evidence must be sustained, and for the error defendant is entitled to a new trial of the issue. *Roe v. Journigan*, 181 N. C. 180, 106 S. E. 680.

New trial.

(182 N. C. 701)

SHEPHERD v. SELLERS. (No. 596.)

(Supreme Court of North Carolina. Dec. 21, 1921.)

Evidence §471(6)—Witness competent to state his understanding from what was said relative to payment of commissions.

In an action for broker's commissions, where a witness was examined as to his conversation with defendant concerning the matter, the witness' statement that "he 'understood' that defendant was to take care of plaintiff," and on further question stating what was said, was competent to show witness' understanding of what defendant had said.

Appeal from Superior Court, Macon County; Long, Judge.

Action by T. B. Shepherd against W. H. Sellers. Judgment for plaintiff, and defendant appeals. No error.

Civil action to recover agent's commissions on the sale of certain real estate.

There was evidence, adduced on the hearing, tending to show that the defendant agreed to pay the plaintiff a reasonable compensation for his services if he would procure a purchaser for the defendant's farm at the price of \$5,000. A sale was effected upon these terms, but the defendant declined to pay the plaintiff, contending that the amount received was to be net and that

plaintiff agreed to look to the purchaser for his commissions.

Upon the traverse and issues thus joined, there was a verdict and judgment in favor of the plaintiff. Defendant appealed, assigning errors.

T. J. Johnston, H. G. Robertson, and R. D. Sisk, all of Franklin, for appellant.

Johnston & Horn and Gilmer A. Jones, all of Franklin, and Bourne, Parker & Jones, of Asheville, for appellee.

STACY, J. The defendant's principal exception is directed to the ruling of the court in allowing the witness Greenwood to give his "understanding" of the contract with respect to the plaintiff's commissions. The witness was being examined as to his conversation with the defendant concerning the matter. He had stated, in answer to a question as to what the defendant had said, if anything, in regard to paying the plaintiff for his services, that he could not remember exactly what was said. He was then asked: "Mr. Sellers did say that he would take \$5,000 for the farm but would not be responsible to Mr. Shepherd for anything?" To this the witness replied: "No, as I understood it, he was to take care of Tom (plaintiff)." Defendant objected and moved to strike out the answer upon the ground that it comes within the rule prohibiting hearsay evidence; and, further, because it does not appear from whom, or what source, the witness obtained his information or understanding.

It will be conceded that the competency of this evidence must be determined by the fair and reasonable inference as to what the witness intended to say and did say. Plaintiff insists that the witness was only stating what he understood the defendant to say in regard to the matter, while the defendant contends his impression or understanding may have been, and doubtless was, obtained from some other source. We think the next succeeding question and answer, immediately following the defendant's objection, will suffice to make clear his meaning:

"Please state again just what you understood Sellers to say in regard to Shepherd getting a commission?" Answer: "I said, 'I will pay you \$5,000, one-third in cash, and you settle with Shepherd,' and he said, 'All right.' Now, that is what was said."

From the foregoing, we think it reasonably appears that the witness was giving his understanding of what the defendant had said; and, if this be so, the evidence was competent. *Gilliland v. Board of Education*, 141 N. C. 482, 54 S. E. 413.

Speaking to a kindred and somewhat similar question in the case just cited, Hoke J., delivering the opinion, says:

"A witness who undertakes to testify to objective facts and qualifies his testimony by using the terms, 'I think,' or 'I have an impression,' etc., if the witness has had no physical observation or has made no note of the facts, but is merely stating to the court and jury his mental inference or deduction, this, as a rule, is incompetent. But if the witness has had opportunity to note relevant facts himself and did observe and note them, and simply qualifies his testimony in this way because his impression or memory is more or less indistinct, this, while in the form of opinion, is really the statement of a fact, and will be so received."

Quite a different question was presented in *King v. Bynum*, 137 N. C. 491, 49 S. E. 955, and we do not think our present holding conflicts, in any way, with the decision in that case.

Upon an examination of the whole case, we have found no material error which would justify our disturbing the verdict and judgment, or the result of the trial.

No error.

(182 N. C. 617)

BOARD OF COM'RS OF MECKLENBURG COUNTY v. MECKLENBURG HIGHWAY COMMISSION. (No. 452.)

(Supreme Court of North Carolina. Dec. 14, 1921.)

1. Highways \S 113(4)—County highway commission and not county board held bound to assume obligation for work done on state highway.

Pub. Loc. Laws 1921, c. 383, §§ 4, 12, 14, vests all local authority over the roads of Mecklenburg county in the county highway commission, and requires the board of county commissioners to place all funds available for such purpose to the credit of the commission, and hence the latter, and not the board, should assume the balance due to the state highway commission for work done by a state contractor, after the county highway commission assumed jurisdiction, on a part of a state highway in the county control of which was vested in the State Highway Commission by Pub. Laws 1921, c. 2.

2. Highways \S 113(4) — Proceeds of bonds being sole highway funds in hand held county highway commission may pay obligation therefrom.

There being no highway funds in hand except those derived from sale of bonds, an obligation of the county highway commission to the State Highway Commission for work done on a part of a state highway in the county may be paid therefrom.

Appeal from Superior Court, Mecklenburg County; Shaw, Judge.

Controversy without action brought by the Board of Commissioners of Mecklenburg County against the Mecklenburg Highway Commission, submitted on agreed statement

of facts. Judgment for defendant, and plaintiff appeals. Reversed.

Cansler & Cansler, of Charlotte, for appellant.

J. L. De Laney, of Charlotte, for appellee.

STACY, J. The following statement of the controversy, as taken from the facts agreed, will suffice for our present decision:

(1) The Legislature of 1921 established the Mecklenburg Highway Commission (chapter 383, Public Local Laws), and provided in section 4 of said act as follows:

"The Mecklenburg highway commission shall be invested with all the road powers and shall perform all the road duties which have heretofore been performed and exercised by the board of county commissioners of Mecklenburg county or by the road officials of the several townships within said county, or by any other body or person now or heretofore acting under authority of existing law in relation to the public roads of said county (other than the power to borrow money, issue evidences of indebtedness and levy taxes), whether under general law or a special law; and the management and control of all the public roads in said county shall be vested absolutely and entirely in the Mecklenburg highway commission, except roads under the exclusive control and management of the authorities of an incorporated city or town or the authorities of the state of North Carolina."

And again in section 12:

"All moneys on hand when this act takes effect or taxes received which were or shall be raised by Mecklenburg county, or by, or on behalf of any township therein for road purposes (other than money raised to pay the principal and interest of bonds or other outstanding indebtedness), whether raised by taxation, bond issues, or otherwise, shall, upon taking effect of this act, or when they are collected, be deposited with the county treasurer and kept by him in a separate fund or funds, and paid out only upon written orders of the highway commission, signed by the chairman and secretary, and countersigned by one other member of the commission. All road machinery, stock, implements and other property owned or used by Mecklenburg county, or by any township therein, shall upon the taking effect of this act be turned over to the highway commission."

(2) On April 4, 1921, the Mecklenburg highway commission assumed jurisdiction and control of all road work in Mecklenburg county, which had theretofore been exercised by the county board of commissioners and the trustees of the various townships in said county.

(3) In 1919 the commissioners of Mecklenburg county entered into a contract with the State Highway Commission whereby they agreed to pay one-half the cost of laying out and constructing about 14 miles of road in Mecklenburg county, known as project No. 55, which work the State Highway Commis-

sion was undertaking on its part with moneys derived from state and federal aid.

(4) On April 4, 1921, the date that the Mecklenburg highway commission assumed jurisdiction and control over the public roads and highways of Mecklenburg county, under the act creating said commission, there remained uncompleted, under project No. 55, work amounting to \$42,703.64, which was thereafter completed by the contractor, to whom the contract for said project had been previously let by the State Highway Commission, the board of commissioners of Mecklenburg county having paid the said Highway Commission one-half the cost of work done under said project, prior to the said 4th day of April, 1921.

(5) Under the provisions of chapter 2, Public Laws of 1921, the highway, of which project No. 55 is a part, was designated and laid out as a state highway, and the control and jurisdiction over said road was vested by said act in the State Highway Commission.

[1] Upon these, the facts chiefly relevant, the question submitted for decision is whether the \$42,703.64, now due the State Highway Commission by the county of Mecklenburg for work done on project No. 55, since April 4, 1921, shall be paid by the Mecklenburg highway commission or by the board of commissioners of said county?

It will be observed that the Mecklenburg highway commission has succeeded to all the powers and duties heretofore performed by the board of commissioners or other officials of Mecklenburg county, with respect to any and all kinds of work connected with the public roads of the county. It is also provided that all moneys of the county available for road purposes "whether raised by taxation, bond issues, or otherwise," shall be placed to the credit of the Mecklenburg highway commission. And in section 14 of the act above mentioned, it is further provided:

"The board of county commissioners shall also turn over to the county treasurer, to be applied to road improvement and construction, as much of the general county funds as may not be needed for other purposes."

From the foregoing, it would seem that the clear intent of the Legislature was to vest all local authority over the roads of the county in the Mecklenburg highway commission and to require the county commissioners to place all funds available for such purpose to the credit of said commission. Hence we think it is but meet and in keeping with the true intent and spirit of the law to declare that the Mecklenburg highway commission should assume the balance of the obligation accruing for work done on project No. 55, after April 4, 1921.

[2] We are also asked to say out of what particular fund this item should be paid. As now advised, we think this is a matter of

indifference; but, there being no funds in hand except those derived from the sale of bonds, we see no reason why it should not be paid from these funds.
Reversed.

(182 N. C. 722)

MILLS v. TABOR et al. (No. 590.)

(Supreme Court of North Carolina. Dec. 21, 1921.)

1. Husband and wife \S 199—Purchaser from wife under defective deed held full equitable owner.

Although a married woman's deed is defective for want of her husband's written consent, where she has received a cash consideration and has accepted the balance of the purchase money after she has become a widow, the grantee becomes the equitable owner of the property.

2. Execution \S 268—Title of execution purchaser held superior to prior deed subsequently recorded.

Where an equitable owner of property purchased from a married woman executed a deed to a third person which was not registered until after a judgment against the equitable owner was obtained, the title of the execution purchaser of such judgment was superior to the deed from the execution debtor to his grantee.

3. Judgment \S 788(1) — Purchase-money mortgage to judgment debtor held not to affect lien of judgment.

Where a judgment debtor prior to the judgment executed a conveyance of the property which was not recorded until after execution sale, the fact that the grantee executed a mortgage back to secure the balance of the purchase price had no effect as against the judgment notwithstanding it was registered prior thereto, the deed of the judgment debtor not being registered until after the judgment was docketed, and such mortgage may be removed as a cloud on the title of the execution purchaser.

4. Estoppel \S 29(1)—Parties claiming under common source cannot contest his title.

In a suit to remove cloud from title, where plaintiff claimed under a judgment by virtue of an execution, and defendant claimed under mortgage by the judgment debtor's grantee, both parties deriving their title from a common source, neither could contest the title conveyed to such common source.

Appeal from Superior Court, Cherokee County; Harding, Judge.

Action by C. C. Mills against W. M. Tabor and others. From the judgment, plaintiff appeals. Reversed.

Hattie Palmer, who was defectively registered as a free trader, conveyed without the joinder of her husband the lands in dispute to W. M. Tabor by deed dated December

28, 1916, and registered two days thereafter, in consideration of \$2,500, of which Tabor paid \$1,000 in cash and executed three notes of \$500 each for the balance payable one, two, and three years after date and secured by a mortgage deed on the land.

Tabor and wife by deed of January 23, 1918, conveyed said lands to Allen Ashe for the consideration of \$2,600, of which \$200 was paid in cash, and Ashe assumed the debt of \$1,500 to Mrs. Palmer and gave Tabor a mortgage deed for the balance, \$900. The mortgage deed to Tabor was registered April 1, 1919, but the deed from Tabor to Ashe was not registered until December 24, 1919.

At November term, 1919, of Cherokee, which began November 3, 1919, the plaintiff, Mills, obtained a judgment against W. M. Tabor for \$2,032.32 which was duly docketed and indexed. Tabor's homestead was allotted. The lands described in the complaint were sold under execution and purchased for Mills.

Hattie Palmer's husband died October 21, 1918. After his death, while a widow, she accepted payment of the two last notes from Allen Ashe, who had paid the first of the three notes to Mrs. Palmer before her husband's death.

On December 28, 1920, after the sale under execution and after Mills had sued Ashe for possession, Mrs. Palmer executed to Ashe a deed for said lands. Mills paid Ashe back the \$1,500 he had paid Mrs. Palmer, and Mills was by a consent judgment decreed owner of the land. Tatham owns the note from Ashe to Tabor for \$900, and this action is brought to have the mortgage from Ashe to Tabor removed as a cloud upon Mills' title. Upon the agreed state of facts as above, the court entered judgment that the mortgage from Allen Ashe to the defendant W. M. Tabor was a valid lien upon the property described in the complaint to secure a note of \$900, and that the defendants should recover of the plaintiff their costs of the action. Appeal by plaintiff.

Dillard & Hill, of Murphy, for appellant.
J. N. Moody, of Murphy, for appellees.

CLARK, C. J. The deed from Hattie Palmer to A. M. Tabor dated December 28, 1916, was defective in that her husband did not give his written assent to the conveyance, but Tabor paid her \$1,000 in cash and executed his three notes for \$500, which were secured by his mortgage on the land back to Mrs. Palmer. One of these notes was paid to her during her husband's life, and the balance of the purchase money was paid to her after she had become a widow by Allen Ashe, who was the grantee in a deed from Tabor. Mills paid Ashe back the \$1,500 he had paid Mrs. Palmer, and by a consent

judgment to which Mills, Ashe, and Mrs. Palmer were parties Mills has been declared the owner of said lands.

This controversy is over the question whether the \$900 note secured by the mortgage from Ashe to Tabor, which was registered prior to the date of the sale under execution in favor of Mills, is a lien upon the title of Mills which accrued by purchase under the execution against Tabor under a judgment against Tabor docketed prior to the registration of Tabor's deed to Ashe.

[1, 2] It is true that the deed to Tabor by Mrs. Palmer was defective for want of the written consent of her husband, but, in addition to \$1,000 cash paid to her by Tabor and by the acceptance by her after she became a widow of the balance of the purchase money, he became the full equitable owner of the property. *Sills v. Bethea*, 178 N. C. 315, 100 S. E. 593. She could not assert any title against him, and certainly no one else could, and under the execution sale against Tabor the purchaser, Mills, stood in the shoes of Tabor and acquired his interest in the land except as against his grantee, Ashe. But Ashe's title by virtue of Tabor's deed is inferior to the lien of Mills' judgment, which was docketed first. Tabor executed a deed to Ashe January 23, 1918, but it was not registered till December 24, 1919, and in the meantime the judgment by Mills against Tabor was obtained at November term, 1919 (which began on November 3), and under it the purchaser Mills has title which is good against the deed for the same interest from Tabor to Ashe which was not registered till after the lien of the judgment. Mills' title therefore is superior to the deed from Tabor to Ashe.

[3] It is true that Ashe executed back a mortgage on this property to Tabor for \$900 to secure the balance of the purchase \$900, but that, though registered April 1, 1919, could have no effect as against the lien of Mills' judgment, as the deed from Tabor to Ashe for the land was not registered till after Mills' judgment was docketed. We are therefore of the opinion that by the payment of the purchase money and the acceptance of the balance thereof after Mrs. Palmer became a widow the equitable title was vested in Tabor. By virtue of the judgment against Tabor in favor of Mills and his purchase of the land under the execution he acquired the interest of Tabor prior to the conveyance of the same interest by Tabor to

Ashe, which was not recorded till after the lien of the judgment, and hence the \$900 mortgage executed by Ashe back to Tabor to secure the note assigned to the defendant Tatham is a cloud upon the title which the plaintiff is entitled to have removed. The mortgage secured by this note was registered prior to the lien of the judgment, but at that time, the conveyance from Tabor to Ashe not being recorded, such mortgage conveyed no interest as against the judgment of Mills.

[4] Both the plaintiff and the defendants derive their title from Tabor, and they cannot contest the title conveyed to him by Hattie Palmer. The plaintiff claims under a judgment by virtue of an execution issued on which the plaintiff, Mills, acquired the sheriff's deed. The assignee, John A. Tatham, holds under a mortgage executed by Ashe back to Tabor, and has no claim except by virtue of the deed from Tabor to Ashe, and, that not having been recorded till after date of the judgment obtained by Mills, Mills is entitled to a decree confirming his title, and to remove the defendant's claim as a cloud upon plaintiff's title.

Both the plaintiff and the defendants claim under Tabor and the title which has accrued to him from Mrs. Palmer, as above stated. The sole controversy is whether the plaintiff has acquired by judgment and execution the interest of Tabor in the land by a lien prior to the interest which Ashe acquired by Tabor's deed which was not registered till after the lien of the docketed judgment under which Mills purchased. The mortgage securing the note executed by Ashe to Tabor and assigned by him to Tatham, though the mortgage was registered prior to the judgment, is invalid as against the lien of the judgment, since the mortgage had nothing upon which to rest.

Though Tabor and those claiming under him would be estopped as to Ashe by his warranty deed, this does not affect the lien acquired under the judgment against Tabor which was docketed before his deed to Ashe was registered. Whatever the title or interest of Tabor in the land, his junior registered conveyance thereof is inferior to title acquired by sale under execution upon the prior docketed judgment.

The plaintiff is entitled to a decree removing the claim of the defendant as a cloud upon his title.

Reversed.

(182 N. C. 593)

LAPISH v. DIRECTOR GENERAL OF RAILROADS et al. (No. 478.)

(Supreme Court of North Carolina. Dec. 14, 1921.)

1. Trial \Leftrightarrow 165—Contributory negligence not considered on motion for nonsuit.

On a motion for nonsuit in action for negligence contributory negligence, being a matter of defense cannot be considered.

2. Railroads \Leftrightarrow 350(7)—Negligence in not giving signals held for jury.

In an action for injuries to a pedestrian struck by train after walking around another train obstructing passage over a path crossing track, where there was evidence that no signal was given or whistle blown, the question of railroad's negligence held for the jury.

Appeal from Superior Court, Iredell County; Bryson, Judge.

Action by G. C. Lapish against the Director General of Railroads and others. Judgment for plaintiff, and defendants appeal. Affirmed.

This is an action for personal injuries sustained by the plaintiff when struck by the engine of the Southern Railroad Company, December 24, 1919, while that company was being operated by the Director General of Railroads.

The plaintiff had left the plant of the Statesville Furniture Company in Statesville about 4:30 p. m. that day on his way to his home in the city, and was going along a path which crossed the railroad track near the station. This path was used by the public generally, there being evidence that about 200 people crossed the track at that point on that afternoon. The railroad track from Charlotte at that point makes a very short curve. The plaintiff, 66 years of age, stepped on the track and walked along the same for a short distance to go around the train which obstructed his crossing, when he was struck from behind by the engine, knocking him from the path, and received serious bodily injury.

There was motion for judgment as of nonsuit, which was overruled, and at the close of the defendant's evidence this motion was renewed and again refused. This is the sole exception presented by the appeal.

L. O. Caldwell, of Statesville, for appellants.

John A. Scott, Jr., and Dorman Thompson, both of Statesville, for appellee.

CLARK, C. J. [1] On a motion of nonsuit in an action for negligence contributory negligence, being a matter of defense, is not to be considered. *Whitesides v. Railroad*, 128 N. C. 229, 38 S. E. 878, which has been cited as authority that on evidence such as this

the case should be submitted to the jury; *Holman v. Railroad*, 159 N. C. 46, 74 S. E. 577; *Shepherd v. Railroad*, 163 N. C. 521, 79 S. E. 968.

[2] According to the plaintiff's testimony, he was seeking to cross the railroad track on his way home from his place of work. He turned up the track to get around a work train on the main or Asheville track, which was blocking his passage. He says he looked around and saw no train on the other or Charlotte track, and stepped upon that as he saw no train on it, and heard no signal or blow; that while on the track for the purpose of going around the standing train he was struck from behind by an approaching train on the other track from Charlotte, which came around a sharp curve without blowing the whistle or giving other warning, and which was 20 minutes late, and was knocked unconscious. His legs were crippled, and one leg cut half in two; his collar bone was broken, his head was injured and he was in the hospital several weeks. Witness further stated that he helped build the Statesville Furniture Factory 20 years ago, and has worked there ever since it was built; these railroad tracks were there then and there was a street across the track, but vehicles do not cross it now, it being used only by pedestrians. He says further that in going around the train upon the other track he looked back in the direction from which this Charlotte train came, and stepped up near the track; that if the train had blown he would have heard it.

The above in brief is the substance of the testimony. The plaintiff says there was no signal given or whistle blown. The engineer says there was; and the jury found in accordance with the plaintiff's testimony. The court at the close of all the evidence denied the motion for a nonsuit. This was simply a question of fact, and, as the evidence on such a state of facts, tending to show contributory negligence, cannot be considered on such motion, the judgment refusing the motion to nonsuit must be affirmed.

WALKER, J. (concurring). This case does not present the question so often decided by this court as to the liability of a railroad company for an injury to a trespasser walking on its tracks when its engineer has the right to suppose that he will leave the track even up to the last moment, when it is too late to save him from injury; the latter, if it occurs, being imputed to his own negligence. Here the plaintiff was walking along the public road, and was diverted from his course because his way was blocked by one of defendant's trains. He therefore went around the train to get into the street or road again, and had to use the track of defendant in doing so, having looked and listen-

(109 S.E.)

ed for trains before entering upon the track and seeing none. The defendant's engine approached him suddenly, and without warning, and under circumstances and surroundings requiring notice of its approach to be given. He was not, therefore, a mere trespasser or licensee, but was acting in the exercise of his legal right, and his conduct being induced by the wrongful act of the defendant. The doctrine as to trespassers, or licensees, on railroad tracks is too well settled to be disturbed, and this decision, as I understand, is not intended to do so, as appears from the court's opinion. See *Neal v. R. R. Co.*, 126 N. C. 634, 36 S. E. 117, 49 L. R. A. 684; s. c., 128 N. C. 143, 38 S. E. 474; *McAdoo v. R. R. Co.*, 105 N. C. 140, 11 S. E. 316; *High v. R. R. Co.*, 112 N. C. 385, 17 S. E. 79; *Ward v. R. R. Co.* 161 N. C. 179, 76 S. E. 717. These, and many other cases, have established this doctrine firmly and placed it beyond any possibility of controversy.

The case was virtually resolved into an issue of fact, both as to negligence and contributory negligence, there being evidence as to both questions. The charge of the court was free from any substantial error, and there is no ground for a reversal. The jury found both issues in favor of the plaintiff, and his right to the judgment has not been successfully assailed.

(182 N. C. 669)

J. E. BURLERSON MICA CO. et al. v. SOUTHERN EXPRESS CO. et al. (No. 513.)

(Supreme Court of North Carolina. Dec. 14, 1921.)

1. Evidence \S 368(3)—Allegation in affidavit to require defendant to file papers that they were necessary to the trial insufficient.

In an affidavit to require defendant to produce certain papers at the trial as provided in C. S. \S 1823 and 1824, an allegation that plaintiff had filed certain papers with and had written certain letters to defendants, and that the papers filed with defendants were necessary in the trial of the action, is insufficient, as being a conclusion, and not alleging the facts showing the materiality and necessity of the papers.

2. Evidence \S 368(8)—Order that defendant file with clerk papers for use in trial within 30 days prior to the next term of court held defective.

Under C. S. \S 1824, giving the court power on motion to require the production of books or papers in the possession of parties to a suit and giving power to render judgment by default for failure to comply with the order, an order of court that the party shall file with the clerk papers for use in a trial within 30 days prior to the next term of court is defective

as exceeding the authority conferred, which is only to secure the presentation of the papers at the time of trial or for an inspection before trial.

Appeal from Superior Court, Mitchell County; Ray, Judge.

Action by the J. E. Burlerston Mica Company and others against the Southern Express Company and another. From judgment for plaintiff by default, defendant American Railway Express Company appeals. Reversed.

Summons was issued against both defendants on November 22, 1919. The Southern Express Company entered a special appearance and moved to dismiss the action as to it on the ground that process had not been served. There was an order for an alias summons, and an alias writ of attachment against the stock held by the Southern Express Company in the American Railway Express Company. Plaintiffs alleged that mica of the value of \$1,290, the property of the Mica Company, was delivered to the Southern Express Company for transportation from Thomaston, Ga., to J. E. Burlerston at Spruce Pine, Mitchell county, that the Southern Express Company put the mica in care of the American Railway Express Company for transportation, and that the defendants negligently failed to transport and deliver it. Answer was filed by American Railway Express Company. J. E. Burlerston made this affidavit:

"J. E. Burlerston, first being duly sworn, says: That in the above-entitled action the plaintiff filed with the defendants the shipping receipt and other papers at the time that he filed his claim herein for loss of mica; that he wrote defendants numbers of letters asking that his shipment be traced before he filed his said claim; that said papers filed with the defendants are necessary in the trial of this action, and this affiant asks that the defendant be required to file all papers and correspondence connected with said case with the clerk of the Superior Court of Mitchell county, so that the plaintiff may have access to same, in the trial of this cause."

Thereupon Judge McElroy made the following order:

"Upon affidavit filed it is ordered by the court that the defendants file with the clerk of the Superior Court of Mitchell county within 30 days prior to the next term of this court all papers filed by the plaintiff with either defendant in connection with this case, including the shipping receipt and all other papers and other correspondence connected with said case."

While the case was in progress and Erastus Greene was testifying for the plaintiff he was asked concerning the claim filed by plaintiffs with defendants. Upon defendants' objection, plaintiffs' counsel called to the

court's attention the order of Judge McElroy and failure of defendants to comply with the order. The court found the facts, among which are the following: The defendants had neither complied with Judge McElroy's order nor explained their failure to do so; plaintiffs had filed their claim with the agent in charge of the express office at Spruce Pine, and the papers in question were material to the controversy and should have been produced; that counsel for defendants had objected to the introduction of parol evidence; and that defendants had been guilty of a contemptuous disregard of the order. The court rendered the following judgment:

"The above-entitled action coming on for hearing and being heard, and it appearing to the court that the defendant Southern Express Company is a corporation, and prior to the 1st day of July, 1918, it had property in the state of North Carolina and was engaged in carrying on business in said state, and that while so engaged it incurred liabilities under its contracts entered into with the citizens of the state of North Carolina and with the plaintiffs herein, and it further appearing to the court that it now has no officer or other agent in this state upon whom process might be served as provided by law, and that it has failed to comply with section No. 1137 of the Consolidated Statutes of North Carolina and maintain such process agent in said state, and it further appearing that summons has been duly issued against said defendant Southern Express Company in this action, and that the same was duly served upon J. Bryan Grimes, Secretary of State, as provided by said statute and that said defendant is now before the court by reason of such service, and it further appearing that a complaint has been filed by the plaintiffs against the said Southern Express Company, and that said defendant has filed no answer thereto, and it further appearing that at July term, 1920, of this court that upon application of the plaintiffs herein an order was entered commanding the defendant American Railway Express Company to produce and file in this court the shipping receipt and all other papers and correspondence filed with said defendant American Railway Express Company, including the claim filed by plaintiffs for damages by reason of the loss of the mica the shipment of which is in controversy herein, together with all papers and correspondence in connection therewith, and it further appearing to the court that the said claim and shipping receipt and other papers and correspondence so filed with the defendant American Railway Express Company contain evidence pertinent on the trial of this cause, and it further appearing to the court that the said defendant, in disregard and contempt of said order so entered in this cause, has failed to satisfactorily account for its failure to produce the same or make any answer whatsoever to the said order, it is, upon motion of Chas. E. Greene and S. J. Black, counsel for plaintiffs, considered ordered and adjudged by the court that the plaintiffs herein recover of the defendant American Railway Express Company the sum of \$1,290, with interest on said sum from the 5th day of July, 1918, until paid, with the costs of this action to

be taxed by the clerk of this court. It is further considered, ordered, and adjudged that judgment by default be, and the same is hereby entered against the defendant the Southern Express Company."

Only the American Railway Express Company excepted and appealed.

Martin, Rollins & Wright, of Asheville, for appellant.

Charles E. Greene, of Bakersville, and S. J. Ervin, and S. J. Ervin, Jr., both of Morganton, for appellees.

ADAMS, J. The appellant's fourteenth exception impeaches the validity of Judge McElroy's order, and incidentally of the affidavit on which it is based. The application for the order rests on the following sections of Consolidated Statutes:

"The court before which an action is pending, or a judge thereof, may, in their discretion, and upon due notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of any books, papers, and documents in his possession or under his control, containing evidence relating to the merits of the action or the defense therein. If compliance with the order be refused, the court, on motion, may exclude the paper from being given in evidence, or punish the party refusing or both." C. S. § 1823.

"The courts have full power, on motion and due notice thereof given, to require the parties to produce books or writings in their possession or control which contain evidence pertinent to the issue, and if a plaintiff shall fail to comply with such order, and shall not satisfactorily account for his failure, the court, on motion, may give the like judgment for the defendant, as in cases of nonsuit; and if a defendant shall fail to comply with such order, and shall not satisfactorily account for his failure, the court, on motion as aforesaid, may give judgment against him by default." C. S. § 1824.

[1] In our opinion, the affidavit is insufficient. The plaintiff Burleson alleged that he had filed certain papers with, and had written certain letters to, the defendants, and that the papers filed with the defendants were necessary in the trial of the action. The latter allegation is only an inference of law. In *Evans v. Railroad*, 167 N. C. 416, 83 S. E. 617, Justice Brown said:

"A mere statement that an examination is material and necessary is not sufficient. This is nothing more than the statement of the applicant's opinion. The facts showing the materiality and necessity must be stated positively, and not argumentatively or inferentially."

See 14 Cyc. 346.

The application should also show the necessity for the inspection or production, and it is a generally accepted principle that the affiant's bare conclusion of law is not sufficient for this purpose. 18 C. J. 1124. Non

constat that the plaintiffs did not have carbon copies of the letters and the other papers filed with the defendant, or such knowledge of their contents as would dispense with the necessity of inspection.

[2] We regard the order also as fatally defective. The plaintiffs alleged that the papers were necessary in the trial of the action; but the order required the defendants to file them with the clerk "within 30 days prior to the next term of this court." If the papers were to be used in the trial and no inspection was necessary, the order should have required their production when the case was reached on the docket; if inspection before the trial was desired, such definite time and place as the law contemplates should have been designated for that purpose. In *McGibboney v. Mills*, 35 N. C. 163, this court affirmed an order of the lower court requiring the plaintiff to file the bond sued on with the clerk for inspection "from the 1st day of January, 1852, to the 15th of January, 1852"; but in *Mills v. Lumber Co.*, 139 N. C. 524, 52 S. E. 200 it was held in an opinion by the Chief Justice that an order to produce and deposit certain papers in the office of the clerk was unauthorized. The Chief Justice very aptly said:

"There is nothing in the statute which authorizes an order that the respondent be required to deposit the papers. In practice, this might prove oppressive and detrimental. The papers and books might be necessary in the conduct of the plaintiff's business, and there is no guaranty of their safety when so deposited. All that the statute authorizes is an order that the papers be produced with sufficient opportunity to the other side to inspect the same and take a copy. *Sheek v. Sain*, 127 N. C. 272."

In *Corpus Juris* it is stated that in some jurisdictions a party cannot be required to deposit his papers in the clerk's office, and North Carolina is classed among this number. 18 C. J. 1128. In the case at bar the order required that the papers be taken from the defendants before the term of court and deposited or filed with the clerk for an indefinite length of time upon the allegation that they were necessary in the trial. There was no suggestion that it was necessary to impound the papers to secure them against loss or to prevent the perpetration of a fraud.

In these circumstances the presiding judge evidently misinterpreted the statutes upon which the order was made to rest, and inadvertently exceeded the authority conferred when, during the examination of a witness, he undertook of his own motion to withdraw the issues from the jury, find the facts from the record, and render judgment as by default against the defendant while the controverted matters were still pending and unsettled.

For these reasons it becomes unnecessary

to consider the other questions discussed in the briefs. We hold, then, that the judgment against the American Railway Express Company must be reversed, and that the matters in controversy must be determined as provided by law.

Reversed.

(182 N. C. 590)

ROBINSON et al. v. BOARD OF COM'RS OF BRUNSWICK COUNTY. (No. 293.)

(Supreme Court of North Carolina. Dec. 14, 1921.)

1. Schools and school districts ~~§ 111~~—Issuance of building bonds and levy of taxes to pay the same held properly enjoined at suit of taxpayers.

Issuance of bonds and levy of taxes to pay the same for the purpose of building in a high school district established by Priv. Laws 1921, c. 251, were properly enjoined at suit of taxpayers, where it appears that property not in the district is made taxable, and property in a portion of the district is exempted.

2. Statutes ~~§ 98(1)~~—Act to establish a school district a local or special act prohibited by Constitution.

An act of the Legislature, undertaking to establish a school district and to establish the lines and boundaries thereof, is a local or special act, prohibited by Const. art. 2, § 29.

Appeal from Superior Court, Brunswick County; Connor, Judge.

Suit by D. E. Robinson and others against Board of Commissioners of Brunswick County for an injunction. From a decree in favor of plaintiffs, defendants appeal. Affirmed.

The plaintiffs are residents and taxpayers of Brunswick, and the defendants are the board of county commissioners of said county.

Chapter 251, Private Laws 1921, entitled "an act to establish a high school district and issue bonds with which to build and equip high school buildings and to provide for the payment of said bonds and the maintenance and government of said school," was ratified March 8, 1921.

The court found as facts that at a special meeting of the board of education of that county held prior to February 26, 1921, said board by resolutions established the "supply high school district" and lines and boundaries thereof, being identical with the boundaries of the high school district established in the above act of the General Assembly; that said high school district was established by said board of education in expectation of the passage of said bill, and it was expressly provided in said resolutions of the board that said district was established upon condition that said bill was passed, and that the bonds and taxes provided there should be author-

ized by the voters in said district at the election to be provided in said bill; and that in pursuance of said act an election was held in said district and a majority of voters therein voted for the bond issue and for the tax authorized by said act. It is further found by the court that the board of county commissioners of Brunswick are now about to issue the bonds and levy the taxes provided for in the aforesaid act and will do so unless restrained and enjoined in this action. It is provided in aforesaid act:

"Said bonds shall be prepared and issued by order of the board of county commissioners of Brunswick for and in behalf of supply high school district."

It is also found as a fact by the court that said supply high school district as established by the resolutions of the board of education and by the aforesaid act of the General Assembly includes a portion of two townships, Lockwood's Folly and Smithville, in said county. It is also provided in said act:

"If at said election a majority of the qualified electors shall vote for high school bonds the said board of county commissioners of Brunswick shall levy annually thereafter a special tax upon all taxable property in said township for the special purpose of paying the principal and interest of all bonds issued under this act."

And it is further provided therein:

"In addition to the tax levied to meet the payment of the principal and interest of said bonds, the board of county commissioners of Brunswick are hereby authorized to levy a special tax upon the taxable property in said high school district for the purpose of defraying the expenses of said high school provided by this act."

It is also found by the court that the high school buildings to be erected with the proceeds of said bonds are to be erected "in Lockwood's Folly township," and all the taxable property in said township is made subject to the tax to be levied for the payment of said bonds and interest on the same: that the district for which said bonds are to be issued does not include all of said township, so much of said township as lies within the corporate limits of the town of Shallotte being expressly excluded from the said district, which further includes a portion of Smithville township, the taxable property of which is not made subject to a tax to be levied for the payment of said bonds.

Upon the foregoing facts, the court held that the bonds the defendants are about to issue and to levy the tax for should be enjoined, and the defendants appealed.

Smith & Ruark, for appellants.

Robert W. Davis, of Southport, for appellees.

CLARK, C. J. [1] The proceeds of the bonds in question are to be used for the

purpose of erecting a high school building in Lockwood's Folly township, but the act provides that said bonds shall be issued "for and in behalf of supply high school district" and said district as defined in the act, and in the resolutions of the board of education of Brunswick county does not include all of said Lockwood's Folly township, and does include a portion of Smithville township, while it is provided that the tax is to be levied for the payment of said bonds "on all the taxable property in said township," thus making the property within the corporate limits of the town of Shallotte subject to the tax, though it is expressly excepted from said district, for which said bonds are to be issued, whereas the act expressly excepts from said district so much of said township as lies in said corporate limits, and further provides that said bonds shall be issued for and in behalf of so much of Smithville township as is included in said district, whereas the property situated in Smithville township is not made subject to the tax to be levied for the payment of said bonds. His honor upon the above facts properly enjoined the defendants from issuing, selling, or disposing of the bonds, and from levying any tax or taxes for the payment thereof. *Commissioners v. State Treasurer*, 174 N. C. 141, 93 S. E. 482, 2 A. L. R. 726.

[2] Further, the act is objectionable and invalid because it undertakes to establish a school district, and, being a local or special act, it is prohibited under the express provisions of article 2, section 29, of the Constitution. *Trustees v. Trust Co.*, 181 N. C. 306, 107 S. E. 130, in which Hoke, J., speaking for a unanimous court, construing a somewhat similar act (but without the discrepancies pointed out in this statute), wherein the Legislature attempted to create a graded school district in Robeson county, defining its limits by metes and bounds and authorizing a vote to issue bonds for buildings and equipments held that—

"A statute which lays off or defines by boundary a certain territory as a graded school district within a county, and provides for an issue of bonds upon the approval of the voters therein, for the necessary buildings and maintenance, comes within the recent amendment to our Constitution forbidding the General Assembly from enacting any local or special acts to establish or change the lines of school districts making them void, and requiring legislation of this character must be by general provisions of law. Constitution, art. II, sec. 29."

The opinion in that case was filed May 4, 1921, receiving the approval of a unanimous court, and invalidates the act now before us. The discrepancies in this act pointed out in the early part of this opinion may have been due to the fact that it was ratified on the eve of the adjournment of the General Assembly March 8, 1921, one of the very last private acts ratified by the General Assembly

at that session, and doubtless it did not receive the close scrutiny it should have had. Affirmed.

182 N. C. 607)

RUCKER v. SANDERS. (No. 398.)

(Supreme Court of North Carolina. Dec. 14, 1921.)

1. Contracts \Leftrightarrow 26—Offer made by mail may be accepted by mail.

An offer made by mail carries with it an implied invitation, nothing else appearing, to accept or reject it by mail.

2. Contracts \Leftrightarrow 20—Offeree must accept within reasonable time.

Where no time limit is fixed, an offeree must accept within a reasonable time, which means that he should have a reasonable time within which to accept, in the absence of any revocation by the offeror.

3. Corporations \Leftrightarrow 116—Unconditional acceptance of offer to sell stock creates a mutual executory contract.

Where an offer to sell stock was accepted absolutely without condition, it resulted in an executory contract, with mutuality of obligation and remedy.

4. Contracts \Leftrightarrow 23—Acceptance, to be effectual, must be identical with offer and unconditional.

An acceptance, to be effectual, must be identical with the offer and unconditional.

5. Corporations \Leftrightarrow 116—Suggestion in a letter of acceptance of offer to sell stock held not an attempt to vary the terms of the offer.

A suggestion or direction, in a letter of acceptance of an offer to sell stock, to draw a draft on the offeree for the purchase price, attach the stock certificates to it, and send it to a certain bank for collection, did not amount to an attempt to vary the terms of the offer to sell, and will not defeat an action for breach of contract.

Clark, C. J., dissenting.

Appeal from Superior Court, Guilford County; Webb, Judge.

Action by P. C. Rucker against W. M. Sanders. From judgment of nonsuit, plaintiff appeals. Reversed.

Civil action to recover damages for an alleged breach of contract growing out of the following negotiations:

On Wednesday, March 24, 1920, the plaintiff who resides in Greensboro, N. C., addressed a letter of inquiry to the defendant, who lives at Smithfield, N. C., asking what was the lowest price he would take for his stock in the Jefferson Standard Life Insurance Company. On Friday, the 26th, the defendant answered by mail, saying that he owned 50 shares of said stock which he would sell for \$10,000. On Saturday, March

27th, the plaintiff wrote the defendant as follows:

"Regarding your fifty shares of Jefferson Standard stock that you offer at \$10,000.00, while this is the highest price I have heard of, I will accept it. Just draw on me here at Greensboro with your Jefferson Standard stock attached to the draft, and I will honor same. Please advise me that you have drawn, so I will be looking out for the draft."

The following Monday, March 29th, the defendant replied, saying that he had disposed of his stock; whereupon, on March 30th, the plaintiff wired the defendant, insisting that the stock be delivered in accordance with his offer.

There was a judgment of nonsuit upon the ground that no enforceable contract had been shown, and from this ruling the plaintiff appealed.

Alfred S. Wyllie and J. S. Duncan, both of Greensboro, for appellant.

King, Sapp & King, of Greensboro, for appellee.

STACY, J. [1] We think the defendant's motion for judgment as of nonsuit should have been denied. The offer to sell the 50 shares of stock in question for \$10,000 was made by mail which carried with it an implied invitation, nothing else appearing, to accept or reject the offer in like manner—that is, by mail. *Patrick v. Bowman*, 149 U. S. 411, 13 Sup. Ct. 811, 866, 37 L. Ed. 790; 13 C. J. 300; 6 R. C. L. 611.

[2] Where no time limit is fixed, it is generally understood that the offeree must accept within a reasonable time; and we think this necessarily means that he should have a reasonable time within which to accept, in the absence of any revocation by the offeror. *Minn. & St. L. R. Co. v. Columbus Rolling Mill Co.*, 119 U. S. 149, 7 Sup. Ct. 168, 30 L. Ed. 376; *Lucas v. Western Union Tel. Co.*, 181 Iowa, 669, 109 N. W. 191, 6 L. R. A. (N. S.), 1016, and note; *Litz v. Goosling*, 93 Ky. 185, 19 S. W. 527, 21 L. R. A. 127, and note. However, this is not one of the mooted questions before us, as the plaintiff's letter of acceptance was forwarded by return mail, and defendant admits that he received it before selling his stock to another.

[3, 4] There is no controversy or difference of opinion between the parties as to the general rules of law governing the subject of contracts by correspondence; but the defendant contends that the plaintiff's letter of March 27th was not an unconditional and unqualified acceptance of his offer. He says the terms were varied by the direction to draw draft with stock attached, and that such was a condition precedent to plaintiff's acceptance. We think this construction is rather too technical and might properly be characterized as "sticking in the bark." It is quite

certain that, if the plaintiff were seeking to avoid his agreement on this ground, we would be disposed to hold against him. And, if the contract be binding as to one of the parties, it is binding as to both. The defendant's offer was accepted absolutely, without condition, and this resulted in an executory contract, with mutuality of obligation and remedy. *Howell v. Pate*, 181 N. C. 117, 106 S. E. 454, and cases there cited.

The difficulty in the instant case arises out of the failure of the parties to distinguish between a condition which goes to the making of the contract and a suggestion relating only to its ultimate performance or execution. Of course, to consummate any kind of a contract, there must be a meeting of the minds upon a given subject. An unaccepted offer is not a contract; and, as stated in a number of cases, an acceptance to be effectual must be identical with the offer and unconditional. 13 C. J. 281. But, in order for this subsequently intended direction or suggestion to invalidate the acceptance, it should amount to a qualification or condition imposed as a part of the acceptance itself. In other words, it must be construed in the case at bar as a qualified acceptance to the effect that "I will accept your offer; provided you attach stock to draft and draw on me here in Greensboro and advise me so that I can be looking out for same." It will be readily conceded, without debate, that if this latter meaning be the reasonable and natural interpretation of plaintiff's letter dated March 27th, then there was no contract, and the defendant's contention, based upon this assumption, is entirely correct. But, on the other hand, if a contrary purpose were intended, as apparently and evidently it was, and the parties so understood it, we must give effect to the most essential and controlling element of all executory contracts, to wit, the real understanding and intention of the parties. The suggestion or direction made by plaintiff to draw draft with stock attached was not an unusual or unexpected method by which the parties might reasonably have contemplated carrying out the contract; and this lends color to the conclusion that a compliance with the plaintiff's wish, hope, or expressed request, "Just draw on me here with stock attached," was not intended as a condition precedent to his acceptance of the defendant's offer. It is further conceded that the result would have been otherwise had this suggestion not been accompanied by a declaration of unqualified and unconditional acceptance. 39 Cyc. 1189, and cases cited in note.

There is no effort to circumvent or deny the well-settled principle that an offer must be accepted in its exact terms in order that a contract should arise therefrom, and any attempt to impose new conditions or terms in the acceptance, however slight, will ordi-

narily deprive it of any efficacy. *Krentzer v. Lynch*, 122 Wis. 474, 100 N. W. 887.

[5] But where the letter of acceptance contains a mere suggestion or requests that payment be made in a certain way, and such request is not in the form of a condition attached to the acceptance, it does not amount to an attempt to vary the terms of the offer to sell, and will not defeat an action in proper instances for specific performance, or one for a breach of the contract. *Curtis Land Co. v. Interior Land Co.*, 137 Wis. 341, 118 N. W. 853, 129 Am. St. Rep. 1068; *Turner v. McCormick*, 56 W. Va. 161, 49 S. E. 28, 67 L. R. A. 853, 107 Am. St. Rep. 904.

In the last-cited case the Supreme Court of West Virginia makes the following general observations pertinent to the subject now in hand:

"If a man says, 'I accept your offer,' that makes a contract. It assents to all the terms of the offer. What more is necessary? There is a complete 'aggregatio mentium.' The acceptance conforms to the offer in every particular. How can a mere request, relating, not to the making of the contract, but to its performance, be deemed to change it? Would the acceptor be permitted to excuse himself from performance on the ground of such request? No precedent of that kind has been found. They are all cases in which the proposer, desiring to escape from the consequences of his offer, because somebody else has proposed a higher price than the first asked, seeks to repudiate the transaction and sell to the other party. Property rights are sacred and should be well guarded by the law, but, when a man has deliberately made a fair contract of sale, he ought not to be permitted to avoid it on some flimsy pretext, in order to avail himself of a better bargain. Time and place of payment, when not mentioned in an accepted offer, are fixed by law, and are matters of performance, carrying out the contract, a thing wholly distinct and separate from the making of the agreement. If, contemporaneously with, or subsequent to the making of the contract, either party suggest, request, or propose a time, place, or mode of performance different from that agreed upon, that does not of itself effect such change, nor does it cause a breach, giving right of action or rescission to the other party. *Swiger v. Hayman* [48 S. E., 839]."

In *Skinner v. Stone*, 144 Ark. 353, 11 A. L. R. 808, 222 S. W. 360, a case practically on all fours with the one at bar, the Supreme Court of Arkansas holds (as condensed and stated in the syllabus):

"A suggestion in the acceptance of an offer to sell real estate that the purchaser will take care of draft attached to deed sent to a specified bank does not make that method of payment a condition which will avoid the contract if not accepted, but the purchaser must be given the opportunity to pay in money if the seller requires it."

In the note following this case published in 11 A. L. R. 811, the reporter cites two of our own decisions in support of the same position,

to wit, *Hughes v. Knott*, 138 N. C. 105, 50 S. E. 586, 3 Ann. Cas. 903, and *Blalock v. Clark*, 137 N. C. 140, 49 S. E. 88.

The defendant relies on the case of *Hall v. Jones*, 164 N. C. 199, 80 S. E. 228, but we think there is a marked distinction between the facts of that case and those here presented. There the plaintiff, Hall, annexed to his acceptance the condition that the trade be consummated in 15 or 20 days thereafter and asked for a ratification of this change by the defendant, Jones. This was not an acceptance in the terms of the offer, and therefore amounted to a rejection of it. *Minn. & St. L. R. Co. v. Columbus Rolling Mill Co.*, supra; *National Bank v. Hall*, 101 U. S. 43, 25 L. Ed. 822.

Our attention has been called to a number of cases in other jurisdictions, seemingly in support of a different position, but we think the conclusion we have reached, and stated above, is more in keeping with the real purpose and intention of the parties; and it is universally conceded that this should be the guiding star of construction in every case. See 39 Cyc. 1197, and cases collected in note.

Defendant further contends that the plaintiff should not be permitted to maintain this suit because at the time in question, he was a stockholder and director in the Jefferson Standard Life Insurance Company, and therefore under the duty of disclosing to the defendant whatever information he may have had regarding the value of this stock.

There is a sharp conflict in the authorities elsewhere over the question as to whether the relations between a director or officer of a corporation, on the one hand, and shareholders, on the other, are not of such a fiduciary relation as to make it the duty of the former to disclose the knowledge which he possesses affecting the value of the stock before purchasing same from a shareholder. An interesting and valuable discussion of this subject will be found in 14A C. J. 128; *Shaw v. Cole Mfg. Co.*, 132 Tenn. 210, 177 S. W. 479, L. R. A. 1916B, 706, and note; *Dawson v. Nat. Life Ins. Co.*, 176 Iowa, 362, 157 N. W. 929, L. R. A. 1916E, 878, Ann. Cas. 1918B, 230; *Strong v. Repide*, 213 U. S. 419, 29 Sup. Ct. 521, 53 L. Ed. 853. And in our own reports see *Bessellew v. Brown*, 177 N. C. 85, 97 S. E. 743, 2 A. L. R. 862, and cases there cited, especially *McIver v. Hardware Co.*, 144 N. C. 478, 57 S. E. 169, 119 Am. St. Rep. 970. But we do not think the facts in the instant case call for a decision of this question at the present time. There is no evidence on the record tending to show that the defendant had any less knowledge of the company's business or the value of the stock than the plaintiff. Hence it does not now appear that any harm has resulted from this alleged circumstance, even if it be open to the defendant.

The judgment of nonsuit will be set aside and the cause remanded for a new trial.
Reversed.

CLARK, C. J. (dissenting). On Wednesday March 24, 1920, the plaintiff, who resided at Greensboro, N. C., inquired by letter of the defendant, who resided at Smithfield, N. C., if he had any Jefferson Standard Life Insurance Company stock for sale, and, if so, to name his lowest price. On Friday, the 26th, defendant replied by letter that he had 50 shares of said stock, for which he would take \$10,000. On Saturday, March 27th, the plaintiff wrote the defendant that he accepted his offer, adding:

"Just draw on me here at Greensboro with your Jefferson Standard stock attached to the draft, and I will honor the same. Please advise me that you have drawn, so I will be looking out for the draft."

On Monday, March 29th, the defendant replied that he had disposed of the stock, whereupon on March 30th, the plaintiff wired the defendant insisting on the delivery of the stock. This constitutes the entire correspondence between the parties with respect to the sale of the stock except the subsequent letter from the defendant of April 21, 1920, which the defendant wrote explaining why he did not accept the plaintiff's offer to draw on him, and had sold the stock in Smithfield for cash:

"April 21, 1920.

"Mr. P. C. Rucker, Greensboro, N. C.—Dear Sir: Of course you understand that I offered you the stock at \$10,000.00 cash in Smithfield. You have never offered me any cash for my stock, but proposed that I draw on you through some Greensboro bank. You also stated that I might notify you a few days ahead of draft so that you could arrange with the bank to pay draft in case of your absence. In your first letter, you referred to my stock as insignificant in quantity. In your second letter you stated that my price was above the market and rather more than you had ever known any to bring. You might have wired or called me over the telephone. Your attitude and expressions led me to believe that you were indifferent. I had the opportunity on Saturday and again on Monday following our correspondence to sell the stock for cash, which I did.

"I am very sorry that you are disappointed, but I think that you slept upon your opportunity. You should have called me over phone or wired.

"Yours truly,

W. M. Sanders."

The court held that the letter of the plaintiff of March 27th was not an unconditional acceptance of the defendant's offer in his letter of March 26th and directed a nonsuit.

The alleged contract being entirely in writing, it was a matter of law for the court to determine whether the correspondence constituted a contract or not. *Spragins v. White*, 106 N. C. 449, 13 S. E. 171; *Festerman v.*

Parker, 32 N. C. 474; Young v. Jeffreys, 20 N. C. 357.

"It is familiar learning that, to make a valid sale, the acceptance must be in the terms of the offer. 7 Am. and Eng. 125. No especial formalities are required, but the offer and acceptance must agree. The buyer has no right to attach any conditions, if he proposes to hold the seller upon the original offer." Hall v. Jones, 164 N. C. 189, 80 S. E. 228.

The offer of the defendant in letter of March 26th acknowledging the receipt of the plaintiff's offer to purchase his Jefferson Standard Life Insurance Company stock says: "I will take \$10,000 for it." The plaintiff's answer on March 27th to this offer says:

"Regarding your 50 shares of Jefferson Standard stock that you offer at \$10,000.00, while this is the highest price I have heard of, I will accept it."

If the reply had stopped with these words, the two minds would have met, and the plaintiff would have become the debtor of the defendant, and should by the earliest opportunity have paid his creditor for the \$10,000 at his home in Smithfield. But the plaintiff added a material condition to his acceptance by saying:

"Just draw on me here at Greensboro with your Jefferson Standard stock attached to the draft, and I will honor same. Please advise me that you have drawn, so I will be looking out for the draft."

This was not an unconditional acceptance, but a material variance. It is true the seller might have complied with this variance, but it is also true that, his terms not having been accepted, which clearly contemplated the payment in cash to him, in the prompt and regular course of dealings, at Smithfield, he could disregard it and accept payment of cash at his home from another party which was made him after the receipt of said conditional acceptance of the plaintiff.

This matter of offer and acceptance in dealings of this kind are of hourly occurrence throughout the country, and it is of the greatest importance that the settled law that the acceptance of an offer must be unconditional shall be kept unchanged. In 13 C. J. 281, the law is thus fully and admirably stated with copious citations in the notes:

"An acceptance, to be effectual, must be identical with the offer and unconditional. Where a person offers to do a definite thing and another accepts conditionally or introduces a new term into the acceptance, his answer is either a mere expression of willingness to treat or it is a counter proposal, and in neither case is there an agreement. This is true, for example, where an acceptance varies from the offer as to time of performance, place of performance, price, quantity, quality, and other like cases. A promise to give an offer con-

sideration cannot be regarded as an acceptance, nor can a statement that the offeree is prepared to make arrangements on the terms named."

If an offer is accepted as made, the acceptance is not conditional.

It is clear from this correspondence that the offer of the defendant meant that he would take \$10,000 cash, payable forthwith, in Smithfield. The reply of the plaintiff varied this by proposing to make payment to the seller in Greensboro, which was not according to the terms of his offer, but a material variance.

If the seller had complied with the proposed condition, he would have made the bank in Greensboro his agent to collect. There would, of course, have been the risk of the check sent by said bank to the seller being protested or lost in the mails, or, if remitted in cash, there would have been danger of theft by the employees of the express company or loss by collision or by train robbers. It is true that these risks might be slight, but they were risks which under the terms of the defendant's offer should have been borne by the plaintiff, whose duty it was to safely convey the \$10,000 and pay it over to the seller at his home in Smithfield within the prompt and ordinary course of transmission and payment.

Among the many notes to the above citation from 13 C. J. 281, are the following:

Note 32: "When the offer is to buy a horse and the offeree accepts (if he will come for it), there is no agreement." Fenno v. Weston. 31 Vt. 345; Baker v. Holt, 56 Wis. 100, 14 N. W. 8.

Also:

"Where the offer of property for sale says nothing about the place of payment, and the acceptor specifies that it shall be made at his residence, there is no agreement for the offer entitles the seller to payment at his place of residence."

See 39 Cyc. 1197, with other citations.

That is exactly the case here. The place of payment not being named, it was, of course, to be made at the residence of the seller in Smithfield, and the condition annexed by the buyer that he would make payment in Greensboro and that notice should be given him so that he might be prepared to make payment was a material difference as to which the two minds did not meet, and his honor properly nonsuited the plaintiff upon that ground. There are occasions when the parties are farther apart than Greensboro and Smithfield. For instance, where the offerer might be in New York and the offeree in San Francisco or New Orleans or London. In such cases the variation by reason of the greater distance and delay would emphasize the variation from the proposal of the de-

fendant and the acceptance of the buyer, but the principle of law involved is the same. It is so important and so universally settled that it should not be made uncertain.

In 6 R. C. L. 608, the same uniform ruling of the court is thus summed up:

"There must be no variance between the acceptance and the offer. Accordingly a proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation unless the party who made the original offer renews it or assents to the modification suggested. The other party, having once rejected the offer, cannot afterwards revive it by attempting an acceptance of it. The acceptance must be unequivocal and unconditional. If to the acceptance of a proposal any condition be affixed by the party to whom the offer is made, or any modification or change in the offer be made or requested, there is a rejection of the offer. Having in effect rejected the offer by its conditional acceptance, the offeree cannot subsequently bind the offeror by an unconditional acceptance. The offeror may, of course, assent to the terms imposed by the offeree, and such assent may be inferred from the fact that the parties conducted business under the conditional acceptance"—citing many cases.

In this instance the defendant upon a fair construction of the correspondence offered to take \$10,000 cash for his stock payable to him in Smithfield. The offeree, the plaintiff, varied this by offering to pay in Greensboro to the agent of the offerer. If the seller had assented to this variation, the contract would have been closed, but the seller was not required to take notice of an acceptance which was conditional. Being offered by another payment in cash to himself in Smithfield, he chose to accept and this he had a right to do.

In 39 Cyc. 1197, the same principle is laid down as in the above quotations from C. J. and R. C. L., with numerous citations of authorities. In note 98 thereto it is said:

"If no place is specified for payment, it is implied that it is to be made at the residence of the vendor or his agent, and an acceptance fixing a different place is bad as a variance from the offer"—citing a very long list of cases as a statement of the uniform ruling of the courts.

The acceptance of the offeree in this case in effect proposing to pay in Greensboro, at the risk of the seller for the transmission of the payment to the vendor, was not the unconditional acceptance which the law requires in such transactions.

Benjamin on Sales (7th Ed.) § 39, says:

"The assent must, in order to constitute a valid contract, be mutual, and intended to bind both sides. It must also coexist at the same moment of time. A mere proposal by one man obviously constitutes no bargain of itself. It must be accepted by another, and this acceptance must be unconditional. If a condition be affixed by the party to whom the

offer is made, or any modification or change in the offer be requested, this constitutes in law a rejection of the offer and a new proposal, equally ineffectual to complete the contract until assented to by the first proposer."

While in this case the offer of the defendant does not use the word "cash," it is apparent from the correspondence and the course of dealing that this was the intent of the parties. In 1 Page on Contracts, 77, § 46, the author says:

"If the offer of sale does not state the terms of payment, cash payment is implied. Hence an acceptance which attempts to secure even a short period of credit does not make a contract."

Under the ruling in *Hall v. Jones*, supra, the defendant was not required under the terms of his offer to incur the expense and risks and delay in sending his stock to some bank at Greensboro to be paid at the pleasure and convenience of the plaintiff. It was incumbent upon the plaintiff to accept or reject the offer unconditionally, and, if he accepted, he should have sent the cash, or what would be accepted as cash, by the earliest conveyance to the seller at his home in Smithfield. This proposition is held the settled law as stated in the above and other citations. Among other cases in point fully supporting these contentions of the defendant in this case are *Sawyer v. Brossart*, 67 Iowa, 678, 25 N. W. 876, 56 Am. Rep. 372; *Iron Co. v. Meade*, 21 Wis. 474, 94 Am. Dec. 557; *Baker v. Holt*, 56 Wis. 100, 14 N. W. 8; 1 *Parsons on Contracts* (6th Ed.) 475; 1 *Page on Contracts*, 75, citing many cases, among them *Gilbert v. Baxter*, 71 Iowa, 327, 32 N. W. 364. It is believed there are none to the contrary.

In *Iron Co. v. Meade*, 21 Wis. 474, 94 Am. Dec. 557, it is said:

"Acceptance" of an offer to sell land, but "fixing a different place for the delivery of the deed" is invalid. "If [the plaintiff] had simply said, 'I accept your proposition,' then there would have been an agreement to sell the land for cash. The payment of the money and the delivery of the deed in such cases are concurrent acts."

The defendant's offer was to accept \$10,000 cash in Smithfield. The plaintiff accepted it upon condition that he was to pay to defendant's agent in Greensboro, thus throwing upon the defendant the expense and risk of transmitting the stock, \$10,000 worth, to Greensboro and the expense and risk of the transmission back to him of the \$10,000 in cash or by check to be turned into cash upon presentation by him to the bank in Smithfield and payment thereof. This was not the offer that was made by the defendant, but a very material variation. It is, on its face, neither an inquiry nor a mere suggestion of the mode of payment, but the statement of

the conditions upon which the plaintiff would accept the defendant's offer.

We are not inadvertent that the defense was also set up that the plaintiff was an officer of the company and informed as to the value of its stock, whereas the defendant was not, but this question does not arise upon the nonsuit, and we think the principle of commercial law involved is of sufficient importance to justify the above citation of authorities, which should be conclusive of the correctness of the nonsuit.

(182 N. C. 892)

STATE v. SATTERWHITE. (No. 533.)

(Supreme Court of North Carolina. Dec. 14, 1921.)

1. Criminal law ⚡1069(6)—Appeal from conviction not docketed before called at following term dismissed on motion of Attorney General.

Under Supreme Court rule 17 (66 S. E. vii), requiring that an appeal be dismissed on appellee's motion, if appellant fails to file a transcript seven days before the call of causes from the district from which the appeal comes, at the term following the rendition of the judgment, a motion of the Attorney General to dismiss an appeal from a conviction in a case tried at the September term of the district court should be allowed as a matter of course, where the appeal was not docketed until the fall term of the Supreme Court the following year.

2. Criminal law ⚡1188—Habeas corpus ⚡109—New trial not granted for defective sentence, but case remanded for correct sentence.

A new trial will not be granted merely because of a defective sentence, but the case will be remanded for imposition of a correct sentence, whether it came to the Supreme Court by appeal, on habeas corpus, or by certiorari.

3. Criminal law ⚡995(4)—Sentence to begin on expiration of another sentence not void.

A sentence to imprisonment for 18 months, to begin at the expiration of a previous sentence for another offense if approved by the Supreme Court, but effective immediately if such sentence is reversed or a new trial granted, is not void as being uncertain, indefinite, conditional, alternative, and contingent in respect to the time the judgment should be executed.

Appeal from Superior Court, Buncombe County; Long, Judge.

Aleck Satterwhite was convicted of selling spirituous liquors, and he appeals. Appeal dismissed.

The defendant was convicted and sentenced for selling spirituous liquors, and appealed. Said appeal not having been docketed

here at the spring term, as required, the Attorney General moves to dismiss.

Philip C. Cocke, of Asheville, for appellant. James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

OLARK, C. J. [1] This case was tried at September term, 1920, of Buncombe. Not having been docketed here till this term, the motion of the Attorney General to dismiss should be allowed as a matter of course. At his option, the case might have been docketed and dismissed, under rule 17 (66 S. E. vii), at last term.

[2, 3] The only point, however, raised by the defendant in his brief is:

"Appellant assigns error that the judgment imposed is uncertain, indefinite, conditional, alternative, and contingent in respect to the time the said judgment shall go into effect and be executed upon the person of the defendant."

If the case was properly before us, we should have to hold against the appellant. The record sets out that—

"When the solicitor prayed judgment in this case he informed the court that this defendant has, since 1914, been under indictment in Asheville in different courts, in about 40 cases on the criminal docket, acquitted in some and convicted in others. This information is put on the record in explanation of the court's sentence and made a part of it. The sentence of the court is that he be imprisoned in the county jail for 18 months and assigned to work on the public roads of Buncombe county. It also appearing to the court that he has been sentenced by another judge, at a previous term of court, for housebreaking for 18 months, and the case is still in the Supreme Court, this sentence is made so that it shall not conflict with the other sentence if the same is approved. In other words, this sentence is to begin at the expiration of the other sentence. If the sentence in the other case is reversed or there is a new trial, this sentence is to begin first and become effective immediately."

The statement of the case on appeal was settled by the judge November 18, 1920. The defendant having been pardoned by the Governor (Bickett) in the other case pending in this court from a sentence of 18 months for housebreaking, the defendant's counsel contends that the sentence in the present case is void, and that the defendant will be entitled to a new trial.

If the sentence imposed were defective, there being no other error assigned, the defendant, though he had prosecuted his appeal in time, would not have been entitled to a new trial, but the case would have been remanded that a correct sentence might be imposed (State v. Lawrence, 81 N. C. 522; State v. Queen, 91 N. C. 660; State v. Jones, 101 N. C. 724, 8 S. E. 147); and this irrespective of whether the case came to this court by appeal from the judgment, or on a habeas

corpus, or by certiorari (State v. Walters, 97 N. C. 490, 2 S. E. 539, 2 Am. St. Rep. 310; State v. Crowell, 116 N. C. 1059, 21 S. E. 502; State v. Austin, 121 N. C. 622, 28 S. E. 361).

But there is no defect in the judgment as entered. In State v. Hamby, 126 N. C. 1067, 35 S. E. 614, it was held:

That a sentence "made to begin on the expiration of another sentence imposed on the defendant" is valid. "This practice, called 'cumulative sentences,' is not unusual on the circuit, and is not contrary to any principle of law. It is in conformity with the settled criminal practice in England and most of the states where a person is convicted of several offenses at the same time"

—citing the text-books and authorities and the reasons therefor, saying, among other things:

"If this were not so, a person could not be punished for an offense committed while undergoing punishment unless the trial were postponed till its expiration. Our statute does not expressly require sentences to begin in present, and it ought not to be so construed," especially "where no present effect can be given to such sentence by reason of another subsisting judgment of imprisonment."

State v. Hamby was approved in Re Hinson, 156 N. C. 252, 72 S. E. 310, 36 L. R. A. (N. S.) 352, and in Re Black, 162 N. C. 459, 78 S. E. 273, in which the court said that it had been "settled by many decisions and with entire uniformity" that where a defendant had been sentenced to imprisonment on conviction of two or more indictments "sentence may be given against him on each successive conviction, the sentence of imprisonment in each successive term to commence from the expiration of the term next preceding," and that such sentences are not void for uncertainty, but the sentence should state that the later term should begin at the expiration of the former term, else they would run concurrently, citing many authorities.

But we have a more recent case affirming a sentence in the exact terms of the present sentence, which was rendered by the same judge, and was affirmed (State v. Cathey, 170 N. C. 797, 87 S. E. 532), in which Allen, J., said that—

It was "lawful to impose a sentence * * * to take effect at the expiration of the first sentence, and by legal operation such sentence would begin immediately upon the reversal of the first sentence on appeal or upon its expiration by the lapse of time, or otherwise; it cannot impair the validity of the judgment that his Honor set down in words [in this case] what the law would have written into it."

The sentence in that case was in the identical terms of that now before us.

We find no error, and have thought proper to call attention to these principles, though well settled, but, as the case was not brought

up at the proper term, the motion of the Attorney General must be granted.

Appeal dismissed.

(182 N. C. 604)

WEESNER v. DAVIDSON COUNTY et al. (No. 396.)

(Supreme Court of North Carolina. Dec. 14, 1921.)

1. Schools and school districts \Leftarrow 103(2) — Statute prohibiting special tax election within two years after unsuccessful election construed.

C. S. § 5533, does not merely prohibit an election in any special tax district for the purpose of revoking a special tax within two years from the date of the election at which the tax was voted, but also prohibits an election to authorize a special tax within two years after a similar election at which the same proposition was defeated, as the concluding clause of the statute should be construed to read, "nor shall any election be ordered and held at any time within less than two years after the date of the last election on the question in the district"; but, in computing the two years, an election held within that time, being void, may be disregarded.

2. Statutes \Leftarrow 211—Caption aids construction only in case of doubt.

Where the meaning of a statute is doubtful, its title may be called in aid of construction; but the caption cannot control where the meaning of the text is clear, especially where the headings of sections have been prepared by compilers, and not by the Legislature itself.

Appeal from Superior Court, Davidson County; Webb, Judge.

Action by C. C. Weesner against Davidson County and its Board of Education. From a judgment for defendants, plaintiff appeals. Error.

Civil action to enjoin the levy and collection of a special tax in Arcadia school district, Davidson county, upon the ground that the election authorizing said levy was without warrant of law and therefore void. Two reasons are assigned for the invalidity of the election: (1) It is alleged that seven persons who voted "For Special Tax" were not legal voters, and therefore ineligible to vote; and (2) that the election was held within two years after a former unsuccessful election had been held on the same question in the same district.

From a judgment sustaining the validity of the election, and establishing the legality of the tax, the plaintiff appealed.

Walser & Walser, of Lexington, for appellant.

Raper & Raper and J. R. McCrary, all of Lexington, for appellees.

STACY, J. We will omit any consideration of the first exception, as it involves only a question of fact, and, indeed, we consider it immaterial, as will presently appear.

The second exception calls for a construction of section 5533 of the Consolidated Statutes. The plaintiff contends that, under this section, the election in question is void, because, within two years prior thereto, a similar election was held for the same territory and defeated. It appears from the record that a special tax election was held for Arcadia township, with the exception of Hill's district, on September 9, 1919, at which said election a majority of the registered voters did not vote "For Special Tax." Thereafter, on April 12, 1921, the present election was held for the five districts comprising all the territory of Arcadia township, with the exception of Hill's district and one family. At this election it is alleged that a majority of the qualified voters cast ballots in favor of the special tax.

It will be observed that both elections were held within a space of less than two years apart. This would seem to be contrary to the statute, which provides:

"No election for revoking a special tax in any special tax district shall be ordered and held in the district within less than two years from the date of the election at which the tax was voted and the district established."

And then there is added:

"Nor at any time within less than two years after the date of the last election on the question in the district."

To hold, in accordance with the defendant's contention, that the prohibition refers only to an election held for the purpose of revoking a special tax already authorized, and not to an election, successful or otherwise, held for the purpose of submitting to the qualified voters of the district the question as to whether or not a special tax should be levied, would render meaningless the second clause in the statute. Again, under this construction, the statute would contain two prohibitions against an election for revoking the tax and none against an election within two years after it is defeated. It should be noted that the "election" referred to in the second clause is not limited to an election for revoking or abolishing an existing tax; but,

by the express terms of the act, it applies to any "election on the question."

The qualifying phrase, "for revoking a special tax," is not brought forward in the second clause; and the use of the word "nor," a disjunctive conjunction or negative connective, would seem to repel the idea of its intended repetition. The second clause is not a duplication of the first, but rather added in contradistinction to it. Obviously it was intended to modify the word "election," and not the words "election for revoking a special tax." In its entirety it would read:

"Nor shall any election be ordered and held at any time within less than two years after the date of the last election on the question in the district."

His honor was doubtless misled by the caption, which reads as follows: "Election for Abolition Not Oftener Than Once in Two Years." Where the meaning of a statute is doubtful, its title may be called in aid of construction (*Freight Discrimination Cases*, 95 N. C. 434); but the caption cannot control when the meaning of the text is clear. (*In re Chisholm's Will*, 176 N. C. 211, 96 S. E. 1031, and cases there cited). Especially is this true where the headings of sections have been prepared by compilers, and not by the Legislature itself. *Cram v. Cram*, 116 N. C. 238, 21 S. E. 197. See, also, chapter 73 of the Consolidated Statutes on the subject of "Statutory Construction."

There was an election on the question September, 9, 1919, and the present election was held April 12, 1921, "within less than two years after the date of the last election on the question in the district." The clear intent of the Legislature was to avoid the multiplicity and frequency of these elections; and we must give effect to each and every part of the statute. In the instant case, however, it may not be amiss to add that, as two years have now elapsed since the election in September, 1919, we see no reason why another election could not be held at the present time, if such be desirable. In computing the two years, the election held in April, 1921 being within the prohibited period should be disregarded.

Upon the record, and as now presented, we think the plaintiff's application for a restraining order should have been granted.

Error.

(182 N. C. 596)

ROGERS v. CITY OF ASHEVILLE.
(No. 542.)

(Supreme Court of North Carolina. Dec. 14, 1921.)

1. Appeal and error \S 564(4)—Failure to serve a case-made within the time agreed on held not excused by fact that stenographer was busy.

Where counsel for plaintiff appellee consented to an allowance of 45 days in which to state and serve case on appeal, and subsequently extended that time 30 days more, Supreme Court will not relieve defendant, appellant, on an excuse that stenographer was busy and could not transcribe her notes within that time, since the stenographer's notes are not the supreme authority as to what occurred at the trial, and, if parties failed to agree as to what testimony was, court could be called on to settle what really occurred.

2. Stipulations \S 6—Denial of further extension to perfect appeal within court rule.

Where on appeal counsel have extended the time of serving a counter case or exceptions 60 days beyond the statutory time, and denial is made that further time was given, and no agreement in writing is filed under court rule 39 (174 N. C. 838, 81 S. E. xiii), no further time will be granted.

Action by W. F. Rogers against the City of Asheville. From judgment for plaintiff, defendant appeals, and moves for certiorari, and plaintiff moves to dismiss the appeal. Motions denied, and judgment affirmed.

Jones, Williams & Jones and Wells & Swain, all of Asheville, for plaintiff.

George Pennell and J. W. Haynes, both of Asheville, for defendant.

CLARK, C. J. This is a petition for certiorari by the defendant, appellant, upon the following state of facts: The case was tried at April term, 1921, of Buncombe. Verdict on the issues against the defendant and judgment. By consent 45 days were allowed the defendant in which to state and serve case on appeal, and plaintiff 45 days thereafter to serve counter case or exceptions. Subsequently the plaintiff extended the time for the defendant to serve his case 30 days, making 75 days in all, on the expiration of which time the appellant did not have his case ready for service, and, the appellee, plaintiff, not agreeing to extend the time further, the appellant docketed the record proper here on November 7, and when the case was reached asked for a certiorari. The appellee, on the other hand, moved to dismiss the appeal or to affirm the judgment upon the record proper.

It is very desirable that cases on appeal should be made up as promptly as possible after the case is tried, while the facts are fresh in the minds of the parties, and there

is less probability of a difference in recollection as to what occurred. Under the former practice before the adoption of the C. C. P. every case on appeal was settled by the trial judge, but the framers of the Code of Civil Procedure, mindful that Magna Carta had placed a "delay of justice" in the same category with "a denial of justice," against which litigants should be equally guaranteed, provided that "cases on appeal" should be settled by the parties or counsel, and the judge called in only in case of disagreement, thus materially expediting the hearing of appeals by relieving the judge of settling them in many cases, and also fixed 5 days after the adjournment of court as the time in which the appellant must serve his case and 3 days later for service of counter case or exceptions.

This was later extended to 10 days, and still more recently the appellant has been given 15 days to serve the case on appeal, and the appellee 10 days to serve the counter case. It is more than doubtful if this concession to delay was desirable and has not been productive of much abuse. This court, recognizing that there might be instances in which a longer time might be necessary, has held valid written agreements of counsel for an extension of time, and a more recent statute has permitted the judge, for the first time to intervene by giving an extension of time to settle the case on appeal when counsel cannot agree on this. This would seem to be the limit to which it would be advisable to extend indulgence in the time for settling cases on appeal.

In this case, by consent, 75 days were allowed, and the only excuse given for the case not being served within that time is that the stenographer was busy in court and could not transcribe her notes within the 75 days. The appellee shows, on the contrary, that for more than half of that 75 days there was no term of court in session during which the stenographer was required in court at all, and further that even during the time in which court was in session there were many days during which the stenographer's services were not required. But, however that might be, the stenographer's notes are not the compelling and supreme authority as to what transpired during the trial. The judge in charging the jury always tells them that their recollection, and not that of the court itself, must govern them as to what was the testimony of the witnesses. And in settling the cases on appeal the first authority is that of counsel themselves in agreeing as to what occurred at the trial as to the evidence, as to the charge, and otherwise, and when they do not agree the judge must settle what really occurred.

[1] Efforts have been made heretofore to make the stenographer's notes of higher authority than the agreement of counsel or

even the statement of facts as settled by the judge. But on the very first occasion when this view was advanced the court held in *Cressler v. Asheville*, 138 N. C. 485, 51 S. E. 54, that, when the parties cannot agree, the judge must settle it, saying:

"The stenographic notes will be of great weight with the judge, but are not conclusive if he has reason to believe there was error or mistake. The stenographer cannot take the place of the judge, who is alone authorized and empowered by the Constitution to try the cause, and who alone (if counsel disagree) can settle for this court what occurred during the trial. * * * Of course, if such notes were conclusive as to the evidence, they should be equally so as to what exceptions were taken and rulings made, and all other matters occurring in the progress of the trial. This would simply depose the judge and place the stenographer in his place for all the purposes of an appeal. All the care taken to secure men of high integrity and impartiality to discharge the functions of the important office of judge of the superior court * * * become of secondary importance if a stenographer appointed by the clerk of the court, and not the judge elected by the people of the state, is to decide what were the exceptions, rulings, evidence, and other incidents of a trial. Now, as always, these matters must be settled by the judge when counsel disagree. The stenographer's notes will be of valuable aid to refresh his memory, but the stenographer does not displace the judge in any of his functions."

In that case we were guarding against the threatened unnecessary expense of voluminous transcripts of cases on appeal by dumping into them the stenographer's notes. Now we are threatened with, if possible, a greater evil by the opportunity, and indeed the inducement to great delays in appeals by making the settlement of cases for this court depend upon the convenience or disposition of the stenographers, who may or may not have other calls upon their time. If we were to yield to this, then, to paraphrase the language of Johnson in regard to Charles XII of Sweden, litigants

"Would be condemned weary suppliants to wait
While ladies interpose and counsel debate."

This is the fourth time at this term that blame for delays to bring up cases in the time prescribed by statute has been sought to be charged upon the stenographers, to the exoneraton of counsel, by alleging the heavy business requirements of stenographers.

We must repeat again that stenographers are a helpful aid, but are not indispensable. They have not been indispensable heretofore,

and are not absolutely indispensable now. The calls upon their time cannot be used to increase the expense of appeals by dumping their notes into the transcript, which we refused to permit in *Cressler v. Asheville*, supra, nor to excuse, as has been attempted at this term, delays beyond the statutory time or the time agreed upon by consent to settle cases on appeal. If the stenographer or stenographers employed, on any given case, cannot reduce the notes so as to state the evidence in a narrative form or within the prescribed time, they must be dispensed with, or a sufficient number of stenographers employed to accomplish the duty of aiding the court, whose records must not be padded, nor delays in appeals inflicted upon litigants, by a plea that the stenographers employed could not do the work in apt time. *Cressler v. Asheville*, supra, has been often cited and approved. *Bucken v. Railroad*, 157 N. C. 444, 73 S. E. 137; *Brazille v. Barytes Co.*, 157 N. C. 460, 73 S. E. 215; *Overman v. Lanier*, 157 N. C. 551, 73 S. E. 192; *Skipper v. Lumber Co.*, 158 N. C. 323, 74 S. E. 342; *Brewer v. Mfg. Co.*, 161 N. C. 212, 76 S. E. 237; *Bank v. Fries*, 162 N. C. 516, 77 S. E. 678; *State v. Shemwell*, 180 N. C. 722, 104 S. E. 885. And more immediately upon this point are *State v. Harris*, 181 N. C. 613, 107 S. E. 466, and *Hotel Co. v. Griffin*, 109 S. E. 871, and other cases at this term.

[2] Counsel for the plaintiff were liberal in the agreement to extend the time to 75 days, which was 2 months beyond the statutory time. They deny that they extended it beyond that time, and this court has uniformly held that, when an agreement between counsel is denied, it will not be recognized by us unless in writing and filed in the cause, which is the express requirement of our rule 39 (174 N. C. 838, 81 S. E. xlii). As stated by us in *Graham v. Edwards*, 114 N. C. 229, 19 S. E. 150, and in the cases there quoted, and in the citations to that case in the *Anno. Ed.*, we must strictly adhere to that rule for the very sufficient reason that we have no means, and no disposition, to pass upon the relative accuracy of the memory of counsel, who can so readily avoid such controversies by complying with the rule.

The motion for certiorari must therefore be denied. The appeal having been docketed here before the call of the district at this, the first term after the trial below, the motion to dismiss must also be denied, but, there being no error upon the face of the record, as docketed, the judgment below must be affirmed.

(182 N. C. 647)

IRVIN et al. v. HARRIS et al. (No. 357.)

(Supreme Court of North Carolina. Dec. 14, 1921.)

1. Appeal and error §151(3) — In administrator's suit to sell land for assets, creditor entitled to appeal as "party aggrieved."

Where, in an administrator's action against devisees and beneficiaries to sell land for assets, claimants were directed to file evidence of their claims, and on a hearing before a referee their claims were contested, the proceeding was analogous to a creditors' bill to prevent undue preference and to marshal the assets of the estate, and a creditor on rejection of his claim by the referee was such a "party aggrieved" as had a right of appeal under C. S. § 632.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Aggrieved Party.]

2. Insane persons §77—Delivery of note to partner for his insane wife held a sufficient "delivery."

Under C. S. § 2976, defining "delivery" as the transfer of possession, actual or constructive, from one person to another, and section 2997, providing that a valid and intentional delivery by one no longer having possession of an instrument is presumed, where a partnership executed a note to the insane wife of one of the partners and delivered it to her husband and thereafter paid the note to him by checks indorsed by him, there was a sufficient delivery, though the husband signed the note in the name of the firm.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Delivery.—Delivery.]

3. Bankruptcy §431—Filing of claim not release of bankrupt's surety.

Conceding that a partnership and a new firm formed after the death of one of the partners were distinct entities, that the new firm assumed the liabilities of the old, and that the new firm thereby became the principal debtor, and the old firm a surety, a creditor of the old firm did not release it by filing his claim in bankruptcy proceedings against the new firm.

4. Election of remedies §3(1)—Doctrine inapplicable unless remedies inconsistent.

The doctrine of election of remedies is founded on the principle that where, by law or contract, there is a choice of two remedies which proceed upon opposite and irreconcilable claims of right, the one taken excludes and bars the prosecution of the other, and does not apply if the remedies are not inconsistent.

5. Limitation of actions §74(1) — Action might be brought by insane payee of note within three years after guardian's qualification.

Under C. S. § 416, relative to acknowledgments or new promises, section 407, providing that one insane when a cause of action accrues may sue within the time limited after the dis-

ability is removed, and section 412, authorizing suit within one year after the issuing of the letters testamentary or of administration on the deceased debtor's estate, where the payee of a note was insane when it was executed for a pre-existing debt, her guardian was entitled to sue within three years from the time of his qualification and was not required to sue within one year after the issuing of letters of administration on the debtor's estate.

6. Insane persons §77—Payment to insane woman's husband does not exonerate debtor.

Delivery of a note payable to an insane woman to her husband did not empower him to collect it, and the right of collection was vested exclusively in her guardian, and payment to the husband did not exonerate the debtor.

Appeal from Superior Court, Rockingham County; Webb, Judge.

Action by Eugene Irvin and another, as administrators c. t. a. of H. C. Harris, against W. C. Harris and others, to sell land for assets, in which various claimants were directed to file their claims. From a judgment confirming the report of a referee, the claimant, Robert Harris, Jr., appeals. Reversed.

See, also, 109 S. E. 871.

Civil action heard on exceptions to the report of a referee.

H. C. Harris died April 11, 1911, leaving a last will and testament, which is as follows:

"Being in my wright mind I make this my last will having destroyed all others. I will my dear wife Lou F. Harris my Home and all Furniture and table ware & all the House hold things I will her my carriage and Black horses & carriage Harness I will her my new top buggy & harness I will my daughter my Home just as it is at my Dear Wife's death just as I gave it to my wife I will Eva my Clark plantation just as it is I will my son W. C. Harris my Wells plantation just as it is I will my son W. C. Harris my entire interest in Our Factory I mean with my Bro. Robt. Harris I will that my son take good care of his mother during her life time and support her out of the factory I will W. C. Harris one pare of the best mules I have & wagon and harness I will Eva one pare of the next best pare and wagon & harness I will that W. C. Harris sell all other personally Property at Private sail & divide equally with his mother and Eva that I may have I will all money that I may have on hand equal between W. C. Harris & Eva Harris.

"I mean for W. C. Harris to have my entire interest in my one half of the factory I will my granddaughter Lou Harris my Crafton lot this 8th day of March, 1899. H. C. Harris.

"P. S. I will that if Eva should die without heirs all I have willed to her I will it to the heirs of W. C. Harris. H. C. Harris.

"Probated June 20, 1911, by the oath and examination of Scott Fillman, Robt. Harris, B. L. Hurdle, W. C. Harris."

For many years prior to his death, H. C. Harris and his brother Robert Harris had conducted the business of manufacturing and selling tobacco in the city of Reidsville under the firm name and style of Robert Harris & Bro. In 1904, after this partnership had been formed, Mrs. Nettie Harris, wife of H. C. Harris, loaned it an amount of money which was credited to her on the books of the firm. This amount was increased from time to time until it reached \$8,400, and on January 9, 1909, Robert Harris & Bro. executed to Mrs. Nettie Harris a promissory note, which was as follows:

"\$8,400. One day after date we promise to pay to Mrs. Nettie R. Harris eighty-four hundred dollars. Value received, with interest at 6 per cent. per annum from date. January 9th, 1909.

"[Signed] Robert Harris & Bro."

This note, which was executed in the lifetime of H. C. Harris, went into the possession of Robert Harris, Sr., husband of the payee. On October 2, 1908, Mrs. Nettie Harris was adjudged insane and committed to the Western Hospital at Morganton, where she has since remained without lucid intervals. The note, it seems, remained among the papers of her husband until March 29, 1913, when Robert Harris & Bro. (at that time composed of Robert Harris Sr., and W. C. Harris, son of H. C. Harris) drew two checks on the Bank of America aggregating \$10,756 (the amount of the principal and interest of the note of \$8,400) payable to the order of Mrs. Nettie Harris. These checks were delivered to Robert Harris and by him indorsed in the name of Mrs. Nettie Harris and delivered to J. H. Walker & Co. The checks were indorsed by Walker & Co., and paid by the Bank of America. After the death of H. C. Harris, the firm composed of Robert Harris and W. C. Harris conducted the business of the partnership until June 9, 1913, when the firm and the individual members were duly adjudged bankrupt by the District Court of the United States for the Western District of North Carolina. The claim of Mrs. Nettie Harris was proved by her guardian in the bankruptcy court against the new firm of Robert Harris & Bro., and credited with a dividend duly paid from the bankrupt estate.

At the time of his death (April 11, 1911) H. C. Harris was seized and possessed of several tracts of land. Although the will of H. C. Harris was probated June 20, 1911, no one qualified as his personal representative until June 30, 1913, when letters of administration with the will annexed were granted to Eugene Irvin and R. S. Montgomery. On August 28, 1915, the administrators instituted a proceeding against the devisees and beneficiaries to sell the testator's land for assets. The defendants, answering and pleading various defenses, par-

ticularly denied the alleged debts, pleaded the statute of limitations, and alleged that the claimants, or some of them, had released the old firm by accepting the new firm of Robert Harris & Bro. as their debtor. By an order of the court all claimants were directed to file with the administrators the original evidence of their claims for inspection by the defendants. When the case was called the court ordered that all matters in controversy be referred to Lindsay Patterson, Esq., with directions to report upon his findings of fact and conclusions of law. On July 28, 1914, Robert Harris, Jr., as guardian of Mrs. Nettie Harris, brought suit on her claim in the superior court of Rockingham county; but the claim was not reduced to judgment. It was presented to the referee, who, in disallowing it, made the following report:

"That exhibit 71 is a note executed by Robert Harris & Bro. to Mrs. Nettie R. Harris for \$8,400 of date January 9, 1909. That no payments were ever made on this note until March 29, 1913, when the same was paid off. That the same was presented to the administrators of H. C. Harris, but was not admitted by them, and that prior to said presentment the note had been paid. That on July 28, 1914, Robert Harris, Jr., guardian of Nettie R. Harris, brought suit on said note in the superior court of Rockingham county against the administrators of H. C. Harris. I therefore find that the note was paid prior to said presentment and suit, and if not paid, but in existence, it was at the time of the suit barred by the statute of limitations. Therefore I find that Robert Harris, Jr., guardian of Nettie R. Harris, is entitled to recover nothing from the estate of H. C. Harris. I further find that at the time of the last transaction Nettie R. Harris was insane, and was confined in the State Hospital at Morganton."

His honor overruled all exceptions and confirmed the referee's report. The claimant, Robert Harris, Jr., excepted and appealed.

Thos. C. Hoyle, of Greensboro, for appellant Robert Harris, Jr.

H. R. Scott, of Reidsville, and King, Sapp & King, of Greensboro, for appellees.

J. I. Scales, of Greensboro, J. M. Sharp, of Reidsville, and H. W. Cobb, Jr., and Fentress & Jerome, all of Greensboro, for defendants.

ADAMS, J. The administrators with the will annexed of H. C. Harris filed a petition before the clerk for an order to sell land to make assets. The devisees and beneficiaries under the will, who were parties defendant, filed several answers, and the cause was thereupon transferred to the civil issue docket for trial in the superior court. The court directed all claimants to file with the administrators the original evidence of their claims for the purpose of inspection by the defend-

ants. Thereafter his honor referred all matters in controversy, with instruction to the referee to embody his findings of facts and conclusions of law in a report to be made at an ensuing term, and authorized those holding claims to make proof thereof before the referee. To the disallowance by the referee of the appellant's claim, exception was taken, and duly renewed before the judge upon confirmation of the referee's report.

[1] When the case was called for argument in this court, the defendants moved to dismiss the appeal on the ground that the appellant, Robert Harris, Jr., is not a party to the suit. They rely upon *Dickey v. Dickey*, 118 N. C. 956, 24 S. E. 715, and *Strickland v. Strickland*, 129 N. C. 84, 39 S. E. 735. These cases are authority for the position that in a proceeding to sell land for assets the creditors of a decedent may not be made parties plaintiff with the personal representative. There is no order in the record which makes claimants against the decedent's estate coplaintiffs with the administrators. The order permitting them to prove their claims before the referee necessarily implied the right to introduce evidence pertinent to the issue joined as to all claims not admitted. On the hearing the creditors became actors, and their claims were subject to contest by the administrators and by the beneficiaries under the will. The proceeding, therefore, was analogous to a creditors' bill brought to prevent undue preference and to marshal the assets of the estate. It necessarily follows that the creditor, upon rejection of his claim by the referee, became for the purpose of the suit such party aggrieved as is given the right of appeal by the express terms of the statute. C. S. § 632.

[2] The defendants contended that the note in question had never been delivered by the makers to the payee, Mrs. Nettie Harris. On October 2, 1908, Mrs. Harris was adjudged insane, and on January 9, 1909, the note which was executed by the old firm of Robert Harris & Bro. passed into the possession of Robert Harris, the payee's husband. Robert Harris, Jr., testified that he had no reason to believe that Mrs. Harris had ever seen the note. On March 29, 1913, the new firm of Robert Harris & Bro. paid the note by checks which were indorsed by Robert Harris in the name of the payee. The situation, then, was this: The old firm executed the note to Mrs. Harris and delivered it to her husband; afterwards the new firm paid the note by checks which were indorsed by her husband in the name of the payee. Did these transactions constitute a delivery of the note to Mrs. Harris? "Delivery" means transfer of possession, actual or constructive, from one person to another. C. S. § 2976. In *Purviance v. Jones*, 120 Ind. 162, 21 N. E. 1099, 16 Am. St. Rep. 320, it is said:

"While it is not indispensable that there should have been an actual manual transfer of the instrument from the maker to the payee, yet, to constitute a delivery, it must appear that the maker, in some way, evinced an intention to make it an enforceable obligation against himself, according to its terms, by surrendering control over it, and intentionally placing it under the power of the payee, or of some third person for his use. The acts which consummate the delivery of a promissory note are not essentially different from those required to complete the execution of a deed. Act and intention are the two elements essential to the delivery of a deed, which is ordinarily effected by the simple manual transfer of possession from the grantor to the grantee, with the intention of passing the title and relinquishing all power and control over the instrument itself. The final test is: Did the maker do such acts in reference to the deed or other instrument as evince an unmistakable intention to give it effect and operation, according to its terms, and to relinquish all power and control over it in favor of the grantee or obligee? *Weber v. Christen*, 121 Ill. 91; 2 Am. St. Rep. 68; *Stone v. French*, 37 Kan. 145; 1 Am. St. Rep. 237."

Section 2997 of Consolidated Statutes provides that where the instrument is no longer in possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved. It is true that Robert Harris was a member of each of the two partnerships and that the note was signed by him in the name of the old firm, but his acceptance and subsequent indorsement of the checks in his wife's name and his collection of the money thereon indicate that the old firm by delivering the note to him intended to make it an enforceable obligation for the benefit of Mrs. Harris. Indeed, the question of nondelivery seems not to have been raised at the hearing, for the referee held that the note had been paid.

[3] In the next place, the defendants insist that the new firm acquired the assets and assumed the liabilities of the old firm with the knowledge and acquiescence of the claimant, evidenced by his filing proof of the note before the trustee of the new firm after the adjudication in bankruptcy and that the claimant thereby exercised such right of election as released the estate of the retired partner from all liability. Conceding that the two partnerships were distinct entities and that the new firm assumed the liabilities of the old, it becomes material to inquire into the relation that existed between the partnerships inter se, as well as between them and the creditors of the old firm.

It has been held that the rule is probably without exception that an agreement, on dissolution of a partnership, by which one or more of the partners take the interest of their copartners, agreeing to pay all partnership liabilities, does not relieve the retiring partners from liability to firm creditors.

Smith v. Shelden, 35 Mich. 42, 24 Am. Rep. 529; *Skinner v. Hitt*, 32 Mo. App. 402. Likewise it has been held in most jurisdictions that where a firm is dissolved and one of the partners takes the assets and assumes the liabilities, as between themselves with respect to existing debts the members of the new firm become the principal debtors, and the retiring partner a surety. But the decisions are by no means unanimous as to the relation existing between the two partnerships and the creditors of the old firm. The weight of authority in England, sustained by authorities in America which command great respect, is to the effect that the relation of principal and surety as between the partnerships must be observed by those who have notice of the agreement and thereafter deal with the new firm. Other authorities hold that the creditors of the old firm are not affected unless they consent to the change, and that in the absence of such consent all the members of the old firm remain principals and joint debtors. *Dean v. Collins*, 15 N. D. 535, 108 N. W. 242, 9 L. R. A. (N. S.) 49, and notes, 125 Am. St. Rep. 610, 11 Ann. Cas. 1027. We do not understand the defendants' counsel as contending that the claimant cannot maintain his suit on the ground that his ward was not in privity with the new firm. *Withers v. Poe*, 167 N. C. 372, 83 S. E. 614. But they argue that if the new firm was principal and the old firm surety, the claimant released the old firm by electing to proceed in bankruptcy against the later partnership. If it be conceded that between the two firms there existed the relation of principal and surety and that the claimant had knowledge of such relation, did filing proof of his claim with the trustee in bankruptcy constitute such an election as precluded him from prosecuting his claim before the referee?

[4] The doctrine of election is founded on the principle that where, by law or by contract, there is a choice of two remedies which proceed upon opposite and irreconcilable claims of right, the one taken must exclude and bar the prosecution of the other. A party cannot, either in the course of litigation or in dealing in pais, occupy inconsistent positions. In the language of the Scotch law, "A man shall not be allowed to approbate and reprobate." 9 R. C. L. 957; *Crossman v. Universal Rubber Co.*, 127 N. Y. 34, 27 N. E. 400, 13 L. R. A. 91 and note. But the doctrine of election applies only where two or more existing remedies are alternative and inconsistent. If the remedies are not inconsistent there is no ground for election. Illustrations of this doctrine in its application to consistent and to inconsistent remedies appear in numerous decisions of this court. *Rounsaville v. Ins. Co.*, 138 N. C. 195, 50 S. E. 619; *Parker v. Ins. Co.*, 143 N. C. 339, 55 S. E. 717; *Huggins v. Waters*, 154 N. C. 444, 70 S. E. 842; *Fields v. Brown*, 160 N. C.

295, 76 S. E. 8; *Machine Co. v. Owings*, 140 N. C. 503, 53 S. E. 345.

Both the old firm and the new became liable to the claimant's ward—the former by virtue of the note, and the latter by assuming the debts of the old firm. *Voorhees v. Porter*, 134 N. C. 594, 47 S. E. 31, 65 L. R. A. 736; *Withers v. Poe*, 167 N. C. 373, 83 S. E. 614. The liability of each firm arose out of contract. The mere proof of claim in bankruptcy did not necessarily waive the claimant's right to enforce his contractual demand by any other appropriate legal remedy. In *McFadgen v. Council*, 88 N. C. 220, this court held that where a discharge in bankruptcy had been refused, or the proceedings determined without a discharge, a creditor who had proved his claim in bankruptcy did not thereby waive his right of action against the bankrupt in the state court. This decision was based on the act of 1874 (chapter 390); but *Collier*, discussing the question, says:

"The effect of proof of a debt on a right of action was much debated under the former law, which in terms provided that he who proved his debt in bankruptcy waived his right to enforce it by any other legal remedy. But the better opinion was that the waiver endured only until a discharge was granted or refused. The amendatory act of 1874 made this view also the written law. That the same is the law to-day, with the exception that a suit may probably be begun and, unless stayed, prosecuted to judgment, is undoubtedly true. So also is the old time rule that the remedy thus suspended comes into being the moment the discharge is granted or denied. But the state court does not lose jurisdiction. The stay is directed to the suitor, not the court, and the latter may go on if the cause is moved by the person enjoined, and a judgment resulting will be valid. The remedy of a party thus aggrieved is in contempt proceedings. It is important, however, to note that, if a stay is not granted and the suit proceeds and judgment is entered after the discharge, the latter cannot be set up as a release to the judgment. A stay of a suit pending in the state courts effected by an injunction issued by a court in bankruptcy is not a dismissal of the suit. It does not defeat the cause of action pending in the state court; it merely suspends the proceedings as long as the injunction is in force."

If, notwithstanding proof of claim, a creditor, in the absence of a stay of proceedings, may prosecute his suit to judgment against the bankrupt, a fortiori may such creditor maintain his action against the original debtor, who became surety on a contract which was made without the creditor's consent. Certainly the claimant's remedies, even if alternative, were not so inconsistent as to estop him from prosecuting the present demand by the mere filing of his proof of claim against the bankrupt's estate. We therefore hold that the doctrine of election may not be invoked in bar of the present action. We have examined the authorities

relied on by the defendants and have concluded that they are not controlling upon the record in this case.

[5] The referee held that the note had been paid; or, if not paid, that it was barred by the statute of limitations.

Mrs. Harris made her first loan of money to Robert Harris & Bro. in 1904, and thereafter made other loans from time to time. These different loans were included in the note of \$8,400 dated January 9, 1909. It is not necessary to decide whether the execution of the note should be considered as a conditional payment, or as collateral security, or as a mere acknowledgment of the amount due. *Bank v. Hollingsworth*, 135 N. C. 571, 47 S. E. 618. The statute of limitations may be determined by reference to section 418 of Consolidated Statutes:

"No acknowledgment or promise is evidence of a new or continuing contract, from which the statutes of limitations run, unless it is contained in some writing signed by the party to be charged thereby; but this section does not alter the effect of any payment of principal or interest."

The note when executed became evidence of a contract, new or continuing, from which the statute of limitations, except for the ward's disability, would have begun to run. *Phillips v. Giles*, 175 N. C. 412, 95 S. E. 772; *Shoe Store Co. v. Wiseman*, 174 N. C. 716, 94 S. E. 452. Mrs. Harris was adjudged insane on October 2, 1908. C. S. § 407, provides that if a person entitled to commence an action be insane at the time the cause of action accrues, he may bring his action within the time limited, after the disability is removed. The note was executed on January 9, 1909. The personal representatives of H. C. Harris were appointed on July 13, 1913, and the guardian of Mrs. Harris on July 13, 1913. If it be granted that the statute of limitations commenced running against Mrs. Harris at the time her guardian qualified, the action would not be barred until the expiration of three years from that date. The guardian was not required to bring suit within one year after the administrators of H. C. Harris qualified; section 412 of Consolidated Statutes enables a party to bring suit after the time limited has expired and within one year after the issuing of letters testamentary or of administration on the estate of the party against whom the cause of action accrued. Suit was instituted by the guardian within three years after his qualification, and it is therefore not barred by the statute of limitations.

[6] It is equally clear that the note has not been paid. We have said that when it went into the hands of the payee's husband, the makers intended that it should be a contract enforceable for the benefit of Mrs. Harris, and that the transaction, as to the mak-

ers, constituted a delivery. But the delivery of the note to the husband of the insane payee did not signify that he was empowered to collect it. The right of collection was vested exclusively in the guardian. The indorsement of the checks and the collection of the money by Robert Harris were without authority of law, and therefore did not exonerate the old firm from liability on the note. The claimant is entitled to recover whatever amount may be found to be due on the note sued on after deducting all proper credits.

On the appeal of Robert Harris, Jr., as guardian of Mrs. Nettie Harris, the judgment is reversed.

Reversed.

WALKER, J., did not sit.

(182 N. C. 656)

IRVIN et al. v. HARRIS et al. (No. 362.)

(Supreme Court of North Carolina. Dec. 14, 1921.)

1. Partnership ⇨247—Organization of new firm held not to affect creditors' rights against surviving partner.

Though, after death of a partner, his devisee was made a member of a new firm, its organization did not deprive creditors of the old firm of their right to require that the surviving partner pay the firm debts and perform the firm obligations.

2. Partnership ⇨285—Estate of deceased partner and his share in assets not liable on new contract not necessary to joint business.

On dissolution of a firm by death of a partner, the estate of the decedent and his share in firm assets are absolved from any new contract or subsequent transactions of the surviving partner not necessary to the joint business.

3. Limitation of actions ⇨155(4)—Payment by surviving partner does not prevent bar as against deceased partner's estate.

Under C. S. § 417, providing that no act, admission, or acknowledgment by a partner after dissolution of the partnership, etc., is evidence to repel the statute of limitations except against the partner doing the act, or making the admission or acknowledgment, payments on firm notes by a surviving partner after the partnership had been dissolved by the death of one partner could not keep alive or renew claims which would otherwise be barred against the estate of the deceased partner.

4. Limitation of actions ⇨83(2)—When debtor dies before debt barred, action brought within statutory period or within one year after granting of administration is not barred.

Under C. S. § 412, if a debtor died before the debt was barred by limitations, a suit brought within the statutory period, or brought

after the time limited and within one year after letters of administration were issued, was not barred by limitations.

Appeal from Superior Court, Rockingham County; Webb, Judge.

Action by Eugene Irvin and another, as administrators c. t. a. of H. C. Harris, against William C. Harris and others, to sell land for assets in which various claimants filed their claims. From a judgment allowing certain claims and disallowing others, defendants appeal. Modified and affirmed.

See, also, 109 S. E. 867.

Civil action heard on exceptions to the report of a referee.

Appeal by the defendants from a judgment of Webb, Judge, confirming the referee's report.

The plaintiff filed a petition before the clerk to sell land for assets. The defendants filed several answers, and Judge Webb referred the cause to Lindsay Patterson, Esq., to take and state an account and report his finding of facts and conclusions of law. The referee disallowed the claims of George E. Barber, executor of Mrs. Marion F. Redd (Exhibits 31, 32, 33), the claim of W. A. Kernodle (Exhibit 37), and that of Reidsville Fertilizer Company (Exhibit 69), and allowed the claims of the following persons: A. B. Troxler (Exhibit 3), A. J. Whittemore (Exhibit 4), D. W. Williams (Exhibit 5), R. P. Thacker (Exhibit 6), A. R. Troxler (Exhibit 7), A. J. Whittemore (Exhibit 8), Nannie B. Motley (Exhibit 9), James W. Walker (Exhibit 10), J. H. Duncan (Exhibit 11), J. P. Matkins (Exhibit 12), J. D. Matkins (Exhibit 13), S. F. Holderby (Exhibit 14), Robert Harris, Jr. (Exhibit 72), Geo. D. Williams (Exhibit 73), Carrie Irvin (Exhibit 74), C. J. Williams (Exhibit 75), Robert Brown (Exhibit 78), M. G. Watlington (Exhibit 79), P. H. Williamson, trustee (Exhibit 80), C. H. Overman (Exhibit 81). The referee found that all the foregoing claims which he allowed were presented to and admitted by the administrators of H. C. Harris. As to these claims the defendants do not insist on the bar of the statute of limitations, but contend that all the remaining claims which were allowed by the referee were barred by the statute.

The defendants further contend that all creditors whose claims have been allowed are precluded from collecting such claims from the estate of H. C. Harris for the reason that these creditors elected to file their claims against the successors of the old firm of Robert Harris & Bro. Reference is made to the statement of facts in the case of Robert Harris, guardian.

J. I. Scales, of Greensboro, J. M. Sharp, of Reidsville, and H. W. Cobb, Jr., and Fentress & Jerome, all of Greensboro, for appellants.

H. R. Scott, of Reidsville, and King, Sapp & King, of Greensboro, for appellees.

Thomas C. Hoyle, of Greensboro, for Cora W. Best, A. E. Chandler, R. H. Scales, E. M. Redd, and Anna J. Redd.

Manly, Hendren & Womble, of Winston-Salem, for Robert Brown, M. C. Watlington, P. H. Williamson, trustee, and C. H. Overman.

ADAMS, J. Not only have the defendants pleaded the statute of limitations in bar of all claims allowed by the referee, except such as were presented to and admitted by the personal representatives of H. C. Harris, but they have invoked against the validity of all claims the doctrine of the claimants' election between inconsistent remedies. The latter proposition has been discussed in the appeal of Robert Harris, Jr., as guardian of Mrs. Nettie Harris, and what is there said resolves the question against the contention of the defendants. There remains for discussion the defendants' plea of the statute of limitations.

It is essential to a proper consideration of this plea that certain dates be kept in mind. H. C. Harris died on April 11, 1911; his personal representatives qualified on June 30, 1913, and on July 3 gave due notice to creditors to present their claims on or before July 10, 1914. By virtue of the last will of H. C. Harris, and the subsequent agreement between his devisee W. C. Harris and the surviving partner, the new firm, continuing business, retained the old firm name of Robert Harris & Bro. The new firm and the individual partners were adjudged bankrupt on June 9, 1913; the Reidsville Fertilizer Company on June 30, 1913; and J. H. Walker & Co. on June 30, 1912. On many, if not all, the claims under consideration, payments were made both before and after the death of H. C. Harris. On the claims as to which the statute of limitations was pleaded, the referee held that the statute ran against the creditors from the date of the last payment, which in practically all instances was made after the death of H. C. Harris by the surviving partner, or by the other member of the new firm, and that, as suit had been instituted within the statutory period next succeeding the last payment, the claims were not barred. This proceeding was commenced on August 28, 1915, and answers were filed by the several defendants in September, October, and December, 1915, and in January, 1916. The order of reference was made at the February term of 1916, and creditors filed their claims before the referee. The referee found as a fact from the evidence and from the admissions of the defendants' counsel that suits were brought by the several creditors of the old firm of Robert Harris & Bro. against the administrators of H. C. Harris in the superior court of Rockingham

county. The time at which these respective actions were instituted will be referred to hereafter as occasion may require.

Counsel for the defendants admit that their contention as to the application of the statute of limitations depends upon the proper answer to two questions: (1) Could Robert Harris, surviving partner of the old firm of Robert Harris & Bro., by making payments after the death of his former copartner, renew or keep alive the firm notes and thereby prevent the administrators or the heirs of the deceased partner from interposing the bar of the statute? (2) Was the statute of limitations suspended from the death of H. C. Harris until the appointment of his administrators?

[1] Now, as to the first question: It is true that after the death of H. C. Harris his devisee was accepted as a member of the new firm; but the organization of the new firm did not deprive creditors of the old firm of their right to require that the surviving partner pay the firm debts and perform the firm obligations.

[2] Here, however, the creditors have undertaken to subject to the payment of their claims the individual estate of the deceased partner. What, then, was the legal effect of payments made by the surviving partner after the death of his copartner? Upon the dissolution of a firm by the death of a partner, the estate of the deceased partner and his share in the firm assets are absolved from any new contract or subsequent transactions of the surviving partner which are not necessary to the joint business. *Martlett v. Jackman*, 3 Allen (Mass.) 287. In *Copeland v. Collins*, 122 N. C. 624, 30 S. E. 315, it was held that a payment renews the obligation, and in *Bank v. Hollingsworth*, 135 N. C. 569, 47 S. E. 622, Justice Connor said:

"It seems to be equally well settled that a surviving partner has no power, after dissolution, to renew or indorse a note in the name of the firm. 'The dissolution operates as a revocation of all authority for making new contracts. It does not revoke the authority to arrange, liquidate, settle and pay those before created. The implied power of the expartner does not extend to giving a note or to drawing a bill in the firm's name, nor could he bind the firm by a check in its name. Renewals of outstanding bills or notes of the firm stand on the same footing; and as the expartner could not draw a bill or note for a firm debt, neither could he renew a bill or note of the firm given for their debt.' *Daniel Neg. Inst.* § 370. 'Where a note is issued by a partner after dissolution, it will not bind the other partners, even though given for a debt due by the firm.' *Ib.*, 371. 'Where the dissolution is by the death of one of the partners, the surviving partner may indorse a note payable to the firm in his own name.' *Bristol v. Sprague*, 8 Wend. 423; *Whitman v. Leonard*, 3 Pick. (20 Mass.) 177; *Charles v. Remick*, 156 Ill.

327; *Woodson v. Wood*, 84 Va. 478; *Lusk v. Smith*, 8 Barb. 570; *Myatts v. Bell*, 41 Ala. 222.

"In *Abell v. Sutton*, 3 East. 110, Lord Kenyon said, in regard to the liability of a partner for an indorsement made after the dissolution of the firm: 'To contend that this liability to be bound by the acts of his partner extends to times subsequent to the dissolution, is to my mind a most monstrous proposition. A man, in that case, could never know when he is to be at peace and retired from all the concerns of a partnership.' 22 Am. & Eng. Ency. 214. 'A note given by one partner, after dissolution of the partnership, does not bind the other partner, although given in the partnership name and in consideration or settlement of a subsisting partnership liability.' *Haddock v. Crocheron*, 32 Tex. 277, 5 Am. Rep. 244; *White v. Tudor*, 24 Tex. 639, 76 Am. Dec. 126; *Fellows v. Wyman*, 33 N. H. 351."

"As a general rule, after the dissolution of a partnership the surviving partner has no right to enter into or make any contract which shall be binding on the firm or affect its assets or prejudice those entitled to a share of its property after the debts are paid. In the absence of some special grant of powers to the surviving partners, the only exception involves such contracts as are appropriate and necessary in settling the affairs of the partnership." 20 R. C. L. 998.

[3] The words of the statute are still more comprehensive:

"No act, admission or acknowledgment by a partner after the dissolution of the copartnership, or by any of the makers of a promissory note or bond after the statute of limitations has barred the same, is evidence to repel the statute, except against the partner or maker of the promissory note or bond doing the act or making the admission or acknowledgment." C. S. § 417.

Here is a direct and explicit provision that neither the act, nor the admission, nor the acknowledgment of one partner occurring after the dissolution, shall be evidence against the other to repel the bar of the statute. Therefore payments made on these notes by the surviving partner, after the copartnership was dissolved by the death of H. C. Harris, cannot operate to keep alive or renew against the estate of the deceased partner claims which, except for such payments, would be barred by the statute of limitations. *Wood v. Barber*, 90 N. C. 79. The cases of *McIntire v. Oliver*, 9 N. C. 209, 11 Am. Dec. 760, *Willis v. Hill*, 19 N. C. 231, 31 Am. Dec. 412, and *Walton v. Robinson*, 27 N. C. 342, were decided prior to the enactment of section 417 of Consolidated Statutes.

[4] As to the second of these two questions the decisions apparently are not uniform. In *Copeland v. Collins*, 122 N. C. 621, 30 S. E. 316, it is said that "it would be difficult to reconcile our opinions upon this subject." The apparent lack of uniformity may be attributed in part at least to the

difference in the phraseology of certain of the statutes which were under consideration, but the question presented by the defendants' exceptions seems definitely to have been settled. Consolidated Statutes, § 412, is as follows:

"If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his representatives after the expiration of that time, and within one year from his death. If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his personal representative after the expiration of that time, and within one year after the issuing of letters testamentary or of administration, provided the letters are issued within ten years of the death of such person. If the claim upon which the cause of action is based is filed with the personal representative within the time above specified, and admitted by him, it is not necessary to bring an action upon such claim to prevent the bar, but no action shall be brought against the personal representative upon such claim after his final settlement."

In *Winslow v. Benton*, 130 N. C. 58, 40 S. E. 840, the present Chief Justice in construing this statute said:

"The Code, section 164, is explicit that where the 'person entitled to bring an action die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives after the expiration of that time and within one year from his death.' This is because the law does not encourage remissness on the part of the creditor. *Coppersmith v. Wilson*, 107 N. C. 31.

"But the same section, 164, prescribes a different rule when the debtor dies—'If a person against whom an action may be brought, die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his personal representative after the expiration of that time, and within one year after the issuing of letters testamentary or of administration.' *Dunlap v. Hendley*, 92 N. C. 115; *Coppersmith v. Wilson*, *supra*; *Benson v. Bennett*, 112 N. C. 505.

"The general rule remains as formerly, that when the statute of limitations has once begun to run, nothing stops it, but the Code does not stop when the cause of action is one which

must be brought by or against a personal representative. And for evident reasons it makes this distinction, that where the action must be brought by a personal representative, the limitation (if it would otherwise expire) is extended one year from the death of the creditor, but if the action must be against the personal representative the limitation (if it would otherwise expire) is extended one year from the issuing letters testamentary or of administration."

In *Geitner v. Jones*, 176 N. C. 544, 97 S. E. 494, the note in suit, which, the record shows, was not under seal, fell due June 18, 1912; the debtor died August 1, 1913; his personal representative was appointed August 4, 1917. It was held that since the debtor had died before the expiration of the time limited for the commencement of the action, the plaintiffs were entitled to institute the action within one year after the issuing of letters testamentary or of administration, because the letters had been issued within ten years after the death of the debtor. C. S. 412.

If H. O. Harris died before the expiration of the time limited for the commencement of suit against him on the claims in controversy and suit was brought within the statutory period, or if the claims were not barred at his death and suit was brought after the time limited and within one year after letters of administration were issued, the statute of limitations in either event would not be available to the defendants.

We have made a careful examination of each of the contested claims, and applying the principles herein stated, we hold the following claims are barred by the statute of limitations and should be disallowed: Exhibits 26, S. E. King; 25, Pattie E. King; 39, D. F. Kernodle; 43, J. P. Somers; 45, Francis Womack; 47, R. H. Scales; and 52, marked also 63, T. E. Balsley.

The remaining claims are not barred, and must be allowed. As to the claims which were disallowed by the court (Exhibits 31, 32, 33, 37, 69), there was no appeal.

The appellants' fourth assignment of error cannot be sustained.

The judgment as herein modified is affirmed.

Modified and affirmed.

WALKER, J., did not sit.

(182 N. C. 637)

(109 S.E.)

WILCOX v. McLEOD et al. (No. 411.)

(Supreme Court of North Carolina. Dec. 14, 1921.)

1. Frauds, statute of §81—Oral permission to cut timber may be revoked.

An oral agreement to permit the cutting and removal of timber from land may be revoked under the statute, without leaving any right of recovery against the owner of the timber giving the permission.

2. Principal and agent §97—Attorney could not convey timber, except in county specified.

Power of attorney given by heirs to executor to sell lands in one county gave such executor no right to convey timber in another county.

3. Principal and agent §97—Deed held not exercise of power of attorney.

A deed containing, "—, heirs at law of M. K. G.," and signed by "R. W. G., as executor of M. K. G., deceased," cannot be held the exercise of power of attorney given the executor by the heirs to convey lands; no reference being made thereto.

4. Appeal and error §1056(6)—Harmless error disregarded.

Plaintiff cannot complain of technical error of the court in the exclusion of evidence offered, where the whole case shows that he could not recover in any event.

Appeal from Superior Court, Moore County; Ray, Judge.

Action by W. C. Wilcox against G. McLeod and others. Judgment for defendants, and plaintiff appeals. Affirmed.

On January 15, 1906, defendants McLeod and wife conveyed by deed to one M. K. Gray the timber on a tract of land in Moore county, giving Gray three years in which to cut and remove the same, with a modification of the time in these words:

"Unless he or they should be providentially hindered in the cutting, manufacturing, and removing the same by reason of death, or fire, and then, in that event, he or they are to have the period of five years from the date of this indenture and agreement to cut, manufacture, and remove the same."

The plaintiff, Wilcox, claims to be the assignee of Gray, or of his heirs, and alleges that he was providentially hindered by death from cutting and removing the timber within the three years, and that consequently he had five years to cut and remove the same, under the exception in the contract, and asks for a recovery of the timber and damages.

Plaintiff submitted to a nonsuit, in deference to an intimation of the court as to his right of recovery, and appealed.

H. F. Seawell, of Carthage, for appellant.
U. L. Spence, of Carthage, for appellees.

WALKER, J. (after stating the facts as above). The plaintiff says that he was hindered by two deaths: First, that of M. K. Gray; and, second, that of James Baxter, plaintiff's sawyer. It is clear that no recovery can be had simply because either Gray, or Baxter, or any one else died; but it must appear that Gray has been, or perhaps his heirs, or assigns, have been, providentially hindered by death. There is no special statement in the complaint of any facts constituting a cause of action on account of any hindrance by death but only the general allegation that the work of cutting and removing the timber were hindered by the deaths of Gray and Baxter.

Defendants, therefore, claim that the action should have been dismissed, in the beginning, and that the court committed no error in its subsequent rulings, and that, but for the nonsuit voluntarily taken, the court should dismiss the action here, *ex mero motu*—citing *Moore v. Hobbs*, 79 N. C. 535; *Garrison v. Williams*, 150 N. C. 674, 64 S. E. 783. It is further contended by the defendants that there is no evidence in the record to show that either Gray was, or his heirs were, hindered in the least from removing the timber within the three years, either by the death of Gray, or any other death; the sole testimony offered with respect to any hindrance being that of the plaintiff, Wilcox. We need not consider this claim of the defendants, because, as will appear later on, we are of the opinion that the plaintiff acquired, if anything, only a precarious right of possession, which could be determined, at any time, by M. K. Gray, by himself or his duly authorized agent acting in his behalf; the plaintiff, W. C. Wilcox, having only the oral permission, or contract, if it may be so called, to enter upon the land and to cut and remove the timber thereon. But more of this hereinafter.

Was Wilcox hindered by Gray's death? He himself says that he was not so hindered, but that Hodgkin, the agent of Gray, who put him in possession of the timber, stopped him from cutting under some sort of an oral contract, and this was before the death of Gray, and that he was not hindered from cutting and removing the timber by any of Gray's heirs, or his executor, after the death of Gray. There is no evidence that Gray's heirs, or executors, or devisees, were hindered by Gray's death. Indeed the evidence shows that the plaintiff did not even have the pretense of a legal title, which he claims, until after the death of Gray, and until after the three years had expired, and nothing except the oral contract of purchase with Hodgkin, the agent of Gray. M. K. Gray, through Hodgkin, his agent, stopped the work of plaintiff, as he had the right to do (the contract not being in writing). This, of course, was done in the lifetime of M. K.

Gray, the owner of the land, and put an end to all rights of plaintiff in the timber, according to his own showing, until after the death of Gray.

That the death of James Baxter, the sawyer of plaintiff, while plaintiff was cutting this timber, under the oral contract with Hodgkin or his oral permission, during the life of Gray, can be construed as one of the hindrances within the reasonable contemplation of the parties, under the terms of the contract, can hardly be made the subject of serious contention. If neither Gray was, nor his heirs were, providentially hindered from cutting and removing the timber within the three years by death, how can the plaintiff, whose record title, on which he must depend, which is dated after the expiration of the three years, claim any rights which are superior to those of defendants? In fact, the plaintiff, as will appear, has shown no title to the timber.

(a) It is further contended by the defendants that the will of M. K. Gray is not probated according to law, as the subscribing witnesses do not testify that Gray was of sound mind and disposing memory, except by the inference that the testator is the one referred to, and they do not testify that they signed as witnesses in the presence of each other; but, laying this suggestion out of the case, we proceed to consider the remaining questions.

(b) The will does not confer authority on the executor to sell this timber, if the ownership of the timber can be determined until after the death of the widow, and the power of attorney to the executor from the alleged heirs at law of Gray (which only purports to authorize a sale of Guilford county property) is without effective validity.

(c) The deed of the timber to plaintiff is void and conveys nothing. It purports to be a deed from the heirs at law of M. K. Gray, without naming any of them, and none of the heirs at law executes it; it is signed by R. W. Gray, in his capacity as the executor of M. K. Gray, deceased, and it does not even purport to be his individual deed. It is most truly a "scrap of paper," say the defendants. *Gray v. Mathis*, 52 N. C. 502; *King v. Rhew*, 108 N. C. 696, 13 S. E. 174, 23 Am. St. Rep. 76; 13 Cyc. 540 (cited by defendants' counsel), to which we add *Lufkin v. Curtis*, 13 Mass. 223; *Catlin v. Ware*, 9 Mass. 218, 6 Am. Dec. 56; *Cruise's Digest of Real Property*, 260, note 2. And see also, *Kerns v. Peeler*, 49 N. C. 226, 67 Am. Dec. 286.

[1] The case is simply this: That the original right to cut the timber on and remove the same from the land, which was given to M. K. Gray by the defendants, contained the provision as to cutting and removing within three years, or within five years if providentially hindered by death; there having been no one to impede or prolong the cutting and re-

moval of the timber. The right to cut was then passed to the plaintiff, W. C. Wilcox, by oral agreement between him and John A. Hodgkin, agent of M. K. Gray for the purpose, and M. K. Gray, by his said agent, subsequently revoked this permission, or license, to cut and remove the timber, which he clearly had the right to do; it not being evidenced by any memorandum in writing, as required by the statute of frauds. The right acquired under the oral transaction, even if it amounted to a valid license for the time being or until withdrawn by some act of the owner, is necessarily revocable, and, when revoked, left the plaintiff without any right of recovery against the defendants. 20 Cyc. p. 212, says that it is generally held that trees and growing grass are so far realty that title to them will not pass without writing, but that crops raised by yearly labor are chattels and will pass by parol. See, also, pages 215 (4), 216, 217, and 218. We find the following in *Reed on the Statute of Frauds* (a very excellent treatise on that important subject) § 685, which is that—

"An oral invalid contract, anywhere in the line of title, vitiates the latter; and in an action brought to recover a chattel, if the evidence introduced by the plaintiff to establish his title showed that the title depended upon a verbal contract within the statute of frauds, the courts ought to instruct the jury to disregard such evidence. If a writing is necessary to pass the right to the thing in demand, etc., a submission and award must be in writing. That a defendant has conveyed to a bona fide purchaser without notice does not avail, as he had no title to convey."

We have held that an agreement for the cutting upon and removal of trees from land passes the title to the trees sub modo, and is within the statute of frauds. *Bunch v. Lumber Co.*, 134 N. C. 116, 46 S. E. 24; *Hawkins v. Lumber Co.*, 139 N. C. 162, 165, 51 S. E. 852; *Lumber Co. v. Corey*, 140 N. C. 462, 53 S. E. 300, and other cases cited in the annotated edition of 134 N. C. at page 124; *Moring v. Ward*, 50 N. C. 272. The oral agreement between M. K. Gray (acting through his agent Hodgkins) and the plaintiff, purporting to pass an interest in land, the trees being regarded as a part thereof, was void under our statute of frauds, and plaintiff acquired no interest therein, and certainly none, except at the will of M. K. Gray, which he exercised against a further continuance of the right to cut and remove the timber. His right, if any existed, was thus terminated.

[2, 3] This being so, he now claims that it was restored by the power of attorney of M. K. Gray's heirs to R. W. Gray, his executor. But the power, at most, applied only to the lands in the county of Guilford, and the lands in controversy lie in the county of Moore; so that plaintiff cannot improve his position by a reliance upon the power. Besides, the power, even as to the Guilford

lands, was never exercised, as no valid deed was ever made by the executor, as to those lands; for under the power, the instrument, claimed to be the executor's deed, describes only the lands in Moore county, the timber on which was conveyed by the defendants to M. K. Gray. It would seem to be useless to further consider the question as to whether that deed was properly framed and executed by the executor. There is no reference in it to the power, the names of the heirs were never inserted in it, and, while it contains a blank presumably for their names, it is still there, and it thus appears in the deed, "_____, heirs at law of M. K. Gray," and signed by "R. W. Gray, as Executor of M. K. Gray, Deceased [Seal]," though that name and title nowhere appears in the body of the deed. See cases supra on this point, and *Bateman v. Lumber Co.*, 154 N. C. 248, 70 S. E. 474, 34 L. R. A. (N. S.) 615.

But, even if the deed were properly drawn and executed, and sufficient, in form, to pass the title, the executor had no power under the will to convey the Moore county lands, until other designated lands had been first sold, and then only to pay his testator's debts, and he had no right to make the deed under the power, as it did not embrace these lands, and only described the lands in Guilford, nor did he profess, as executor, to be acting either under the power contained in the letter of attorney or under any power to be found in the will. The plaintiff, therefore, so far as this paper writing is concerned, is hedged in by many, if not insurmountable, difficulties.

Upon a careful review of the entire case, as shown even by the plaintiff himself, the intimation of the judge was correct.

[4] If by any chance the court committed technical error in the exclusion of any evidence offered, the whole case shows that the plaintiff can in no event recover, and the voluntary nonsuit was properly taken by the plaintiff, and leaves him out of court. *Bateman v. Lumber Co.*, 154 N. C. at page 249, fifth headnote, 70 S. E. 474, 34 L. R. A. (N. S.) 615.

The ruling of the court is free from reversible error.

Affirmed.

ADAMS, J., did not sit.

(N. C. 619)

HOUSE v. GILLETT et al. (No. 99.)

(Supreme Court of North Carolina. Dec. 14, 1921.)

1. Brokers \S 63(1)—Entitled to commissions for procuring contract with responsible purchaser, though principal surrendered rights thereunder.

A broker, employed to sell real estate, who within the terms of the authority given pro-

cures a contract with a responsible purchaser, is entitled to his stipulated commissions, or the reasonable worth of his services if no definite amount is specified, and his claim therefor is not affected because his principals voluntarily surrendered his rights under the contract.

2. Brokers \S 88(3)—Correspondence held to show binding contract of sale of timber so as to entitle a broker to commissions.

Letters and correspondence held to show a binding contract of sale of timber procured by a broker within the authority conferred so as to entitle him to his commissions from the seller who surrendered his rights thereunder.

Stacy, J., dissenting.

Appeal from Superior Court, Halifax County; Kerr, Judge.

Action by A. C. House against R. G. Gillett and others. Judgment for plaintiff, and defendants, appeal. Affirmed.

The action is to recover \$3,000 with interest, as an amount alleged to be due plaintiff for commission in effecting a sale of the timber on a certain tract belonging to defendants. The court being of opinion that plaintiff was entitled to recover on the facts admitted in the pleadings, judgment was so entered, and defendants excepted and appealed.

F. H. Brooks, of Smithfield, Travis & Travis, of Halifax, and Butler & Herring, of Clinton, for appellants.

Geo. C. Green and W. E. Daniel, both of Weldon, for appellee.

HOKE, J. Plaintiff filed his complaint, duly verified, in terms as follows:

Complaint.

The plaintiff, complaining of the defendants, alleges:

(1) That the plaintiff is a resident of the county of Halifax, state of North Carolina, and the defendants are residents of the county of Johnson, state of North Carolina.

(2) That on April 9, 1920, the defendants wrote plaintiff the following letter:

"Smithfield, N. C., April 9, 1920.

"Mr. A. C. House, Weldon, N. C.—Dear Sir: We agree to pay you the sum of three thousand dollars (\$3,000.00) to make sale for us of our tract of timber near Clinton, N. C., at the price and on the terms outlined in our letter to you of this date. Yours very truly, R. G. Gillett and Abell & Gray, by J. H. Abell."

(3) On April 9th the defendants wrote the plaintiff the following letter, which is the letter referred to in the preceding paragraph:

"Smithfield, N. C., Apr. 9, 1920.

Mr. A. C. House, Weldon, N. C.—Dear Sir: We hereby authorize you to make sale for us on or before April 12, 1920, of our tract of timber near Clinton, N. C., at the price of \$135,000.00, on the following terms: \$45,000.00 cash, and the balance in five equal annual payments.

"We agree to sell an option on the timber at

the price and on the terms mentioned for a period of sixty (60) days for the sum of \$10,000.00, this amount to apply on the purchase price in case the option is exercised. Yours very truly, R. C. Gillett and Abell & Gray, by J. H. Abell."

(4) On April 13, 1920, the defendants wrote the plaintiff the following letter, to wit:

"Smithfield, N. C., Apr. 13, 1920.

"Mr. A. C. House, Weldon, N. C.—Dear Sir: Following up our conversation with reference to sale of the A. T. Griffin Manufacturing Company timber in Sampson county, beg to say that if the deal with Camp Manufacturing Company shall go through, and the final timber estimate shall fall below twenty-two and one-half (22½) million feet, and the purchase price be thereby reduced below \$135,000.00, we still agree to pay you the sum of three thousand dollars (\$3,000.00) for your services. R. C. Gillett. H. G. Gray. J. H. Abell."

(5) On April 12, 1920, the Camp Manufacturing Company wrote the plaintiff the following letter, to wit:

"Franklin, Va., Apr. 12, 1920.

"Mr. A. C. House, Weldon, N. C.—Dear Sir: In re A. T. Griffin Manufacturing Co.'s Timber Holdings in Sampson County, N. C.

"Confirming conversation with you to-day in regard to timber in Sampson county, N. C., known as the A. T. Griffin Manufacturing Company's holdings, consisting of about 77 tracts and covered by 51 deeds, which tracts you estimate at about 25,000,000 feet; time to cut 5 years with 5 years further time by paying 6 per cent. interest on the original purchase price.

"If there is 23,000,000 feet of timber on these tracts, which tracts are covered by the various deeds to the Griffin Mfg. Company, we will give you, or the now owners of the timber (Abell & Gray) \$135,000.00 for this timber, payable as follows: \$45,000.00 cash and the balance in 1, 2, 3 and 4 years with 6 per cent. interest from date of papers. Should you and your associates accept this proposition, we are to pay \$5,000.00 on acceptance and the balance of the cash payment, to wit, \$40,000.00 when estimate is completed and satisfactory deed delivered to us; all papers to be dated June 1, 1920.

"To arrive at the estimate of the quantity of timber on this land, we are willing to follow the following procedure, that is to say, we put in a man and you a man, and we, together, to select the third man, the third man to be a man who has never estimated timber for either of us, or at least the third man is to be satisfactory to us. Our man and your man to go in and estimate the timber and on any tract or tracts that our men cannot agree upon, then we are to call in the third man, as stated above, and he is to send us report of every tract of timber he estimates, and he is not to estimate to exceed four tracts before we get the estimate, and if the third man or umpire is not satisfactory to either party, then either party has a right to call him off and put in another third man to estimate not to exceed four tracts of timber (the selection of this third man to be in the same manner as referred to above) before we receive the estimate, and if this estimate is not satisfactory, then we could call him

off and continue the selection of a third man in the manner referred to above until all the timber is estimated and terms and conditions of estimating as above outlined complied with.

"If you give us an option, we would start our man in there just as soon as we could and continue estimating until we complete the whole transaction, and all of it should be closed up within sixty days unless extended by agreement between all parties concerned.

"If however, there is not 23,000,000 feet of timber on the various tracts referred to, constituting the A. T. Griffin Manufacturing Company's holdings, and the actual amount of timber, by estimate agreed upon, does not come to \$135,000.00, we would take the quantity of timber shown by estimate at \$6.00 per thousand feet. If there is not 23,000,000 feet, and we should buy the timber at the rate of \$6.00 per thousand feet, we will pay \$45,000.00 cash and the balance in 1, 2, 3 and 4 years with 6 per cent. interest from date of papers; the cash payment, however, to be less \$5,000.00 which amount is to be paid in case our proposition is accepted.

"Yours very truly,

"Camp Manufacturing Company.

"pdc/b

By ———, Pres."

(6) That the letter referred to in the preceding paragraph was delivered to the defendants, and on April 13, 1920, the defendants wrote the Camp Manufacturing Company, Franklin, Va., the following letter, to wit:

"Smithfield, N. C., Apr. 13, 1920.

"Camp Manufacturing Co., Franklin, Va.—Gentlemen: We have noted your letter of the 12th inst., addressed to Mr. A. C. House with reference to the timber holdings of A. T. Griffin Manufacturing Company, in Sampson county, consisting of about 77 tracts covered by 51 deeds, and beg to say that we have decided to accept your proposition to pay \$135,000.00 for the same, \$5,000.00 to be paid cash and \$40,000.00 to be paid when estimate is completed and contract made, but it is understood that we are selling you all the timber owned by A. T. Griffin Manufacturing Company, in Sampson county, covered by the 51 deeds with time for cutting and removing same as therein specified, which is approximately five years, with five years' extension by paying six per cent. interest on original purchase price of same. Estimate of timber to be made according to method set out in your letter to Mr. House, and should estimate not amount to 22,500,000 feet, then said timber to be paid for according to estimate at price of \$6.00 per thousand feet

"After the payment of the \$45,000.00, the balance of the purchase price of said timber is to be divided into four equal payments to be made annually, with interest at six per cent. from May 1, 1920, with provisions that in case you wish to cut any of said timber, same shall be paid for in advance at the rate of \$6.00 per thousand feet, which payment shall be applied to the next annual installment falling due.

"Upon receipt of this letter (which is sent by Mr. House) we will thank you to send us your check for \$5,000.00 according to your proposition contained in letter of the 12th inst., to Mr. House. If you desire more formal contract before paying the \$5,000.00, we shall be glad to meet you or your attorney in Smith-

(109 S.E.)

field and enter into any reasonable arrangement with you respecting the matter.

"We are holding Mr. Ashley at Clinton to meet your estimator and go over these several tracts of timber and make joint estimate of this timber, which of course is at considerable expense, and we trust you will proceed at your earliest convenience to send your man to Clinton to enter upon this work.

"Thanking you in advance for your early reply, we are, yours very truly."

That the above letter was given to the plaintiff to be by him delivered to the Camp Manufacturing Company, and on the 14th day of April, 1920, he wrote the Camp Manufacturing Company the following letter, to wit:

"Franklin, Va., April 14, 1920.

"Mr. P. D. Camp, Pres., Camp Mfg. Co., Franklin, Va.—Dear Sir: I herewith hand you letter of acceptance from Messrs. Abell, Gray & Gillett in which they agree to sell you the holdings of A. T. Griffin Manufacturing Company as per your offer in your letter to me of the 12th inst.

"You will note that the amount of timber as mentioned in your letter of 23,000,000 feet has been changed in their acceptance to 22,500,000 feet, which was done at my request, because if there had been more than 22,500,000 feet and less than 23,000,000 feet, you would have paid more than \$135,000.00 for it.

"Messrs. Gillett, Abell & Gray requested me to say to you that Mr. Griffin, of the A. T. Griffin Manufacturing Company wishes to make bond of title, securing from you contract to carry out the terms of payment, and, not taking your notes for the deferred payments, he believes if he takes your notes that he will have to give it in as income received during this year, and it is his desire to distribute this income over a period of four years, during which time the actual payments are to be. I think he is so advised by his attorney. I do not know just what a bond of title is, but your attorney can advise you along this line, and if you can do so, I believe it would be good policy to accommodate Mr. Griffin. However, if this cannot be worked out satisfactorily to yourself and Messrs. Gillett, Abell & Gray, it is their desire to satisfy you in the matter even to the extent of their paying Mr. Griffin cash for the timber and giving you a straight deed secured by a deed of trust. You will note that there is a provision in the letter of acceptance, providing that you might cut timber prior to the payment of the deferred payments by paying in advance at the rate of \$6.00 per thousand feet. There was nothing in your letter which mentioned this and this provision was put in to cover any case in which you might wish to cut the timber before all the payments had been made. Messrs. Gillett, Abell & Gray also requested me to say to you that they were willing to meet your attorney or representative and enter into any reasonable agreement as regards details to carry out the terms and spirit of your offer to them in their letter of acceptance to you.

"If I can be of any further service to you in this transaction, kindly advise me. I will be away from Weldon a few days the first of next week, but after that time I see no reason why I cannot act for you on short notice.

"I have left the deeds to all the Griffin holdings in your office, and wish to call your attention to the fact, as I mentioned, when here on the 12th, that there are two deeds to small tracts of timber in this lot carrying five years to cut and five years' extension, and one carrying seven years to cut and five years' extension.

"All of the other deeds, as I have read them, carry ten years to cut with five years extension. All the deeds, I think, are dated in the latter part of 1914, and early part of 1915.

"Yours very truly."

(7) That on April 17, 1920, the Camp Manufacturing Company wrote the defendant the following, to wit:

"April 17, 1920.

"Messrs. R. C. Gillett, H. G. Gray, and J. H. Abell, Smithfield, N. C.—Gentlemen: In re Purchase of A. T. Griffin Manufacturing Company's timber holdings in Sampson County, N. C.

"We are in receipt of your letter of the 13th accepting our offer of the 12th. We have written to try to get estimators, and will get estimators to go in the timber just as soon as we can, and we thought it would be well for us to try to agree upon the third party. Do you know of any good man to act as Umpire? Check for \$5,000.00 has been made up and turned over to Mr. T. D. Savage, our attorney, Norfolk, Va., for delivery to you as soon as some little details concerning the contract have been satisfactorily worked out between your attorney and Mr. Savage. We would thank you to kindly advise Mr. Savage who your attorney is, so that he can get in communication with him.

"Yours very truly, Camp Mfg. Co.,
"pdc/b By ——— President.
"CC: To Mr. A. C. House, Weldon, N. C."

(8) That the Griffin timber, the A. T. Griffin Manufacturing Company's timber, is the same timber mentioned in the two letters of the defendants of April 9 and April 13, and the letters of the Camp Manufacturing Company to A. C. House of April 12, 1920, and the letter of the defendants to Camp Manufacturing Company dated April 13, 1920, above referred to, and also the letter of the plaintiff to Camp Manufacturing Company dated April 14, 1920, and above referred to, and also the letter of Camp Manufacturing Company to defendants dated April 17, 1920.

(8½) The defendants wrote the plaintiff the following letter, to wit:

"Smithfield, N. C., May 31, 1920.

"Mr. A. C. House, Weldon, N. C.—Dear Mr. House: We beg to advise that we have been to see the Camp Manufacturing Company and have returned to them the \$5,000.00 paid on the contract, and have canceled the same because they insist on the Doyle rule in estimating the timber. We are, therefore, no longer under obligation to them. Yours very truly, R. C. Gillett and Abell & Gray, by J. H. Abell."

(9) That the Camp Manufacturing Company, through the efforts of the plaintiff, actually contracted to purchase of the defendants the timber mentioned in the preceding paragraphs,

and actually paid the defendants the sum of \$5,000 called for in said contract.

(10) That the plaintiff has performed his part of said contract in full, and has demanded payment of the sum of \$3,000 of the defendants, which they have failed and refused, and still refuse, to pay.

(11) That by reason of the matters and things above set out the defendants are indebted to the plaintiff in the sum of \$3,000 with interest from April 13, 1920.

Wherefore, plaintiff demands judgment against the defendants for the sum of \$3,000 with interest and for cost.

Defendants filed answer to said complaint, duly verified, in term as follows:

The defendants answering the complaint of the plaintiff, herein filed allege:

(1) That paragraph 1 of the complaint is admitted.

(2) That paragraph 2 of the complaint is admitted.

(3) That paragraph 3 of the complaint is admitted.

(4) That paragraph 4 of the complaint is admitted.

(5) That paragraph 5 of the complaint is admitted.

(6) That paragraph 6 of the complaint is admitted, wherein it is alleged that the defendants wrote the Camp Manufacturing Company the letter, set out in paragraph 6 of the complaint.

As to the remainder of said paragraph, these defendants have no knowledge, and therefore deny the same.

(7) That paragraph 7 of the complaint is admitted.

(8) That paragraph 8 of the complaint is admitted, except where it is stated that the plaintiff wrote the Camp Manufacturing Company on April 14, 1920, of which these defendants have no knowledge, and therefore deny the same.

(9) That paragraph 9 of the complaint is denied.

(10) That paragraph 10 of the complaint is denied.

(11) That paragraph 11 of the complaint is denied.

There was a further answer, duly verified, alleging in effect that defendants owed plaintiff nothing because by the terms of the agreement they were only liable in case the "deal with the Camp Manufacturing Company goes through," and that no sale had ever been consummated, nor had defendants ever received anything thereon for the reason further stated that after the interchange of the letters and writings above set forth, and after defendants had received the \$5,000 check given by the Camp Manufacturing Company as part payment on the alleged contract, when defendants met for the purpose of proceeding with the deal, the estimator selected by the Camp Manufacturing Company, one S. R. Flowers, insisted that the timber be estimated by the Doyle rule, and would consent to no other, and that ascertaining that under such rule the amount

of defendants' timber would be reduced 25 to 33 per cent., defendants were therefore forced to call off the proposition, and returned to the Camp Manufacturing Company the \$5,000 it had paid on the transaction.

[1, 2] Upon this a sufficient statement for a proper apprehension of the question presented, we concur in the ruling of the court below that on the admissions appearing in the pleadings the plaintiff is entitled to judgment. It is a well-established principle that a real estate broker, employed by the owner to make sale of designated real estate, who, within the terms of the authority given succeeds in bringing about a binding contract of sale with a responsible purchaser, is entitled to his stipulated commission, or to the reasonable worth of his services, if no definite amount is specified, and his claim therefor is not affected because the principal has seen proper to voluntarily surrender his rights under the contract. *Aycock v. Bogue*, 108 S. E. 434, at the present term; *Love v. Miller*, 53 Ind. 294, 21 Am. Rep. 192; *Lunney v. Healey*, 56 Neb. 313, 76 N. W. 558, reported also in 44 L. R. A. 593; *Seabury v. Fidelity Insurance Trust & Safe Deposit Co.*, 205 Pa. 234, 54 Atl. 893; *Parker v. Walker*, 86 Tenn. 566, 8 S. W. 391; *Wilson v. Mason*, 153 Ill. 304, 42 N. E. 134, 49 Am. St. Rep. 162; *Parmly v. Head*, 33 Ill. App. 134; *Shainwald v. Cady*, 92 Cal. 83, 28 Pac. 101; *Leete v. Norton*, 43 Conn. 219. *Love v. Miller*, supra, is reported also in 21 Am. Rep. 192, where the principle is thus stated in the syllabus:

Where "the owner of real estate agreed with the broker that if the latter would 'find a purchaser for designated real estate' he would give a certain sum as commission. The broker procured a person to enter into a valid and binding contract * * * to purchase, * * * but he afterwards refused to perform. Held, the broker was entitled to the sum agreed upon."

In the second headnote to *Lunney v. Healey*, in 44 L. R. A. p. 593, it appears that—

"Where a real estate broker contracts to produce a purchaser who shall actually buy he has performed his contract by the production of one financially able, with whom the owner actually makes an enforceable contract of sale. The failure to carry out that contract, even if the default be that of the purchaser, does not deprive the broker of his right to commissions."

And in *Parker v. Walker*, 86 Tenn. supra, it is held:

"A broker, who agrees for compensation 'to procure a purchaser' for lands, has earned his commissions when he effects a valid written contract for sale of the lands, upon terms and with a purchaser acceptable to the owner. Neither the purchaser's refusal to perform his contract upon grounds not imputable to the broker's fault, nor the voluntary failure of the vendor to compel him to do so, will defeat the broker's claim for commissions."

From a proper consideration of the letters and correspondence, there was a binding contract of sale between the defendants and the owners and the Camp Manufacturing Company of all the timber on 77 tracts of land contained in 51 deeds, and known as the holdings of the Griffin Manufacturing Company in Sampson county, at a designated price agreed and acted upon by the parties as within the authority conferred upon the broker. Even if the letter of defendants of April 13, 1920, should be considered as modifying the terms contained in the definite offer of the purchaser, the Camp Manufacturing Company, of April 12, these modifications, if they be such, were acquiesced in by the Camp Company, the other contracting party, and the company's check for \$5,000 was given and received in part compliance with the contract. And as to the stipulation for the commission, while the first agreement for \$3,000 was based on a sale at \$135,000, in defendants' letter of April 9, 1920 (pages 1 and 2 of the record), in a subsequent letter, also on page 2, of April 13th, defendants agreed to pay the \$3,000.00 for effecting a sale, though the price should fall below \$135,000. It is insisted for defendants that, no rule or standard of measurement for the timber having been specified in the agreement, the same was thereby rendered too indefinite to constitute a binding contract of purchase. As we have seen, the contract contained an agreement to sell all the timber on certain designated tracts of land at a stipulated price, and the agreement itself affords a means for determining the quantity, that is, that each of the parties should select a man as estimator, and the two parties together to select the third man. And if it were otherwise, if, as defendant contends, the contract failed to specify a rule by which the timber should be estimated, the approved position is, the agreement being otherwise definite and complete, that the timber shall be measured according to the standard ordinarily prevailing in such cases. 25 Cyc. p. 1560, citing Sanderson v. Hagan, 7 Fla. 318; McIntyre v. Rodgers, 92 Wis. 5, 65 N. W. 503; Heald v. Cooper, 8 Me. (8 Greenl.) 32. Again it is contended that the subsequent agreement for \$3,000, appearing in defendants' letter of April 13, 1920, was predicated and made dependent upon the proposition that the "deal with the Camp Manufacturing Company should go through"; the entire letter in reference to the proposed sale being: That if the deal with the Camp Manufacturing Company should go through, and the final estimates should fall below 22½ million feet and the purchase price be reduced below \$135,000, "we still agree to pay you \$3,000.00 for your services."

It will be noted that when this letter was written no contract had been made, and the terms of "the deal with the Camp Manu-

facturing Company should go through" clearly means "if the negotiations in which you are now engaged should result in a binding contract of sale." In view of the terms used this was the natural significance of the language, and afforded the correct and reasonable interpretation of the agreement. In one aspect of the contract as proposed by the Camp Manufacturing Company the cutting of the timber and the partial payments therefor would extend over four years, and it would not be contended that the parties contemplated any such delay before plaintiff should receive his commissions. In our opinion on the facts presented there was a binding agreement between the parties for sale of the timber, effected by the plaintiff as broker, and in which defendants have voluntarily surrendered their rights to plaintiff's prejudice, and that said plaintiff has been properly allowed to recover as per terms of the agreement.

Affirmed.

STACY, J., dissents.

(182 N. C. 690)

**ROSEMAN FEED CO. v. NASHVILLE
GRAIN & FEED CO.**

BLANTON FEED CO. v. SAME.

(No. 514.)

(Supreme Court of North Carolina. Dec. 21, 1921.)

1. Attachment ⚡307—Intervener may only raise issue as to whether property attached belongs to him.

In an action of attachment, an intervener is entitled to be heard only upon one issue, namely, does the property attached belong to him, and the objection against the warrants of attachment that it does not appear affirmatively that the attached property belongs to nonresident defendants might be waived by the defendants, and hence the intervener, a stranger, will not be permitted to make it for them.

2. Banks and banking ⚡159—Where intervening bank is a purchaser of a draft for value, proceeds of the draft cannot be garnished in hands of correspondent bank.

In attachment suit, where the intervening bank is a purchaser of a draft for value, proceeds of the draft cannot be garnished in the hands of a correspondent bank in a suit against the payee of the draft; but, if the intervening bank is merely an agent to collect the draft, the proceeds may be garnished in the hands of the correspondent bank.

Appeal from Superior Court, McDowell County; Shaw, Judge.

Action by the Roseman Feed Company against the Nashville Grain & Feed Company, and action by the Blanton Feed Com-

pany against the Nashville Grain & Feed Company, consolidated and tried together. From judgment for plaintiff in each action, the intervener, the American National Bank of Nashville, Tenn., appeals. No error.

Civil actions to recover damages for alleged breaches of contracts, by consent, consolidated and tried together in the superior court.

Plaintiffs, local companies, having causes of action against the Nashville Grain & Feed Company, a foreign-resident partnership, instituted these suits in the superior court of McDowell county, and in each case sought to obtain service upon the defendants by attaching the proceeds of certain drafts in the hands of the First National Bank of Marion, N. C., and the First National Bank of Lincolnton, N. C.; it being alleged that said funds belong to the defendants.

Thereafter, in each case, the American National Bank of Nashville, Tenn., was allowed to intervene and set up its claim of title to the proceeds of said drafts. By consent the funds were turned over to the intervener, bonds being filed, and the garnishee banks were released from further liability. The defendants filed no answer in either case.

The causes, after consolidation, came on for trial upon the issue of ownership raised by the interpleader, and the jury returned the following verdict in each case:

"Is the American National Bank of Nashville, Tenn., the interpleader, the owner of the proceeds of draft paid by Roseman Feed Company to First National Bank of Lincolnton, N. C., and of proceeds of draft paid by Blanton Grocery Company to First National Bank of Marion, N. C., and attached in this cause, and entitled to the possession of same? Answer: No."

A. L. Quickel, of Lincolnton, for appellant.
Kemp B. Nixon, of Lincolnton, and Pless, Winborne & Pless, of Marion, for appellees.

STACY, J. [1] The first exception, appearing on the record, is directed to his honor's refusal to vacate the warrants of attachment, for that it does not appear affirmatively that the property attached belongs to the nonresident defendants, and it is therefore contended that the court was without authority to proceed further in the cause. It should be observed that the defendants have made no appearance and filed no answer in either case. This jurisdictional question, arising from an alleged want of proper service, is sought to be raised by the intervener after having taken the property upon the execution of bonds which were to stand in lieu thereof. We have held in *Forbis v. Lumber Co.*, 165 N. C. 403, 81 S. E. 599, and cases cited therein, that this position was not open to appellant. It is enti-

tled to be heard only upon one issue, viz.: Does the property attached belong to it? *Bank v. Furniture Co.*, 120 N. C. 477, 26 S. E. 927. The intervening bank ostensibly has no interest in the merits of the actions pending between the present plaintiffs and the present defendants. Furthermore, this is an objection which, even if valid, might be waived by the defendants; and hence a stranger will not be permitted to make it for them. *Blair v. Puryear*, 87 N. C. 101.

[2] If the intervener held the drafts as a purchaser for value the proceeds derived therefrom could not be attached in the hands of the Marion and Lincolnton banks as the property of the Nashville Grain & Feed Company; but on the other hand, if the intervener acted merely as a collecting agent, the proceeds would belong to the defendants, and consequently they would be subject to attachment in the hands of the local garnishee banks. *Worth Co. v. Feed Co.*, 172 N. C. 335, 90 S. E. 295. The case was tried upon this theory, and the question of ownership, as found by the jury, has been determined against the intervener.

Applying these settled principles to the facts presented, it follows that the remaining exceptions must be overruled. His honor charged correctly on the burden of proof and ruled properly on the plea of estoppel. After carefully examining appellant's exceptions and assignments of error, we have found no sufficient reason for disturbing the result.

No error.

(182 N. C. 633)

MITCHELL v. TALLEY. (No. 400B.)

(Supreme Court of North Carolina. Dec. 21, 1921.)

1. Attachment \S 7—Extends to an action for causing death of another.

Under C. S. \S 160, providing an action for causing the death of another, but one cause of action is contemplated, and the injury to the person causing the death continues to be a constituent and essential feature of the action, and has the effect of permitting an attachment of property under section 798, subsec. 4, giving the right of attachment in actions for an injury to the person by negligence or any wrongful act.

2. Attachment \S 307—Only question open to intervener is whether his right to property is superior to that conferred by writ of attachment.

In suit founded on attachment, the only question open to the intervener is whether his right to the property is superior to that conferred by the attachment.

3. Attachment \S 180—Award of alimony constituting lien on defendant's property held not valid against prior attachment.

While, under C. S. \S 1667, alimony may be awarded without divorce and made a lien

against defendant's property, it does not necessarily follow that a judgment awarding alimony and making it a lien against his property will prevail against a lien of a valid attachment first levied in another court of concurrent or equal jurisdiction.

4. Courts ~~§~~481.—One superior court has no power to revoke or modify orders of another.

One superior court has no power to revoke or modify the orders and judgment of another in matters of which the latter has acquired and holds jurisdiction.

Appeal from Superior Court, Guilford County; Webb, Judge.

Action by S. S. Mitchell, administrator of W. T. McCulston, deceased, against Carl L. Talley. Judgment for plaintiff by default and inquiry, and on motion of plaintiff that the court proceed to execute the inquiry pursuant to the judgment, Ethel K. Talley intervened, and on her motion judgment was entered that the attachment be vacated and motion to proceed to execute the inquiry was denied, from which judgment plaintiff appeals. Reversed, with directions.

Civil action to recover damages of the defendant for the willful and wrongful killing of plaintiff's intestate who was a police officer, and at the time of his death was engaged in the discharge of his duty in undertaking to arrest defendant for violation of the prohibition law. Defendant escaped immediately after plaintiff's intestate was killed and personal service on defendant could not be made. At the time of issuing the summons, plaintiff, on proper affidavit, secured a warrant of attachment, and same was levied on personal and real property of defendant in said county, including a levy on \$3,111.60 on deposit in the National Bank of Greensboro. Service of summons by publication having been completed, a properly verified complaint was duly filed, and, defendant having failed to answer, there was judgment by default and inquiry, and later, the case having been called in open court, the plaintiff moved that the court proceed to execute the inquiry pursuant to the judgment. And thereupon Ethel K. Talley, wife of the defendant, having intervened after said judgment by default was entered, moved to vacate the warrant of attachment: First, for that under the statute no such warrant would properly lie in this case, and, second, because the facts alleged as the basis for the application were untrue. And upon said motion the court, being of opinion that the attachment would not lie in an action of this character, entered judgment that the same be vacated. The plaintiff then moved to be allowed to proceed to execute the inquiry, which was refused.

As a basis for the right of Ethel K. Talley

to intervene in this cause, it was made to appear in a verified petition filed by the intervener that she was the wife of Carl Talley; that she had four living children of the marriage, aged six, four, and two years, and six months; that her husband was a fugitive from justice, had separated himself from the intervener, and was providing nothing for the support of herself and children; that the petitioner had made application to the superior court of Rockingham county, under section 1667 of the Consolidated Statutes, to obtain alimony without divorce; and that on such her application the judge presiding in said county had ordered and decreed as follows:

"That the plaintiff is entitled to a reasonable subsistence from the property and earnings of defendant, and that the court hereby allots to plaintiff the dwelling house and lot referred to and described in the complaint as a home for herself and said children, and further allots and assigns to her the sum of \$100 a month as a reasonable subsistence for her and said children, which sum the defendant is required to pay out of his earnings or other moneys to plaintiff; and if defendant fails to pay said sum on the first day of each and every calendar month, then the same may be collected by execution out of other property or funds of the defendant in the state.

"It is further adjudged, that plaintiff have and recover of the defendant the sum of \$300 as reasonable subsistence for her and said children from the date of the abandonment of them by the defendant until the date of the making of this order.

"And it is further ordered and adjudged, that the defendant be, and he is hereby required to cause all moneys on deposit in the Greensboro National Bank of Greensboro, N. C., assigned or transferred to the clerk of this court as trustee in order to secure compliance with this order.

"A certified copy of this order shall be served upon the Greensboro National Bank, to the end that it shall not pay out or permit the transfer of the funds in said bank, except as provided by order in this action, and the allowance to plaintiff is hereby secured by a lien which the court declares upon said fund."

No notice of the motion on which this judgment was entered was served on defendant Talley, and, so far as appears, there has been no service by publication on said Talley of either the notice or the summons in said proceedings, nor has there been any order for such service; but the judgment in said proceedings was entered on allegations in the petition, duly verified, as to the kind and placing of the property, and that the defendant, Carl Talley, her husband, was a fugitive from justice, had abandoned and separated himself from the applicant, and was furnishing no support either for herself or infant children; and that the order applied for was absolutely essential to their subsistence.

From the rulings of the court, adversely affecting his interests, plaintiff, having duly excepted, appealed.

King, Sapp & King, of Greensboro, for appellant.

A. W. Dunn, of Leaksville, and Brooks, Hines & Smith, of Greensboro, for Ethel K. Talley, intervener.

HOKE, J. [1] In the recent case of *Tisdale v. Eubanks*, 180 N. C. 153, 155, 104 S. E. 339, 11 A. L. R. 374, the court, in upholding the writ of attachment in an action for slander, had occasion to refer to the successive statutes controlling the matter, by which the lawful use of this writ has been continuously enlarged until under the latest amendment, Consolidated Statutes, § 798, subsec. 4, the right is extended to actions for "any injury to the person, caused by negligence or wrongful act," and it was there said that the history of this legislation and this, the latest amendment to the law, showed an evident intent on the part of the Legislature to broaden the right to this writ and make the same well-nigh coextensive with any well-grounded demand for judgment in personam. Under this, the correct interpretation, we are of opinion that our statute appertaining to attachments, from the language used and the purpose and policy of the Legislature as evinced in these various amendments, is sufficiently comprehensive to include the action for "causing the death of another by wrongful act neglect or default of another," as provided in section 160 of the Consolidated Statutes.

While we have repeatedly held, and the position is in accord with the authoritative cases on the subject elsewhere, that this law, commonly designated as the Lord Campbell's Act, has the effect of creating a new cause of action in the sense that such a suit could not be maintained at common law, it will appear from the better-considered decisions construing the statute, both in England and in this country, that its purpose was to withdraw claims of this kind from the effect and operation of the maxim, "*Actio personalis moritur cum persona*," and that the action did not thereby lose its identity, but that the basis of such a claim continued to be the wrongful injury to the person resulting in death. Applying the principle, though there are cases to the contrary, it has been very generally held that if, in case of willful injury causing the death, the defendant was acting in his necessary self-defense, or in case of negligence if the deceased at the time was guilty of contributory negligence or if the injured party had given a release or had been settled with for the injury during his life, either by adjustment inter partes or by suit, under the statute no recovery could be had for the death, thus

showing that in case of death following a wrongful injury there were not two causes of action contemplated, but one, and that the "injury to the person" continued to be a constituent and essential feature of the action provided for, and so as stated coming under the broad and comprehensive terms of our law of attachment affording the remedy for "injury to the person by negligence or any wrongful act." *Edwards v. Chemical Co.*, 170 N. C. 551, 87 S. E. 635, L. R. A. 1916D, 121; *Mich. Central R. R. v. Vreeland*, 227 U. S. 59-70, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176; *Lincoln v. Detroit, etc., R. R.*, 179 Mich. 189, 146 N. W. 405, 51 L. R. A. (N. S.) 710; *Read v. Great Eastern*, 3 L. R. 867-868, p. 555; *Hecht v. R. R.*, 132 Ind. 507, 32 N. E. 302; *Littlewood v. Mayor*, 89 N. Y. 24, 42 Am. Rep. 271; *Crapo v. City of Syracuse*, 183 N. Y. 395, 76 N. E. 465; *Tiffany, Death by Wrongful Act*, § 124; 8 R. C. L. pp. 786-790.

In *Edwards v. Chemical Co.*, holding that a judgment for the wrong, duly paid to the injured party in his life, would bar any action to recover for the death, after quoting from the opinion of Rapallo, Judge, in *Littlewood v. Mayor*, supra, it was said:

"These views of the learned judge, arising chiefly from the language of the statute, derive strong support from the suggestion that, although the statute may be considered in some respects as creating a new right of action, it has its foundation in a single wrong."

And in *Vreeland's Case*, supra, Associate Justice Lurton delivering the opinion:

"But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent."

And in *Hecht v. Ohio Valley R. R.*, it was said, among other things:

"Although some items of evidence may be competent or even necessary in one case and not in the other, and the method of proof may differ, still the action in either case is based on the negligence of the defendant in causing the same and identical injury, and the damages in either case grow out of * * * such negligence."

It will be understood that we do not intend to qualify the principle upheld in our decisions, *Causey v. R. R.*, 166 N. C. 5, 81 S. E. 917, L. R. A. 1915E, 1185, Ann. Cas. 1916C, 707, and others that the statute commonly known as Lord Campbell's Act creates a new cause of action; but we are of opinion, and so hold, that the action it does create is so involved in and dependent upon the injury to the person which results in death as to bring the same within the broad and comprehensive language of our statute on attachment, authorizing the issuance of the writ.

We do not consider it necessary or desirable to advert especially to the authorities cited by intervener tending to show that the wrongful causing of another's death is not included in the terms "injuries to the person." Some of them undoubtedly are in support of defendant's position, but the question as a rule was presented in facts differing from those of the instant case, and in the construction of statutes having terms of less comprehensive import and permitting other construction than our law as to writs of attachment.

[2, 3] While we have dealt somewhat at length with the ruling of the court vacating the writ because, as the record now appears, the right of plaintiff to further continue the present suit is dependent on its validity, we must not be understood that the intervener, Mrs. Talley, has the right to raise this question. Coming into court and claiming the property held by it, she submits her case to the court's jurisdiction, and the only question open to her is whether she has an interest in the property superior to that conferred by the writ of attachment. In a case at the present term, of *Roseman Feed Co. v. Nashville Grain & Feed Co.*, 109 S. E. 881, it was very earnestly contended before us that an intervener could raise the question of the court's jurisdiction, and in disapproval of the position Stacy, Judge, delivering the opinion, said:

"This jurisdictional question, arising from an alleged want of proper service, is sought to be raised by the intervener after having taken the property under proper bonds" for its forthcoming. "We have held in *Forbis v. Lumber Co.*, 165 N. C. 403, and cases cited therein, that this position is not open to appellant. It is entitled to be heard only upon one issue, viz.: Does the property attached belong to it [the intervener]? *Bank v. Furniture*, 120 N. C. 477."

[4] As to the rights of the interveners and on the facts as they now appear in the rec-

ord, her claim is based on a preliminary judgment of the superior court of Rockingham county, purporting to be under section 1667, Consolidated Statutes, providing for an award of alimony without divorce; and we deem it not amiss to say that a perusal of this statute will disclose that the relief in such cases must be wrought by civil action and for the proper maintenance of which there must be, either personal service of summons on defendant within the jurisdiction, or voluntary appearance by him, or there must be at least constructive service by publication. *Johnson v. Whilden*, 166 N. C. 104, 81 S. E. 1057, Ann. Cas. 1916C, 783. And while the statute provides that an order for temporary support may be made in the cause without notice of such an application, where the defendant, having abandoned his wife, is absent from the state or is in parts unknown, etc., and our authorities seem to hold that as against such a defendant an award of alimony may be made effective against his property situated within the state without personal service and without an attachment levied (*White v. White*, 179 N. C. 592, 103 S. E. 216), it does not necessarily follow that such a judgment would prevail as against the lien of a valid attachment first levied in another court of concurrent or equal jurisdiction, and in any event, and as now advised, the rights of the parties presented in this litigation must be determined as the present suit and not otherwise. One superior court has no power to revoke or modify the others and judgment of another of which the latter has acquired and holds jurisdiction. *Bear v. Cohen*, 65 N. C. 411.

On the facts as now presented, this opinion will be certified that judgment vacating the attachment be reversed, the amount of plaintiff's damages be ascertained, and the issue then determined between the plaintiff and the intervener as to their respective rights and interests in the property levied on.
Reversed.

(118 S. C. 12)

HOLMAN v. FARRELL. (No. 10753.)

(Supreme Court of South Carolina. Nov. 1, 1921.)

1. Evidence \S 222(3), 471(5)—Testimony by witness to a statement by defendant held competent as an admission, and not a conclusion.

In replevin by an administrator to recover a ring which defendant claimed as a gift from deceased, a statement in an affidavit as to testimony of an absent witness that in an investigation as to what property the deceased had left he interviewed defendant, and that "she had admitted that deceased had only loaned it to her to wear as a friend, that they were not engaged," was improperly excluded as a mere conclusion and not testimony.

2. Continuance \S 26(5)—Party, believing that witness would attend without compulsion, not diligent.

A plaintiff, who did not avail himself of means of compelling his witnesses to attend when he might have done so, was not diligent in the sense of being entitled to continuance for the absent witnesses, though honestly convinced that they would attend without compulsion.

3. Evidence \S 317(1)—Details of conversation of witness and another held inadmissible, though he might testify he had received certain information.

Where in replevin for a ring which plaintiff claimed decedent had loaned to defendant, and which defendant claimed as a gift, an affidavit of an absent witness recited that in investigating what property deceased had left a hotel keeper had informed him that witness did not have all the property, and informed him that there was other property leading to discovery as to the ring the conversation between the witness and the person giving the information was not competent, though the fact of receiving the information might be shown.

Fraser and Watts, JJ., dissenting.

Appeal from Common Pleas County Court of Richland County; M. S. Whaley, Judge.

Action by W. F. Holman, as administrator, against M. Eileen Farrell. From a judgment for defendant, plaintiff appeals. Reversed.

Holman & Holman, of Columbia, for appellant.

D. W. Robinson, of Columbia, for respondent.

GARY, C. J. This is an action in claim and delivery for a diamond ring. The complaint alleges that prior to the death of Dr. T. C. Homan, plaintiff's intestate, the defendant borrowed from him a valuable diamond ring, for the purpose of wearing the same and, upon demand, refuses to return it. The defendant denies that she borrowed the ring, but alleges that Dr. T. C. Holman gave it to her as an expression of the strong and

cordial friendship that existed between them.

The following statements appear in the record: On the call of the case for trial, the attorneys for the plaintiff requested the court to continue the case, upon the ground of the absence of a material witness, Miss Cecil True, and also the absence of the witness, G. B. Holman. The plaintiff's attorney submitted a statement, that the witness, Miss True, would, if present, have testified:

"I was very well acquainted with Dr. T. C. Holman, deceased, and with the defendant, Miss Eileen Farrell. We went together on many and numerous occasions. That we were all together at the Jefferson hotel, in the city of Columbia, one evening, and Dr. Holman offered me his diamond ring to wear, which I refused, when the defendant, Miss Eileen Farrell, requested him to let her see the ring, which he handed to her, and she placed it on her finger, and did not return it to him, nor did he give it to her for any other purpose than for her to look at it; that Miss Farrell's statement that Dr. Holman gave her the ring at her residence is untrue; that on several occasions after that time, she was in the company of the defendant and Dr. Holman, and that she knows of her own knowledge that Dr. Holman tried to get the ring back from the defendant, and the defendant through some excuse managed to keep the ring until after the death of Dr. Holman."

Whereupon the following occurred:

"Mr. Robinson: Your honor, as to the affidavit of one of these, Mr. G. B. Holman, they have a doctor's certificate that he is not able to be here. I am willing to admit that if he were here he would swear to that, but it is subject to the question of competency.

"As to the other, of some lady that lives here in town, there is no excuse for her, except that statement that he issued a subpoena for her and the sheriff cannot find her."

"Mr. Holman: Your honor, this lady living right in town, and, I having talked with her last week, I presume that she would be here. I turned over the subpoena to the sheriff this morning.

"The Court: That is your risk. You are too late. If Mr. Robinson does not choose to admit it, that is your look out.

"Mr. Robinson: I am not willing to admit it.

"The Court: Then we will have to go ahead.

"The affidavit of G. B. Holman was offered in lieu of his testimony, which affidavit is as follows: 'Personally appeared before me G. B. Holman, who, being duly sworn, says that he is the father of Dr. Capers Holman, now deceased. That W. F. Holman, my son, administered upon the estate of Dr. Capers Holman, deceased and in an effort to secure all of his property, I was at St. Joseph's Hotel, Orangeburg, S. C., some time after the death of my son, getting up what property he had there. At that time I received information from the wife of the proprietor of that hotel that I did not have all the property of Dr. Holman, and upon investigation found that there was a diamond ring belonging to Dr. Holman that he had loaned to Miss Eileen Farrell, of Columbia,

to wear; that the undersigned saw Miss Eileen Farrell, and she admitted that Capers (Dr. Capers Holman) had only loaned it to her to wear as a friend; that they were not engaged; that Miss Farrell showed me the ring upon her finger, but stated that she would not give it to me. The above statement is true of my own knowledge.

Upon objection made in due time, the court ruled that the portion of the affidavit in italics could not be received in evidence. Counsel for defendant agreed to admit the balance of the affidavit. And the following colloquy occurred in reference thereto.

"Mr. Holman: We offer this statement.

"Mr. Robinson: Has your honor passed on it?

"The Court: No. Do you want to object to it now or wait until he comes to that?

"Mr. Robinson: I want to state my grounds and have it ruled out before it is read. It starts with what some proprietor of a hotel told him. And that further part down there where he says that the defendant admitted. Now, what she said he can testify to. Her admissions of conclusions is not testimony."

The jury rendered a verdict in favor of the defendant, and the plaintiff appealed.

The first question for consideration is whether there was error on the part of his honor the presiding judge in refusing the motion for a continuance.

The defendant's attorney interposed no objections whatever to the statement, as shown by the physician's certificate, that the witness G. B. Holman was not able to attend the trial, and stated that he was willing to admit that, if the witness was present, he would testify in accordance with his affidavit, but reserved the right to object to the competency of the testimony, on the ground that the admission alleged to have been made by the defendant was a mere conclusion and not testimony.

[1] The affidavit of G. B. Holman shows that upon receiving information that he did not have all the property belonging to Dr. Holman's estate he made an investigation, and found that there was a diamond ring, which he had loaned to the defendant. The words, "she admitted that Capers (Dr. Capers Holman), had only loaned it to her to wear as a friend," when considered in connection with the other parts of the affidavit, are not only an admission as to the correctness of the information revealed by the investigation, but likewise specify what that information was. His honor the presiding judge erred, therefore, in ruling that they constituted a mere conclusion.

Furthermore, the presiding judge erroneously exercised his discretion when he did not grant the continuance on account of the absence of Miss Cecil True. She lived in Columbia, and when she left the state failed to notify the plaintiff's attorney that she would not be present at the trial. There was no doubt that her testimony was very

material, and could not be supplied by other witnesses. Under the rulings of the presiding judge it was impossible for the plaintiff to win the case.

As the plaintiff's attorney was not guilty of any negligence whatever, justice required a postponement of the trial.

The opinion of Mr. Justice PURDY changes in part the result herein announced. The exceptions assigning error in the ruling as to continuance are overruled, and those in regard to the admissibility of certain testimony are sustained.

New trial.

COTHRAN, J., concurs.

PURDY, A. A. J. (concurring). [2] The plaintiff could have availed himself of the means provided for compelling the attendance of the witness, but failed to do so, and no matter how honestly he was convinced that the witness would attend without availing himself of such means, he took the risk of such nonattendance, and the interests of the public are superior to the private inconvenience growing out of it. The action of the trial judge in this respect should not be disturbed, unless there appears to be a clear abuse of discretion. His sole interest is to promote the public welfare and administer justice impartially. I do not think that there has been an abuse of his discretion in this case, and this exception should not be sustained.

[3] In reference to the affidavit of G. B. Holman a part of it is clearly incompetent. Had he been present, he would not have been allowed to have given the conversation between himself and the person who gave him the information, but could only state that he had received information from the wife of the proprietor of the hotel, and so much of that part of the affidavit would have been competent.

As to so much of the affidavit to which objection was made because it was a conclusion, I think that it is more than a conclusion, and is in the nature of a statement, and should have been admitted, and that his honor the trial judge erred in not admitting it, and that his judgment on this exception should be reversed.

Reversed.

FRASER, J. I dissent. This is an action in claim and delivery to recover a diamond ring. Dr. T. C. Holman was the owner of a diamond ring. Dr. Holman died, and after his death the ring was found by the plaintiff, the administrator of his estate, in the possession of Miss M. Eileen Farrell. Miss Farrell claims to be the owner of the ring, as a gift from Dr. Holman, and refused to deliver the possession. When the case was

called for trial, the plaintiff moved for a continuance, on the ground of the absence of a material witness. The motion was refused, and this refusal of a continuance forms the basis of the first exception.

I. The motion was in the discretion of the trial judge, and we do not see that he abused his discretion. There was no attempt to subpoena the witness until the day of the trial. The plaintiff claims that he did not know that the witness was going away. It was his duty to know that the witness was not going away, or to take no chances by issuing a timely subpoena. This exception should be overruled.

II. The plaintiff attempted to introduce a statement of an absent witness in which the witness stated that Miss Farrell had admitted that Dr. Holman had only lent the ring to her. This part of the statement was stricken out, because it was a conclusion and not statement of fact. His honor was right. One man might consider a statement an admission and another might not. There was no attempt to show the words used, and this exception should be overruled.

III. The third and last exception contains about two pages of Judge Whaley's charge and assigns two errors:

(a) "That said charge was prejudicial to the plaintiff, in that it conveyed to the jury the impression that the mere passing by manual delivery of personal property, from one person to another, would, in law, constitute a gift without other facts to establish the same." His honor charged:

"What were the circumstances surrounding it? If it was such that it was a gift, why, that gift cannot be rescinded. But if those circumstances were reasonably sure that there was a stipulation between the parties that it was to be a loan, then it would be a loan, and it would take something thereafter to turn it into a gift."

This assignment of error should not be sustained.

(b) The second assignment of error is that his honor charged the jury that the nature of Miss Farrell's possession was fixed at the time of delivery. This was more favorable to the plaintiff than he was entitled to. If Dr. Holman intended to give the ring to

Miss Farrell at the time of the delivery, then nothing that he could do subsequently could convert it into a loan. If he intended at the time of the delivery to make a loan and retained the title in himself, he could subsequently release his title and convert the loan into a gift. This assignment of error should not be sustained.

I think the judgment appealed from should be affirmed.

WATTS, J., concurs.

On Petition for Rehearing.

PER CURIAM. Petition dismissed.

GARY, C. J., and WATTS, FRASER, and COTHRAN, JJ., concur.

PURDY, A. A. J. I concur in the foregoing. The objection, if meritorious, should have been made before the hearing of the cause.

(118 S. C. 19)

W. H. MILES SHOE CO. v. WILLIAMS et al.
(No. 10766.)

(Supreme Court of South Carolina. Dec. 10. 1921.)

Appeal from Common Pleas Circuit Court of Lexington County; J. W. De Vore, Judge.

Action by the W. H. Miles Shoe Company against T. H. Williams and others. From an order striking out certain answers as sham and frivolous, defendants appeal. Appeal dismissed.

Eldred & Carroll, of Lexington, for appellants.
E. H. Blackwell, of Columbia, for respondent.

GARY, C. J. This is an appeal from an order striking out certain answers as sham and frivolous.

The ruling of his honor the circuit judge is fully sustained by the cases of Germofert Co. v. Castles, 97 S. C. 398, 81 S. E. 665, Interstate Ch. Cor. v. Farmington Cor., 100 S. C. 196, 84 S. E. 710, and Bank v. Fripp, 101 S. C. 185, 85 S. E. 1070.

Appeal dismissed.

WATTS, FRASER, and COTHRAN, JJ., concur.

(118 S. C. 102)

FREDERICK et al. v. CULLER.
(No. 10767.)

{Supreme Court of South Carolina. Dec. 10, 1921.)

1. Partition ⚡62—In partition answer denying complaint and alleging title in defendant puts plaintiffs' title in issue.

In action for partition, answer denying each and every allegation of the complaint not specifically admitted and alleging possession as owner in fee simple, and that plaintiffs have no right, title, or interest, puts in question the title of plaintiffs.

2. Slaves ⚡25—Evidence held sufficient to prove cohabitation of slaves as husband and wife.

Evidence held sufficient to prove cohabitation of slaves as husband and wife.

3. Marriage ⚡45—Certificate of marriage by minister not bound to keep record is not admissible.

If not bound to keep a record of marriage ceremonies, a minister's certificate is merely a statement of a private person, and not admissible in evidence.

4. Marriage ⚡45—If certificate of marriage is admitted, identity of parties named therein must be established.

In proving a marriage, if the certificate of marriage is admitted, the identity of the parties named therein must be established.

5. Slaves ⚡25—Cohabitation of man slave and woman slave before emancipation constituted lawful marriage.

Under the Enabling Act of December 21, 1865, and subsequent acts, the cohabitation of a man slave and a woman slave before emancipation and continuance of the relation at the time of the passage of the act constituted lawful marriage.

Appeal from Common Pleas Circuit Court of Orangeburg County; I. W. Bowman, Judge.

Action by Henrietta Frederick and others against W. C. Culler. From a judgment for defendant founded on the report of a master in chancery, plaintiffs appeal. Affirmed.

Following is the master's report and the judgment based thereon:

This action is brought by the plaintiffs, claiming to be certain of the heirs at law of George Baxter, deceased, for the partition of a tract of 30 acres of land situate in this county of which it is alleged the said George Baxter died seized and possessed, the plaintiffs alleging also that the defendant, W. C. Culler, has purchased the interest of Bettie Baxter, the widow of the said George Baxter in the said real estate, and that the plaintiffs and the defendants are tenants in common as to the same.

[1] The defendant makes answer denying each and every allegation of the complaint not specifically admitted in said answer, and alleges that he is in possession as the owner in

fee simple of the premises described in the complaint, and that the plaintiffs have no right, title, or interest therein. The answer of the defendant therefore puts in question the title of the plaintiffs to any interest whatever in said real estate.

I have held reference in the action and taken such testimony as was submitted by the respective parties, and they have been as fully heard as they desired to be; and, from the testimony taken, the facts are as follows:

George Baxter, late of the county of Orangeburg, in said state, departed this life intestate about the year 1914, and it is not questioned that he was the owner in fee simple at the time of his death of the real estate described in the complaint in this action, which contains 30 acres more or less and situate in Goodland township in said county and state. He left surviving him a widow, Bettie Baxter, and the plaintiffs contend that they are the lawful children and grandchildren of the said intestate, and are therefore entitled to their shares in the property in question as heirs and distributees of his estate, and they make no question as to the share of the widow, Bettie Baxter, in the property, and claim that the defendant is a tenant in common with them as to the said property to the extent of the share of the said Bettie Baxter therein. The defendant, however, is in the possession of said real estate, claims to be the owner of the same in fee simple, and, as has been stated above, he denies that the plaintiffs have any right, interest, or title in the property. In other words, he disputes the contention of the plaintiffs that they are the lawful children and grandchildren of the said George Baxter, and thus makes a clear cut issue as to the facts upon which they based their claims of interest in the property in question.

[2] The said George Baxter was born a negro slave and belonged to Jacob Stroman prior to the war between the states and up to the time of emancipation and during all this time he lived on the plantation of said Stroman. There was also a woman slave on Stroman's place and belonging to him called Dolly, and on the plantation of Gabriel Summers a woman slave named Bettie, who was the property of the said Summers. Bettie had four children, Henrietta, Aaron, Maxie, and Sam. The first three named are plaintiffs in this case. Sam died, leaving two children, Luther and George Baxter, who are also plaintiffs herein. Henrietta and Aaron were born during slavery, and Maxie and Sam after the war. George was the reputed father of all Betty's children named above. He was also the father of Frank, a son of Dolly, born in 1854. Dolly also had children previous to the birth of Frank, the reputed father of same being Jerry Guignard. There is no evidence, however, that Dolly lived with Jerry at any time, and, although George had several children by Bettie, it does not appear that he made his home with her or lived with her regularly. On the other hand, the testimony is full and to my mind conclusive that George lived continuously in the same house with Dolly from the time of the birth of their son, Frank, until her death, which was shortly after 1900. On the old plantation of their master, Jacob Stroman,

before and during the war and then after the war still on the same place until a home was given to them by the family of his old master, George and Dolly made their home together and also together moved to Orangeburg and resided there for several years.

It is understood that there was frequently no formal marriage ceremony among slaves, but the consent of the master to the cohabitation together of a man and woman slave was regarded sufficient to consider them as husband and wife. It appears, however, that in the case at bar there was a formal ceremony of marriage of George and Dolly at Rocky Swamp church some time before the birth of their son, Frank, which we have notice was in 1854, and there can be no doubt that during all the years that followed and down to the time of the death of Dolly they lived together as husband and wife, and that this relation was understood and recognized by all colored and white who knew them best. The above facts in reference to George and Dolly negative very largely the testimony taken in the case with reference to the claim of the plaintiffs as to the relationship of George and Bettie. That he had children by her is not denied, but the preponderating weight of the testimony is that they never cohabited together as husband and wife, and were not so regarded. Bettie lived in slavery on the plantation of her master, Gabriel Summers, until freedom, and during the same period, as we have observed, George lived on the place of their master, Jacob Stroman, cohabiting there with Dolly, who was recognized as his wife, and their son, Frank, lived with them from his birth until some time after the war. In this connection there is another circumstance which strikes me as suggestive. Bettie was known as Bettie Jones when a slave, and for several years after the war, and some of the witnesses in the case allude to her by that name in the testimony. When or how she got the surname Jones has not been explained. She had children by George Baxter during slavery and after the war, and, if she was a wife to George and so recognized, it is strange that she should have had the surname Jones, instead of Baxter, and that the fact that she bore the name of Jones when she had children by George Baxter strengthens the conclusions that, whatever may have been her relations with him, she was not his wife, and the fact that all this time George was cohabiting and living regularly with and in the same house with Dolly, who was commonly regarded his wife, stamped his relationship with Betty as altogether one of concubinage. But there is a claim made on behalf of the plaintiffs that Betty Jones was married to George Baxter some time after the war, and I have carefully considered the testimony bearing on this contention.

[3,4] One of the witnesses, M. J. Frederick, who is the son of the plaintiff Henrietta Frederick, was offered to prove, among other things, the contents of a certificate he says he obtained from Rev. S. B. Sawyer concerning such a marriage, it being stated that the said certificate was lost. This testimony was objected to at the time, but it was taken subject to the objection, and I then had doubts as to its admissibility and am now satisfied that it

should not be received. In the first place, it was not shown that the minister who furnished the certificate was not living. If still alive, he could have been examined as to the fact of the marriage, or another certificate, if admissible, could have been procured. If dead, the record of the marriage, if he was required to keep a record of the same, could have been obtained. If not bound to keep a record of same, his certificate, whether he was alive or dead, would have been merely the statement of a private person and would be rejected. 1 Green on Ev. § 498. And, even if the certificate was such a one as was admissible, the identity of the parties named in the same would have to be established. Three other witnesses touch upon this alleged marriage in their testimony. One of them, Edith Bell, says she was the sister of Bettie Jones, and that in slavery time she heard George ask the master and missus for her and they gave her to him, and she also states that he afterwards lived with Bettie, which is not in accord with the facts, as have been found above; and this witness also stated in the first part of her testimony that she did not know about the marriage of Bettie, and later on in her testimony remembered that it did take place on the Rutland place, where Bettie was living, but she does not mention who performed the ceremony or any of the circumstances attending the ceremony or any of the circumstances attending the marriage. Another witness, Amelia Woodward, testified that she was present at the marriage of George Baxter and Bettie Jones by Rev. S. B. Sawyer at his place the second year after emancipation, but that she did not know either of the parties to this marriage, and never saw them any time afterwards, which she qualified afterwards by a statement that she saw George Baxter afterwards coming by home going to Orangeburg. Eliza Johnson also testified on the subject of the marriage of George Baxter and Bettie Jones by Rev. S. B. Sawyer at his place about the second year after freedom, but she was a "don't know" witness, which impresses one on the reading of her testimony of nearly four pages. The testimony on this subject, it will be observed, is very weak. Betty's sister, Edith Bell, speaks of it as on the Rutland place, and the other witnesses say it was on the place of the officiating minister, Mr. Sawyer. As it is claimed that the marriage is two years after freedom, it appears to me that it can make no difference whether it was had or not. Should it be regarded as important, all the testimony is before the court. It has already been referred to that George Baxter died about the year 1914 and he left a widow also named Bettie, who married him after the death of Dolly, and is still living.

In February, 1915, an action was commenced in this Court by one A. C. Fulmer, against Bettie Baxter and Frank Baxter as the heirs at law and distributees of George Baxter, deceased, for the foreclosure of a mortgage of real estate alleged to have been executed by the said George Baxter in his lifetime, and which was then held by the said A. C. Fulmer, the said mortgage being a lien upon the said real estate mentioned and described in the complaint in this action, and such proceedings

were had in the said cause as resulted in a judgment of this court, which is dated August 23, 1915, whereby a sale was ordered and adjudged of the said mortgaged premises, the sale to be made by the judge of probate of this county as special referee upon the terms set forth in the said judgment order, and the proceeds of said sale were to be applied to the payment of the costs and expenses of said action and then to the payment of the plaintiff's mortgage debt. The said judgment order was thereafter modified upon the application of D. O. Herbert, and he was made a party defendant, and provision was made for the payment to him of a mortgage held by him upon the said property from the proceeds of the sale thereof, and the balance of the proceeds after the payments of all costs and the expenses and the mortgage debts of the said A. C. Fulmer and D. O. Herbert was directed to be held subject to the further order of the court. Under the said judgment order as so modified, a sale was held as directed therein, and at such sale the mortgaged real estate, being the same property involved in this action, was sold to the defendant, W. C. Culler, who complied and received a title for the said property. The proceeds of said sale were applied to the payment of the costs and expenses of said action, and then to the payment of the mortgage debts of Fulmer and Herbert above mentioned, and under further order of the court the surplus proceeds, after such payment, were paid to the said Bettie Baxter and Frank Baxter, one-third of the same to Bettie Baxter and two-thirds to Frank Baxter; they being regarded the heirs at law and the distributees of the before-mentioned George Baxter, deceased.

Having ascertained from the testimony what in my judgment are the facts of the case, it remains to indicate the conclusions which should follow, and these will be briefly stated.

The defendant being in possession of the real estate, the subject of the action, under a claim of title, makes it incumbent upon the plaintiffs to establish their title to the interest claimed by them in the property. This they have attempted to do, basing their claim upon the contention that they are the lawful children and grandchildren of said George Baxter, and, together with his surviving widow, the heirs at law and distributees of his estate. The question, therefore, is have they made good their contention. The case is one of the relics of slavery as it existed in this state over a half century ago, and the testimony in its sweep therefore goes back to the period of the war of the '60's and before that time.

[5] The emancipation of slaves which followed in the wake of that war made it necessary to adjust the social order prevailing among this people, and the Legislature of the state, looking to that end, promptly enacted into law the Act of December 21, 1865 (13 St. at Large, p. 291), by which the relations of husband and wife among persons of color was established, and those then living as such were declared to be husband and wife, and every colored child thereafter born was declared to be the legitimate child of his mother and

also of his father, if he had been acknowledged by such father.

This act and other kindred laws on the same subject naturally found their way into the courts for construction, and a line of decisions, beginning in 1877 with *Davenport v. Caldwell*, 10 S. C. 317, and coming down to *Mims v. Jones*, 107 S. C. 87, 91 S. E. 987, decided in 1916, has, it seems, pretty well settled the law of this state on the subject. A review of these cases would be interesting, but it is unnecessary for the purposes of this case. Sufficient to say that they enforced the provisions of the Enabling Act of December, 1865, and uniformly hold that, where slaves entered the relation of husband and wife before emancipation and continued to occupy such relations at the time of the passage of the Enabling Act of December, 1865, these relations became effective as constituting a lawful marriage, and their children were entitled to inherit as though born in lawful wedlock. Applying this rule to the case at bar, the preponderating weight of the testimony as it is early set forth in the foregoing statement of facts, it is against the contention of the plaintiffs, and they must fail in their action. They are the issue of concubinic relations of George Baxter and Bettie Jones, who was not known or recognized as his wife. On the other hand, it appears that George Baxter in slavery time was married in form to Dolly, a slave of the same master, and lived with her as his wife on their master's place until emancipation and afterwards until she died, and was living with her at the time of the act of December, 1865, and there was born to them, so living together as man and wife, a son, Frank Baxter, who lived with his parents, recognized by them as their son, until after the war, and is still living. The suggestion that is made that George Baxter was duly married to Bettie Jones fixed the time of such alleged marriage after the passage of the Enabling Act of December, 1865. If then had, under the circumstances of this case, it would have been void. *Mims v. Jones*, supra. It is unnecessary to consider the effect of the judgment and sale under which the defendant, W. C. Culler, purchased the real estate involved, as the main question in the case is determined against the plaintiffs, and is decisive of the case, and their complaint should be dismissed with costs. I submit herewith the minutes of the references held, together with the testimony taken.

M. J. Frederick, of Sumter, and Jacob Moorer, of Orangeburg, for appellants.

Wolfe & Berry, of Orangeburg, for respondent.

WATTS, J. For the reasons stated by A. C. Dibble, Esq., master, and confirmed by his honor Judge Bowman, it is the judgment of this court that the judgment of the circuit court be affirmed.

GARY, C. J., and FRASER and COTH-RAN, JJ., concur.

(89 W. Va. 659)

CITIZENS' NAT. BANK OF CONNELLSVILLE et al. v. HARRISON-DODDRIDGE COAL & COKE CO. et al. (No. 4059.)(Supreme Court of Appeals of West Virginia.
Nov. 29, 1921.)*(Syllabus by the Court.)*

1. Mortgages \S 244(3)—Vendor and purchaser \S 265(4)—Assignee of secured paper held to have preference over original creditor, subsequent assignee, and subsequent purchaser of security for value; "goods and chattels."

An assignment of a note or bond secured by a deed of trust, mortgage, or vendor's lien and described in the instrument is not recordable, and the assignee thereof, without having had it recorded, has superior right to the original creditor, a subsequent assignee and a subsequent purchaser for value, of the property on which it is secured, in the absence of conduct on the part of such assignee, amounting to an estoppel.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Goods.]

2. Mortgages \S 249(3)—Vendor and purchaser \S 265(4)—Deed of trust, mortgage, or vendor's lien held constructive notice of lien as against subsequent assignees and purchasers.

Until released by the assignee of such a note or bond, the deed of trust, mortgage, or vendor's lien is constructive notice of the lien by which it is secured, as against subsequent assignees and purchasers, notwithstanding a release thereof by the original creditor, and a court of equity will set aside such release on a bill by the assignee for enforcement of his equitable right to the lien.

3. Vendor and purchaser \S 230(3)—Subsequent purchaser of incumbered real estate must ascertain whether liens have been paid.

A subsequent purchaser of real estate incumbered by such an instrument mentioning and describing notes or bonds as being secured by it, in order to be protected from them in his purchase, must ascertain that they have been paid or surrendered, else he purchases the property at his peril.

4. Mortgages \S 231—Equitable title by implication need not be recorded under statute.

The statute requiring every contract for the conveyance of real estate or a term therein of more than five years, every deed conveying any such estate or term, and every deed of gift or deed of trust or mortgage to be recorded, Code, c. 74, \S 4 and 5 (secs. 3834, 3835), does not contemplate recordation of an acquisition of title or right in real estate arising only in equity by mere implication from an express contract of assignment of a chose in action, nor the assignment of a chose in action to which equity annexes such right. It is limited to contracts, deeds, and other instruments passing such title or interest by express contract or conveyance.

5. Mortgages \S 231, 249(3)—Assignment must be recorded; subsequent purchaser without notice takes precedence over assignee's right where release, but not assignment, recorded.

An assignment of a mortgage, as contradistinguished from an assignment of a note or bond mentioned, described, and secured in it, is a conveyance of real estate or a contract for such conveyance, the former, if by deed, and the latter, if not; and, for protection against the mortgagee and a subsequent purchaser of the mortgaged property for value, the assignee must cause it to be admitted to record. If, in the event of his failure to do so, the original mortgagee has released the mortgage, and the release has been recorded, a subsequent purchase of the property for value and without actual notice of the assignment takes precedence over the right of the assignee.

Appeal from Circuit Court, Harrison County.

Suit by the Citizens' National Bank of Connellsville and others against the Harrison-Doddridge Coal & Coke Company, the Commonwealth Trust Company of Pittsburgh, and others. Decree for plaintiffs, and last-named defendant appeals. Affirmed.

Neely & Lively, of Fairmont, for appellant.
P. J. Crogan, of Kingwood, and Starling, Higbee & Matthews, of Uniontown, Pa., for appellees.

POFFENBARGER, J. The decree complained of on this appeal determines questions of priority between the Citizens' National Bank of Connellsville, assignee of notes secured by a deed of trust, and also of an interest in a mortgage, on the one hand, and the Commonwealth Trust Company of Pittsburgh, a subsequent mortgagee of the same property on which the assigned debts were secured, on the other, in favor of the bank, and cancels releases of the deed of trust and prior mortgage executed by the original creditor.

The property involved is about 30,000 acres of coal made up of numerous small tracts consolidated, one-sixth of which was owned by Joseph E. Barnes, one-half by Alfred J. Cochran, and the residue by James R. Barnes. After Joseph E. Barnes and Cochran had incumbered their interests by the deed of trust and prior mortgage, all of the interests in the coal became vested in Josiah V. Thompson, who organized a corporation known as the Harrison-Doddridge Coal & Coke Company, and conveyed the entire body of coal to it. That company executed the subsequent mortgage upon the entire property to the Commonwealth Trust Company to secure an issue of bonds amounting to \$4,000,000.

On July 6, 1907, Joseph E. Barnes execut-

ed a mortgage by which he conveyed his undivided one-sixth of the property to Jasper Augustine to secure a debt of \$150,000, evidenced by the provisions and covenants of the mortgage, and not otherwise. No notes are mentioned or described in it. By a formal deed dated October 26, 1907, and properly acknowledged, Augustine assigned four-fifteenths of the mortgage to F. E. Markell, who is shown to have been the president of said bank, to secure notes executed by Joseph E. Barnes and others, on which he was liable as indorser and otherwise, amounting in the aggregate to about \$40,000, according to a recital in the instrument. Both the mortgage and assignment were duly recorded in Harrison and Doddridge counties, in which the coal was situated, long before the mortgage to the Commonwealth Trust Company was executed.

On December 11, 1907, Cochran conveyed his undivided one-half of the property to John Bassel, trustee, to secure his twenty notes for the sum of \$10,000 each, made and delivered to Augustine. This instrument was likewise recorded in both of said counties. On the day of its execution Cochran assigned four of the notes to Markell, as collateral security for the same notes for security of which the Barnes mortgage was partially assigned, two \$16,000 notes and one \$18,000 note, held by Markell for the bank, none of which have been paid, and all of which were duly presented for payment and protested for nonpayment.

Augustine, on January 14, 1910, executed releases of both the mortgage and deed of trust, which were recorded in both counties December 21, 1910. He swears he executed them by mistake, superinduced by misrepresentation and fraud on the part of Thompson, who, before the date of these transactions, acquired the property subject to the indebtedness thereon. Thereafter, July 26, 1912, Thompson conveyed it to the Harrison-Doddridge Coal & Coke Company, and on August 1, 1912, that company executed said \$4,000,000 mortgage.

As the notes secured by the deed of trust and the mortgage differ in point of status, the assignment of the former not having been recorded, while that of the other was, and the deed of trust being a mere security for a debt, while the mortgage vested the legal title to the property in the mortgagee, they will be separately considered.

[1] A debt secured by a deed of trust is a mere chose in action, wherefore an assignment thereof is not required to be recorded. It is not included in the terms "goods and chattels," as used in section 5, c. 74 (sec. 3835), of the Code. *Turk v. Skiles*, 45 W. Va. 82, 87, 30 S. E. 234; *Fleshman v. Hoylman*, 27 W. Va. 728; *Tingle v. Fisher*, 20 W. Va. 498; *Bank v. Gettinger*, 3 W. Va. 317; *Kirkland, Chase & Co. v. Brune*, 31 Grt.

(Va.) 126. In this state and Virginia this doctrine has been enunciated, in most instances, in controversies between claimants of the secured debt, or between the assignee and the debtor, but it may have some bearing upon the relative rights of the assignee and a purchaser of the property upon which the debt is secured, taking it after a release by the trust creditor.

The original trust creditor, after having assigned the debt, cannot validly release the lien and thus destroy the right of his assignee therein. *Fleshman v. Hoylman*, cited; *Taylor v. Godfrey*, 62 W. Va. 677, 59 S. E. 631; 2 *Jones on Mortgages*, § 957. This rule is applicable to judgments and mortgages securing payment of notes and bonds. *Crumlish v. Railroad Co. and Fidelity Co. v. Railroad Co.*, 32 W. Va. 244, 9 S. E. 180; *Clarke v. Hogeman*, 13 W. Va. 718; *First National Bank v. McGraw*, 85 W. Va. 298, 311, 101 S. E. 474.

[2, 3] Upon the inquiry as to the effect of a release by the original trust creditor upon the relative rights of the assignee and a purchaser of the property upon which the debt is secured, without notice of the assignment and in reliance upon the recorded release, the propositions above stated are not decisive nor strongly persuasive. The distinction between two claimants of the secured debt or the debtor and an assignee of the debt, on the one hand, and a purchaser of the property on which it was secured and an assignee, on the other, is very clear. The subjects of controversy or conflicting claims, though related, are entirely different. To the purchaser the recorded deed of trust is constructive notice, as is also the release. If the release is as broad in its scope as the deed of trust and specifically covers all of its possible elements, the purchaser ought to be protected by it, and this view is sustained by authority. The vendor's lien involved in *Turk v. Skiles*, 45 W. Va. 82, 30 S. E. 234, described no note for the unpaid purchase money, although one had been executed. The vendor holding that note joined the vendee in the execution of a deed of trust on the land, and thus released or conveyed his lien to the trustee and creditor in the deed of trust, and then assigned the note. Upon this state of facts, the trust creditor, being in law a purchaser, was held to have a right superior to that of the assignee of the note, and this conclusion was based largely upon the fact that the reservation of the vendor's lien did not mention the note, and, for that reason, gave no notice of its existence. The only debt disclosed by the record, the obligation evidenced by the deed, was released, and the purchaser was under no duty to look beyond it. Such also was the holding in *Bank v. Harman*, 75 Va. 604, notwithstanding the unmentioned note had been assigned before the vendor released his contract by a

sale of the land to a third party and a conveyance made by his vendee at his instance. If, in these cases, the existence of the notes had been disclosed by the record or otherwise and brought to the attention of the purchaser, the assignees would no doubt have been accorded right superior to that of the purchasers. That is the import of the argument found in the opinions, and it seems to rest upon sound reason. A purchaser is bound to take notice of everything the record discloses. When a lien secures notes or bonds, he knows they are assignable and may have been assigned. Hence, if he relies upon a release by the original creditor and looks no further, he closes his eyes to the probability that some of the notes or all of them may be unpaid and in the hands of assignees. The deed of trust is not, in such case, the primary evidence of the debt, and the release constitutes no certain proof that such evidence, the note or bond, has been surrendered. He must ascertain if the original creditor still has the notes or whether they have been paid.

In jurisdictions in which an assignment of the deed of trust or mortgage is not required to be recorded, the assignee of the note or bond, under such circumstances, is protected, and the purchaser takes the property subject to his right. *Bamberger v. Geiser*, 24 Or. 203, 33 Pac. 609; *Lee v. Clark*, 89 Mo. 556, 1 S. W. 142; *Trust Co. v. Shaw*, 5 Sawy. 340, Fed. Cas. No. 10,556; *Reeves v. Hayes*, 95 Ind. 521; *James v. Morey*, 2 Cow. (N. Y.) 246, 14 Am. Dec. 475; *Dixon v. Hunter*, 57 Ind. 278; *Hasselman v. McKernan*, 50 Ind. 441; *People's Trust Co. v. Tonkonogy*, 144 App. Div. (N. Y.) 333, 128 N. Y. Supp. 1055; *Quimby v. Williams*, 67 N. H. 489, 41 Atl. 862, 68 Am. St. Rep. 685; *Wilson v. Kimball*, 27 N. H. 300; *Singleton v. Singleton*, 60 S. C. 216, 38 S. E. 462. For other cases see 5 Ann. Cas. 339, note. An overwhelming weight of authority stands in favor of this proposition, and it follows that, in so far as the decree accords priority to the bank in respect of the four \$10,000 notes, it is correct and irreversible. Recordation of the assignment of the notes was not required and they were described in the deed of trust.

To bring the assignment of the mortgage within the requirements of the recording acts, and thus give force and effect to a recorded assignment thereof, the distinction between a mortgage and a deed of trust, in point of character, is relied upon. It is contended that, to give it effect as against a subsequent purchaser for value and without notice, the assignment must be recorded, because it is a conveyance of an estate in land, and therefore comes within the statute. Of course, a mortgage vests the legal title conditionally in the mortgagee, while a deed of trust puts it in a trustee. At common law, upon a default in payment of the amount

due upon a mortgage, the title vests unconditionally in the mortgagee, subject only to an equity of redemption in the mortgagor, of which the law takes no notice. In case of default in payment of a debt secured by a deed of trust, no change occurs in the title. The property merely becomes liable to sale under the power of sale conferred upon the trustee. This difference, substantial and important in some respects, does not justify a distinction between a mortgage and a deed of trust in the construction of the recording statute. A trust creditor is a purchaser within the meaning of that statute. The estate in the property is held by the trustee for his benefit, just as firmly and completely as a mortgagee would hold it. He has the equitable estate within his power, through the trustee's possession of the legal title, for his use. That amounts to an interest in the property, and an assignment of it as much a conveyance of land as is an assignment of a mortgage. An assignment by a trust creditor would not pass the legal title, as an assignment of a mortgage would, but conveyances of equitable title are as clearly within the recording acts as conveyances of legal title.

But for statutory modification of the common law respecting mortgages, the contention for distinction between assignments of deeds of trust and mortgages might be forceful in this connection. As to this, it is unnecessary to express an opinion, beyond the suggestion just made by way of argument. At common law a mortgagor, after having made default, vesting the legal title in the mortgagee absolutely and unconditionally, could not reacquire it by mere payment and the taking of a simple release. To obtain it, he was required to go into equity by bill for a decree restoring it by conveyance or otherwise, or to take a voluntary reconveyance from the mortgagee. *Jones, Mort.* (7th Ed.) § 889, citing numerous authorities. This is no longer necessary. By force of the statute (sections 1 to 4 of chapter 76, inclusive [secs. 3858-3861]), the estate is revested in the mortgagor by the signing and acknowledgment of a release. The effect of this is to make a mortgage a mere security for the mortgage debt. That the release statute applies to mortgages is clear. The lien of a mortgage is a lien "created by conveyance," mentioned in section 1. Section 4 provides that, by execution of the release, the lien "shall be discharged and extinguished, and the estate, of whatever kind, bound or affected thereby, shall be deemed to be vested in the former owner or those claiming under him, as if such lien had never existed."

There may be a difference between the assignment of the note or bond secured by a deed of trust or a mortgage and assignment of the lien itself, or rather of the deed of trust or mortgage. In the former case the note or bond is the immediate and direct

subject of the contract and the assignment carries the security, only in equity, not at law. The assignee obtains no legal interest in the land. He obtains a mere equitable interest in the mortgage, enforceable only in the name of the holder thereof. *Clark v. Havard*, 122 Ga. 273, 50 S. E. 108; *Kleeman v. Frisbie*, 63 Ill. 482; *Grassly v. Reinback*, 4 Ill. App. 341; *Warren v. Homestead*, 33 Me. 256; *Barnes v. Boardman*, 149 Mass. 106, 21 N. E. 308, 3 L. R. A. 785; *Olcott v. Crittenden*, 68 Mich. 230, 36 N. W. 41; *Bailey v. Winn*, 101 Mo. 649, 12 S. W. 1045; *McCamant v. Roberts*, 87 Tex. 241, 27 S. W. 86; *Jones, Mort.* (7th Ed.) § 818. In equity an assignment of the debt is an assignment of the security. *Machir v. Sehon*, 14 W. Va. 777, 783; *James v. Burbridge*, 33 W. Va. 272, 276, 10 S. E. 396; *Jenkins v. Hawkins*, 34 W. Va. 799, 12 S. E. 1090; *Tingle v. Fisher*, 20 W. Va. 497; *McClintic v. Wise*, 25 Grat. 453, 454, 18 Am. Rep. 694. There seems to be no exception to this rule, in the absence of a statute modifying the common law. It follows that an assignment of a mortgage carries the legal title, while an assignment of the note or bond secured by it does not. Likewise the assignment of a deed of trust may carry an equitable interest in the land, by direct contract, while an assignment of the note or bond secured by it merely vests right in the assignee to invoke the jurisdiction of a court of equity to give him the benefit of the security. However that may be, he certainly does not obtain the benefit of the security by direct contract. It comes to him by mere implication, and it may well be said that the recording statute embraces only direct conveyances, those made by express contract, and not those effected by implication. Here is found a very substantial ground for the view that an express assignment of the lien, the mortgage, or deed of trust is recordable, while an assignment of the note or bond it secures is not. Whether an express assignment of a lien is recordable and must be recorded for protection of the assignee against other creditors and subsequent purchasers for value and without notice seems never to have been a subject of inquiry or determination in this state or in Virginia.

[4] It falls within the terms of the recording statute. Section 4 of chapter 74 (sec. 3834) Code, makes every "contract in writing, * * * made for the conveyance or sale of real estate, or a term therein of more than five years," as valid as if it were a deed conveying the "estate or interest embraced in the contract." Section 5 of that chapter requires "every such contract, every deed conveying any such estate or term, and every deed of gift, or deed of trust or mortgage, conveying real estate or goods and chattels," to be recorded. Mortgages and deeds of trust convey estates and interests in

real estate and goods and chattels. Assignments thereof pass them from the creditors to third parties or strangers to the original transactions, either by deed or informal contract. For this proposition there is an abundance of authority in which similar statutes of other states have been construed. *Torrey v. Deavitt*, 53 Vt. 331; *Williams v. Pelley*, 96 Ill. App. 346; *Bank v. Anderson*, 14 Iowa 544, 83 Am. Dec. 390; *Bowling v. Cook*, 39 Iowa, 200; *Bridge v. Shedd*, 82 Iowa, 540, 48 N. W. 933; *Swasey v. Emerson*, 168 Mass. 118, 46 N. E. 426, 60 Am. St. Rep. 368; *Huitink v. Thompson*, 95 Minn. 392, 104 N. W. 237, 111 Am. St. Rep. 476, 5 Ann. Cas. 338; *Bacon v. Van Schoonhoven*, 87 N. Y. 446; *Decker v. Boice*, 83 N. Y. 215; *Henniges v. Paschke*, 9 N. D. 489, 84 N. W. 350, 81 Ann. St. Rep. 588; *Donaldson v. Grant*, 15 Utah, 231, 49 Pac. 779. In my opinion some of the decisions just cited go too far. They make a merely implied assignment of the lien recordable. That cannot possibly be brought within the terms of the statute. I should say, too, that, if the mortgage is expressly assigned and it secures notes or bonds mentioned in it, a subsequent purchaser is not protected, as against a subsequent assignee of the notes or bonds. He cannot rely upon the release of the mortgage by the assignee, without requiring production of the notes. But, if the mortgage, deed of trust, or vendor's lien mentions no notes or bonds and merely secures a debt evidenced by it and not otherwise, the assignee, shown to be the owner thereof by his recorded assignment, may effectually release it, although there be unmentioned notes representing the debt, and thus give a subsequent purchaser relying upon the release, and ignorant of a second assignment, a preference over the second assignee. The rule applicable between a first assignee and a purchaser in such case should apply to a purchaser and a second assignee.

For the distinction between an assignee of the lien and an assignee of notes described in it, as regards right respecting an innocent purchaser of the property, *Turk v. Skiles* and *Bank v. Harman*, cited, may properly be invoked as authority. The following observations made by Judge Staples in the latter case were approved by Judge Brannon in the former:

"If the deed from M. G. Harman to Asher W. Harman had mentioned the existence of a negotiable note, it might have become the duty of Mrs. O'Toole, before purchasing, to call for its production; the failure of the parties to produce it might justly have led to a strong suspicion that the note had passed out of the possession of Michael G. Harman into the hands of a third party. Mrs. O'Toole having constructive notice of the lien, would have the like notice of the negotiable note, and she would not be allowed to close her eyes to the fact thus communicated. But it will

be observed that the deed makes no reference to any note, or to any personal obligation of the debtor whatever. The most prudent and cautious inquirer would not have supposed that any such instrument existed. Certainly it cannot be said that persons were bound at their peril to suspect or presume it."

These two cases do not judicially hold that the purchasers would not have been protected, if the notes had been mentioned in the deeds, nor do we, for the facts did not warrant or call for application of the rule indicated, nor do they here. But they hold that the purchaser is protected, when the note or bond is not so mentioned, if the apparent owner of the lien has released it.

[6] In the case of the mortgage involved here there was an assignment of the lien itself by a formal deed. That carried an estate or interest in the land, wherefore, as has been shown by ample authority, the deed of assignment was recordable, and, if not recorded, would have been void as against a subsequent purchaser for value and without notice, and the release by Augustine good against the bank, in the controversy between it and the trust company. But it was recorded and constituted constructive notice to the trust company that the bank was the owner of four-fifteenths of the mortgage, in consequence of which Augustine could validly release only the remaining eleven-fifteenths thereof. This conclusion makes obvious the correctness of the decree as to the mortgage.

Perceiving no error in the decree either as to the notes or the mortgage, we will affirm. Affirmed.

(59 W. Va. 693)

FISHER v. TETER et al. (No. 4191.)

(Supreme Court of Appeals of West Virginia. Dec. 6, 1921.)

(Syllabus by the Court.)

1. Wills 728, 736—Rights of devisees under prior oil and gas lease stated.

The rules and principles announced in *Pittsburg & West Virginia Gas Co. v. Ankrom*, 83 W. Va. 81, 97 S. E. 593, 5 A. L. R. 1157, and *Musgrave v. Musgrave*, 86 W. Va. 119, 103 S. E. 302, are reaffirmed and applied to the facts alleged in the bill in this case.

2. Wills 741—Complaint held not to show that defendants fraudulently prevented drilling on plaintiff's land.

The principles of those cases are controlling in this case, notwithstanding the general allegations of fraud and collusion between the operating lessees and the owners by devise or partition of lots adjoining the lands of plaintiff. Applying the rules of pleading announced in *Hall v. South Penn Oil Co.*, 71 W. Va. 82, 76 S. E. 124.

Poffenbarger and Lynch, JJ., dissenting.

Appeal from Circuit Court, Lewis County.

Bill by Margaret L. Fisher against Philander K. Teter and others. Decree for defendants on demurrer, and complainant appeals. Affirmed.

Herbert M. Blair and Linn Brannon, both of Weston, for appellant.

Charles P. Swint and Robert L. Bland, both of Weston, A. B. Fleming, Charles Powell and Kemble White, all of Fairmont, and Edward A. Brannon, of Weston, for appellees.

MILLER, J. Plaintiff is the sister of the defendants Philander K. Teter and Jesse H. Teter, and all are devisees and heirs of David Teter, who died testate in 1912. By his will the testator devised his farm of 528.97 acres in Lewis County, as follows:

"To my daughter Margaret Lancaster Fisher the tract of fifty acres known as the Jesse Moneypenny tract adjoining lands of E. C. Fisher. I also will to Margaret Lancaster Fisher another fifty acres to be cut off my home farm beginning at a south east corner, near the present residence of John Horton, thence running along the old fence line a southerly course eight rods, thence to the top of the hill on Neds run so as to contain fifty acres. Making a total to her 100 acres in the two tracts. After deducting said fifty acres from the right hand side of road.

"I will and bequeath to my son Jesse Hamilton all of the lands on the right hand side of the Murphys creek as you go up the creek. And all of the lands on the left hand side as you go up Murphys Creek to my son Philander K. Teter upon a survey it is found that that part of the home farm willed to Jesse H. contains a greater number of acres than the part willed to Philander K. then Jesse H. is to pay to Philander K. twenty dollars per acre within six twelve and eighteen months in three equal payments."

The will was dated July 13, 1901. Prior to that date, namely, on August 18, 1899, the said David Teter and A. L. Teter, his wife, executed and delivered to Andrew Edmiston a lease on said larger tract for oil and gas, bounding it by the lands of adjoining owners, and further describing it as containing 512 acres, more or less, and containing the covenants and agreements usually contained in such leases, for the term of five years and so long thereafter as oil and gas might be produced in paying quantities, which lease came by assignment to the Philadelphia Company of West Virginia, the Hope Natural Gas Company, and the South Penn Oil Company, the present owners thereof.

The bill alleges that shortly after the death of said testator Philander K. and Jesse H. Teter procured a surveyor to make a survey and a plat of the entire tract so devised, and designated thereon the several lots allotted to each of the said devisees by said

testator, which plat was placed on record by them, a copy of which is exhibited with the bill; that subsequently to the making of said survey and plat, and in accordance therewith, division fences were built and continuously since then have been maintained along the boundary lines between the several parcels so designated and held by the devisees under the terms of the will, and so definitely fixed by said survey and plat; and that the devisees aforesaid thereupon assumed and took exclusive possession and control of their respective parcels, and have since so occupied the same as their own.

The bill alleges further that said will was executed before any development of said land for oil and gas, and that to construe said will so as to permit two of the devisees thereunder to consume and enjoy the fruits of said leasing would be contrary to the manifest purpose of the testator, and repugnant to the intention on his part to dispose of said tract of land among his devisees and according to the nature of an indulgent and considerate father.

The prayer of the bill is for an accounting to plaintiff by said Philander K. and Jesse H. Teter, and that they pay over to her her proper share of all gas well rentals or royalties collected or secured by them, or either of them, by reason of or from any and all gas wells drilled or operated on any part of said land, and that her right to share in the future in the rents and royalties and in all the oil and gas produced from said lands, under said lease, be adjudicated and determined.

It is conceded that the decree below sustaining defendants' demurrer to and dismissing her bill must be affirmed, unless we should determine to overrule prior decisions, or should consider other allegations thereof, to be now referred to, take this case out of the rule of those decisions, and constitute sufficient ground for distinguishing it from the cases relied on by demurrants, and upon which the court below based its decree.

[1] In *Pittsburg & West Virginia Gas Co. v. Ankrom*, 83 W. Va. 81, 97 S. E. 593, 5 A. L. R. 1157, and *Musgrave v. Musgrave*, 86 W. Va. 119, 103 S. E. 302, we distinctly decided, that where land subject to a prior lease for oil and gas has been partitioned, or devised in severalty by a testator, as in the case at bar, the owner of each of the subdivisions from which oil or gas is produced is entitled to recover the rents and royalties arising from the subdivisions owned by him. Those cases received thorough consideration by the court, after elaborate arguments by counsel; and nothing that we could now say in support of the principles there established would add to or detract from the arguments advanced and maintained therein; and our opinion is to reaffirm the points adjudicated therein. Those

cases are conclusive of this case unless, as already suggested, something has been alleged by plaintiff to take the case from under the principles of those cases.

[2] The allegations relied on we do not think show any fraud or collusion on the part of the defendants affecting the rights of plaintiff. They are as follows:

"Plaintiff further says that no drilling whatever has been done by any of the said operating companies on the parcel of said Teter tract allotted to her, although plaintiff's said parcel is covered by said lease and is held thereunder to the exclusion of plaintiff and all persons with whom she might contract for the drilling and exploration of her said parcel for oil and gas; and plaintiff here alleges that, although she, and those acting for her, have requested said Hope Natural Gas Company and said Pittsburg & West Virginia Company, and its predecessors, the Philadelphia Company of West Virginia, to test plaintiff's said parcel for oil and gas by drilling and completing wells thereon, they, and each of them, have declined and refused so to do on the ground that said Teter tract had been adequately and sufficiently drilled and developed by the existing wells on said parcels of said Philander K. Teter and Jesse H. Teter.

"Plaintiff further says that, although she is in no wise responsible therefor, the operations of the said Companies engaged in developing said land for oil and gas have been restricted and confined to a limited portion of same and have not been such as to adequately and properly test and explore for gas or oil the entire Teter tract bound by said lease without regard to the surface lines and boundaries defining and separating the parts severally held by said Philander K. Teter, Jesse H. Teter and plaintiff, but that in drilling said Teter tract of land said operating companies have persistently and unalterably pursued a policy of confining the drilling to the parts of said tract of land held by said Philander K. Teter and Jesse H. Teter.

"Plaintiff further says that said policy of limiting the drilling to the portions of said land so devised to said Philander K. Teter and Jesse H. Teter, as aforesaid, has been adopted and consistently adhered to by said operating Companies, as plaintiff is informed and believes, as a result of various arrangements and understandings from time to time entered into and had between said Philander K. Teter and Jesse H. Teter, co-operating with each other in the matter, or acting independently, and said operating Companies, or their officers and agents, whereby said Philander K. Teter and Jesse H. Teter have contrived to have said drilling confined and restricted, as aforesaid, and that pursuant to further arrangements and understandings entered into and had between the said Philander K. Teter and Jesse H. Teter and the said operating Companies, or their officers and agents, said Philander K. Teter and Jesse H. Teter have, until a comparatively recent date, contrived and managed to have paid to them, and have been taking, appropriating and enjoying all of the gas well rentals and royalties paid for the gas wells on said Teter tract to the exclusion of plaintiff and in total disregard of her rights therein."

What the rights of plaintiff may be against the operating companies, if the facts be as they are alleged in the first and second paragraphs of the bill quoted, we need not say, for the question is not presented. But it may be said without hesitancy that the failure or refusal of the lessees to perform any of the covenants, express or implied, in the lease can constitute no ground upon which plaintiff can lawfully demand an accounting by the other devisees for the rents and royalties received, or produced from the land allotted to them by the testator. Nor will the fact alleged in the third paragraph, if true, that the policy of the operating companies in confining their operations to the land devised to Phllander K. and Jesse H. Teter, respectively, which plaintiff on information and belief alleges to be the result of various arrangements and understandings from time to time entered into and had between them, co-operating with each other, or acting independently, and said operating companies, their officers and agents, whereby they contrived to have the drilling confined and restricted to their land, to the exclusion of plaintiff's land, entitle plaintiff to the relief she is seeking by her bill.

It is not alleged that plaintiff's land has sustained any drainage of oil or gas from the operations on the parcels devised to her brothers. The bill contains no allegation as to the location of the wells drilled on their land with reference to her land. It is not unlawful for one adjoining owner to persuade a lessee to first drill and develop his land subject to such common lease, provided no injury is done to the land of the other; and certainly he could not be compelled to account to the unsuccessful contestant for the right of priority in development for oil or gas produced on his land by such prior development, unless, as said, there resulted unlawful drainage and fraud therein injuriously affecting the land of such adjoining owner.

The case here presented is unlike that presented in *Steel v. American Oil Development Co.*, 80 W. Va. 206, 92 S. E. 410, L. R. A. 1917E, 975; *Grass v. Big Creek Development Co.*, 75 W. Va. 719, 84 S. E. 750, L. R. A. 1915E, 1057; and *Jennings v. Southern Carbon Co.*, 73 W. Va. 215, 80 S. E. 368. The first two of these cases were actions at law against the lessee for damages for failure to develop resulting in damage. The last case was a suit in equity for failure to develop, and for a cancellation for breach of the implied covenant to properly develop the leased land, in which case we reversed the decree below sustaining the demurrer to the bill, and remanded the cause for further proceedings. In the case of *Hall v. South Penn Oil Co.*, 71 W. Va. 82, 76 S. E. 124, the bill which sought cancellation of a lease and did contain charges of drainage and fraud, was

held bad because too general and as alleging mere conclusions of law and not facts sufficient to sustain the bill. In *Steel v. American Oil Development Co.*, supra, we held that a lessor in an oil and gas lease may maintain a suit in trespass on the case to recover damages for injury sustained by him because of the failure of the lessee to drill wells necessary to save the oil on his land and prevent it from being drained by wells on adjoining land. May not the relief suggested by these authorities be invoked where the lessee of an entire tract fails to develop the whole to the extent necessary to protect the rights of all owners, or parts thereof, subject to the provisions of the lease? This is a question mooted, but not decided.

For these reasons we affirm the decree sustaining the demurrer and dismissing the bill.

POFFENBARGER, J. (dissenting). For reasons elaborately stated in *Campbell v. Lynch*, 81 W. Va. 374, 94 S. E. 739, L. R. A. 1918B, 1070, and in my dissenting opinion in *Musgrave v. Musgrave*, 86 W. Va. 119, 124, 103 S. E. 302, I am unable to concur in the decision of this cause, and I respectfully dissent. Regarding the facts involved in *Pittsburg & West Virginia Gas Co. v. Ankrom*, 83 W. Va. 81, 97 S. E. 593, 5 A. L. R. 1157, and *Musgrave v. Musgrave* as constituting exceptions to the general principles expressed by me, as aforesaid, and this case as falling within those principles, Judge LYNCH also dissents, and authorizes me to say for him that he regards the decision in *Campbell v. Lynch* as being correct and the views expressed by me in *Musgrave v. Musgrave* as being generally sound and applicable in ordinary cases of the kind here involved.

I cannot forego this opportunity to make some observations respecting the possibility of relief to the plaintiff and others similarly situated in some form other than that sought by the bills in this and the other cases above referred to. Her situation is admittedly one of hardship. All of the decisions enunciating the rule applied here by a majority of the court concede this. When it is pressed upon the attention of the courts adopting the rule, they either make a feeble and unsatisfactory response or suggest remedy in some other form without indication of its character.

Could this plaintiff, upon the facts alleged in her bill, showing the rankest kind of discrimination against her and deprivation of the use of her land, in so far as it is useful for oil and gas production, compel the lessee to drill wells on it? Certainly not. *Ammons v. South Penn Oil Co.*, 47 W. Va. 610, 35 S. E. 1004; *Harris v. Oil Co.*, 57 Ohio St. 118, 48 N. E. 502; *Koch Ballet's Appeal*, 93 Pa. 434; *McKnight v. Kreutz*, 51 Pa. 232; *Paschall v. Passmore*, 15 Pa. 295; *Harness v. Eastern Oil Co.*, 49 W. Va. 232, 38 S. E. 662; *Colgan*

v. Oil Co., 194 Pa. 234, 45 Atl. 119, 75 Am. St. Rep. 695; Young v. Oil Co., 194 Pa. 243, 45 Atl. 121. Could she have the lease canceled as to her land? Emphatically, no. McGraw Oil Co. v. Kennedy, 65 W. Va. 595, 64 S. E. 1027, 28 L. R. A. (N. S.) 939; Core v. Petroleum Co., 52 W. Va. 276, 43 S. E. 128; Kellar v. Craig, 126 Fed. 630, 61 C. C. A. 366. See, also, the cases cited in support of the answer to the former question.

Can she recover damages for failure to drill her land or failure so fully to develop the whole lease as to test her part of the land? No. The difficulties she would have to overcome in an effort of that kind are disclosed in Grass v. Big Creek Dev. Co., 75 W. Va. 719, 84 S. E. 750, L. R. A. 1915E, 1057, in which it is held that—

If "the operator exercises a sound and honest judgment, and not an unreasonable or arbitrary one, in continuing operations for mineral oils, he has faithfully discharged the duties implied devolving upon him by virtue of the lease, although he may not exercise that high degree of diligence which the exaggerated expectations of the landowner may demand."

If she could, the remedy would be inadequate. No man, no jury, could more than approximate the damages, and it may well be doubted whether approximation is attainable in any action for damages for breach of a covenant to drill for oil or gas. Nothing but the drill can determine whether any piece of land has oil or gas in it, and the lessee with his experts can practically demonstrate that there is none in any given parcel of land not drilled.

In a case of this class, the lessee cannot be required to treat each of the separate parcels of land covered by his single lease as a separate lease, and to protect all of the lines by offset wells. Any judgment or decree founded upon such a theory would so define and apply the law as to impair the obligation of the lease contract, in violation of provisions of both the federal and state Constitutions. When made, his lease required him to protect only the exterior boundary lines, limited in number, ordinarily, to four or five. If he is required to protect a dozen or more interior lines made in dividing the land, in addition to the exterior ones, his obligation is multiplied several times, and the increased obligation is based upon no act or assent of his. His lease conferred right to take out all the oil and gas, burdened with an obligation to protect exterior lines only. That right would be partially denied him if he were required to protect interior lines also. The value of the right originally conferred by the lease is depreciated proportionately with the extent of the burden imposed upon him by the construction necessary to make each parcel vir-

tually a separate lease. His right is the correlative of the lessor's obligation. When it is diminished by construction the obligation is correspondingly reduced, and the right of the lessor enlarged. A clearer case of impairment of the obligation of a contract could hardly be imagined.

The rule adopted by the majority opinion makes the owners of the several parcels into which the leased tract has been divided separate lessors of their respective parcels. They are as separate, distinct, and strange to one another as if the parcel of each was the sole and only subject-matter of a separate lease executed by him. Each owns exclusively the oil and gas in his own parcel, and has no interest direct, indirect, or collateral in the oil or gas of any other tract. Consistency with this theory requires of its adherents the further holding that the lessee, thus holding separate leases, shall protect the interior division lines as well as the exterior lines, in cases of production in such close proximity thereto as will cause drainage. If not, he may take out all of the oil and gas from several small tracts into which the whole has been divided, by means of one or more wells located on one of them, and so give the owner of that one all of the minerals in all of the parcels, except the royalty. In the case of a lease of an oil-bearing tract divided by partition, subject to the lease, among four owners, the lessee must either drill four wells, where one would do, or give the owner of one parcel the minerals in all of them. It requires him to go beyond the obligation originally imposed upon him by the lease or to rob three owners for the benefit of one, or, if there is corruption between him and that one, for the benefit of himself and the favored lessee.

To say the lessee of the entire tract may be required to develop and work it as a whole, with diligence, by virtue of an implied covenant, or incur liability in damages for failure to do so, does not cover the entire situation, and that is the utmost right against him that seems to have any real basis in judicial suggestion. He can diligently prosecute his enterprise within the meaning of this suggestion, without protection of interior division lines, and to the ruin of some of the separate owners within the exterior lines. He can comply with the implied covenant without such protection; but, to deal fairly and justly with all of the lot owners, and to maintain the relation of separate lessee to each of them, he must go beyond that covenant, to the extent of protecting the interior lines. Requirement of that on his part would work a radical and fundamental change in his contract, amounting to an impairment of its obligation.

(152 Ga. 262)

**FARMERS' WAREHOUSE CO. v. FIRST
NAT. BANK OF MILLEDGEVILLE.**
(No. 2445.)

(Supreme Court of Georgia. Nov. 17, 1921.
Rehearing Denied Dec. 16, 1921.)

(Syllabus by the Court.)

1. Contracts — 37 — Secretary and manager held competent to witness instrument executed by corporation.

The secretary and manager of a corporation, who owns no stock in the corporation and is not otherwise beneficially or pecuniarily interested therein, is qualified to witness an instrument of writing to which the corporation is a party. *Citizens' Trust Co. v. Butler*, and cases cited, 152 Ga. —, 108 S. E. 468.

2. Chattel mortgages — 60 — Crops — 1 — Replevin — 4 — Not maintainable against cropper for crops attached to the soil; bill of sale to growing crop must be attested by two witnesses including official witness.

"Agricultural crops raised by a 'cropper' do not become personalty until they are detached from the soil; and the owner of the land cannot employ the remedy provided in the Civ. Code 1910, § 4483, generally applicable for the recovery of the possession of personalty, for the purpose of recovering from the 'cropper' possession of the crops raised by him, while they remain attached to the soil." *Williams v. Mitchem*, 151 Ga. 227, 106 S. E. 284; Civ. Code 1910, § 3617; *Pitts v. Hendrix*, 6 Ga. 452; *Frost v. Render*, 65 Ga. 15; *Bagley v. Columbus So. Ry. Co.*, 98 Ga. 626, 25 S. E. 638, 34 L. R. A. 286, 58 Am. St. Rep. 335. See, also, 8 R. C. L. 360, 371, §§ 6, 16; *Cobb's Law of the Farm*, 13. (a) A bill of sale to the immature and growing crop, in order to be entitled to record, must have been attested by two witnesses, one of whom is an official witness. Civ. Code 1910, § 3257.

3. Warehousemen — 17 — One receiving warehouse receipts for cotton to apply on notes held bona fide purchaser as against vendee in bill of sale.

Applying the principle ruled in headnote 1, and under the allegations of the petition, which are admitted by the demurrer to be true, the plaintiff in the lower court was a bona fide purchaser for value of the cotton and obtained title thereto as against the vendee in the bill of sale.

4. Pleading — 220 — Judgment on demurrer held final determination when it was agreed that court should determine rights of parties.

Where parties to a controversy pending in court enter into the following agreement relatively to the issues involved, to wit, "that the court in his decision on the demurrer provide in his judgment to whom the cotton [in controversy] belongs and the rights of the parties relatively thereto be determined," this is a submission to the court upon the facts alleged in the equitable petition and the issue made by the demurrer of the question of title to the property, and his determination of that question, a judgment being rendered accordingly,

is a final determination of the cause upon its merits.

5. Demurrer properly overruled.

The trial judge did not err in overruling the general demurrer to the petition, and, under the agreed statement of facts, in decreeing the title to the cotton in question to be in the plaintiff.

George, J., dissenting.

Error from Superior Court, Baldwin County; J. B. Park, Judge.

Suit by the First National Bank of Milledgeville against the Farmers' Warehouse Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The First National Bank of Milledgeville, Ga., hereinafter referred to as the bank, brought an equitable petition against the Farmers' Warehouse Company, hereinafter referred to as the warehouse company, and Samuel Evans Sons & Co., hereinafter called Evans & Co., for injunction and other relief. The petition alleged in substance the following: On March 2, 1920, the bank advanced to W. P. Ennis \$1,042.79, and took as security therefor the promissory note of Ennis payable to the bank, due October 1, 1920. C. W. Ennis, the father of W. P. Ennis, indorsed and guaranteed payment of the note. At the time the bank advanced the money to Ennis it knew that he was a farmer engaged in growing cotton and other crops in Baldwin county, and the money was advanced to him on the faith of the crops as well as on the indorsement of C. W. Ennis; but the bank did not know at the date of the note what lands W. P. Ennis was cultivating. On September 20, 1920, W. P. Ennis delivered to Evans & Co., for the bank, two bales of cotton; and on October 4, 1920, Ennis delivered to Evans & Co., for the bank, six bales of cotton. Receipts were issued to W. P. Ennis on the respective dates for the eight bales of cotton, and were not negotiable. Immediately after the delivery of the receipts to Ennis by Evans & Co., Ennis delivered them to the plaintiff, with instructions to credit the cotton on the indebtedness; and the receipts are now, and have been since that date, in the possession and custody of the plaintiff. Plaintiff accepted the cotton as a credit on its note, but agreed with Ennis as a matter of accommodation to him, with the hope that the price of cotton would advance, to hold the cotton and convert it into cash, which agreement has been fully complied with. Plaintiff "alleges positively and unequivocally that it accepted said cotton as a payment and credit on said note, and to the extent of the value of said cotton relieved the said W. P. Ennis of all other and further liability on account thereof." Plaintiff is a bona fide purchaser of the cotton, without any notice or knowledge of the facts hereinafter set out.

On May 29, 1920, W. P. Ennis, without any knowledge on the part of the plaintiff or his indorser, C. W. Ennis, executed and delivered to the warehouse company an instrument purporting to be a bill of sale upon his entire crop, including cotton raised or to be raised during the year 1920, cultivated by him or by his direction on lands of Mrs. W. P. Ennis; the instrument purporting to convey the title to all of the crops into the warehouse company. The instrument was executed in the presence of, and attested by, R. L. Wall, a notary public of Baldwin county, and was recorded in the office of the clerk of the superior court on June 1, 1920. On June 22, 1920, W. P. Ennis, without the knowledge of plaintiff or C. W. Ennis, executed and delivered another instrument purporting to be a bill of sale, and purporting to convey the title to the same crops covered by the first instrument to the warehouse company. The last instrument was also executed in the presence of, and attested by, the same notary public, and was recorded June 23, 1920. The express consideration of the first instrument was \$391, and that of the second instrument was \$200. After the cotton was delivered by W. P. Ennis to Evans & Co., on or about October 12, 1920, the warehouse company sued out bail trover for the eight bales of cotton against Evans & Co., returnable to the January term, 1921, of the superior court of Baldwin county, and at the same time made an affidavit for bail for the cotton. Copy of the suit was served on Evans & Co., and the warehouse company is demanding that Evans & Co. give the trover bond required by law. Evans & Co. have no interest in the cotton except in so far as insurance and storage charges are concerned, and lay no claim whatsoever to the cotton. The title to the cotton is in the bank, and under the law it has no right to intervene in the trover suit or to give bond for the production of the property or for the eventual condemnation money. Inasmuch as Evans & Co. have no interest in the cotton and no reason to contest the claim of the warehouse company, plaintiff will be remediless unless a court of equity intervenes. As against the bank the bills of sale executed to the warehouse company do not constitute any notice, and the records of the same are not notice to the bank, for the reasons: First, that the instruments were executed in the presence of, and attested by, Wall, who at the time of their execution was the secretary and treasurer and general manager of the warehouse company, in full control of its business; and, second, that if the bills of sale were valid at all as against the bank, a bona fide purchaser without notice, still their record is not constructive notice to the bank, for the reason that they purport to convey realty, and therefore, to entitle the instruments to record, it was necessary for them to be executed in the presence of two witnesses, one

of whom should be a notary public or a justice of the peace. Even if entitled to record so as to be constructive notice to future purchasers, the instruments of the character heretofore set out cannot operate as notice, for the reason that it would be impossible for any future purchaser to ascertain from an examination of the record that mature, ginned, and baled cotton was covered by the description in the instruments. Plaintiff had no notice, either actual or constructive, of the existence and execution of the instruments, and it in good faith bought from W. P. Ennis the cotton and credited him with the same upon his note, and to that extent relieved him of further liability thereon, the exact amount to be determined when the cotton is placed upon the market; and the plaintiff relieved, to the extent of the value of the cotton, the indorser on the note, C. W. Ennis. The plaintiff prayed: First, that the warehouse company be enjoined from proceeding further with the trover action until the further order of the court; second, that Evans & Co. be enjoined from giving any bond and from changing the present status of the cotton; third, that the court decree the title to the cotton to be in plaintiff.

The defendant filed a general demurrer to the petition, on the ground that it set forth no cause of action and showed no ground for equitable relief. It was agreed between counsel for all parties that the bail-trover suit, referred to in the petition, be merged into the present suit; that W. P. Ennis, the warehouse company, Evans & Co., and the bank are parties hereto; and that the court in his decision on the demurrer provide in his judgment to whom the cotton in controversy belongs, and the rights of the parties relatively thereto be determined, with the right of all parties to except. It was further agreed that R. L. Wall is not a stockholder in the warehouse company, but is its secretary and treasurer and general manager, and was only that at the time of the execution of the bills of sale by W. P. Ennis; and that this agreement be considered and made a part of the petition in this case. The court, after reciting the above agreement, overruled the demurrer and passed the following order:

"Ordered further that the title to the eight bales of cotton in question be and the same is hereby declared to be in the First National Bank of Milledgeville, Ga."

To the judgment the Farmers' Warehouse Company excepted.

D. S. Sanford and Sibley & Sibley, all of Milledgeville, for plaintiff in error.

Allen & Pottle, of Milledgeville, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur, except GEORGE, J., who dissents.

(152 Ga. 251)

HARPER v. HESTERLEE. (No. 2375.)(Supreme Court of Georgia. Nov. 17, 1921.
Rehearing Denied Dec. 18, 1921.)*(Syllabus by the Court.)*

1. Deeds \S 111—Not extended beyond terms because of grantee's belief or grantor's unexpressed intention.

The expressed description in a deed to realty will not be extended beyond its terms because of a belief by the holder under it that it covered land not embraced in that description, nor because of any unexpressed intention in the mind of the grantor that it should cover land not described in the deed itself, there being no suggestion of mistake in the drawing of it. *Williamson v. Tison*, 99 Ga. 791, 26 S. E. 766.

2. Evidence \S 23(2) — Court takes judicial notice of form and contents of particular lot of land.

The court will take judicial notice of the fact that land lot No. 81 in the second district and third section of Carroll county, Ga., contains 202½ acres and is in the form of a square. *Huxford v. Southern Pine Co.*, 124 Ga. 181, 52 S. E. 439; *Payton v. McPhaul*, 128 Ga. 510, 58 S. E. 50, 11 Ann. Cas. 163.

3. Deeds \S 114(5)—Description as 25 acres in southwest corner of lot construed.

Where land is alleged to be described as "25 acres of land lying and being in the southwest corner of lot of land No. 81 in the second district and third section of Carroll county, Georgia," such language should be construed as alleging that the lot is in the form of a square, located by taking the southwest corner of the lot as a base point and running equidistant along the two sides of the lot which intersect at such corner to the intersection of other lines drawn parallel to the respective lines first mentioned, all the lines being of such length as will embrace the exact quantity of 25 acres. *Payton v. McPhaul*, 128 Ga. 510, 58 S. E. 50, 11 Ann. Cas. 163.

4. Verdict erroneously directed.

Accordingly, in an action for land, where the plaintiff on the trial of the case relied on a conveyance to himself of "25 acres of land lying and being in the southwest corner of lot of land No. 81 in the second district and third section of Carroll county, Georgia," in view of the language of such instrument and the conflicting evidence as to the establishment of a line by agreement between the parties, the court erred in directing the following verdict: "We, the jury, find in favor of the plaintiff as to the north line and establish it as set out in the petition. We further find in favor of the injunction, permanently restraining the defendant as prayed for, in reference to the house; and we leave the east line open and undecided."

Error from Superior Court, Carroll County; J. R. Terrell, Judge.

Action by P. H. Hesterlee against S. H. Harper. Judgment for plaintiff, and defendant brings error. Reversed.

J. L. Smith and Willis Smith, both of Carrollton, for plaintiff in error.

Boykin & Boykin, of Carrollton, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(152 Ga. 299)

MASSACHUSETTS BONDING & INS. CO. v. LOWENSTEIN INV. CO. (No. 2468.)(Supreme Court of Georgia. Dec. 2, 1921.
Rehearing Denied Dec. 18, 1921.)*(Syllabus by the Court.)*

1. Injunction \S 32—Defendant having claim against plaintiff in excess of municipal court's jurisdiction may sue to restrain action in such court.

A contractor brought suit against the owner of a building for \$250, the balance alleged to be due under the contract, in the municipal court of Atlanta. The owner filed in the superior court of Fulton county an equitable petition against the contractor and the surety upon its bond, in which the owner claimed damages in the sum of \$5,000 for breach of the building contract, alleging that the municipal court of Atlanta was a court of limited jurisdiction, and that its jurisdiction did not exceed \$500 in amount. The owner prayed that the suit in the municipal court of Atlanta be enjoined, and that the plaintiff in that suit be required to set up its claim in the equity suit. *Held*:

The owner was entitled to maintain the suit in equity. *Kirkpatrick v. Holland*, 148 Ga. 708, 98 S. E. 265.

2. Petition held sufficient.

The petition as amended set forth a cause of action, and the court did not err in overruling the general demurrers thereto.

3. Special demurrers cured by amendment.

The special demurrers, in so far as meritorious, were met by the amendments to the petition.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by the Lowenstein Investment Company against the Massachusetts Bonding & Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Dodd & Dodd, of Atlanta, for plaintiff in error.

Rosser, Slaton, Phillips & Hopkins, of Atlanta, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur.

(152 Ga. 275)

(109 S.E.)

(152 Ga. 302)

MURPHY v. MURPHY et al. (No. 2561.)

(Supreme Court of Georgia. Nov. 17, 1921.
Rehearing Denied Dec. 16, 1921.)

(Syllabus by the Court.)

1. Wills \Leftrightarrow 53(9)—Evidence that property formerly owned by husband, a caveator, admissible on question of capacity.

Where probate of a will is contested for incapacity of the maker, it is proper to inquire whether the provisions of the will are just and reasonable, and accord with the state of the testator's family relations, or the contrary. Civil Code 1910, § 3841; *Franklin v. Belt*, 130 Ga. 37, 60 S. E. 146. In the trial of such issue the source from which the property disposed of by the will came into the decedent's possession may be shown, as well as the reasonableness of the provisions of the will. *Holland v. Bell*, 148 Ga. 277, 96 S. E. 419. Accordingly, it was not error to admit in evidence deeds showing that the land in controversy, and devised under the will, formerly belonged to the husband of the testatrix, now one of the caveators, and was conveyed by him to a third party, and subsequently conveyed by such third party to the testatrix.

2. Wills \Leftrightarrow 53(9)—In contest over will embracing property formerly owned by caveator, evidence as to conveyances and occupancy held admissible.

It was not error to allow parol evidence by the husband of the testatrix, to the effect that he executed the deed first mentioned in the preceding headnote to the grantee named therein, because he had borrowed the sum of \$300; that he had repaid the borrowed money and had requested said grantee to reconvey the land to himself, which request was refused; that he had lived upon the property, claiming it as his own, for more than 50 years, and had given it in and paid taxes on it during that time; and that he had not given to the grantee in said deed authority to make the deed to the testatrix.

3. Other assignments of error.

The remaining assignments of error are either incomplete, and present no question for decision, or do not show cause for the grant of a new trial.

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Will contest between C. E. Murphy and J. W. Murphy, administrator, and others. Judgment for the latter, and the former brings error. Affirmed.

Jas. Humphreys and Dowling, Askew & Wheelchel, all of Moultrie, for plaintiff in error.

W. A. Covington and Shipp & Kline, all of Moultrie, for defendants in error.

GILBERT, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent because of sickness.

WRIGHT, Comptroller General, v. HARDWICK, Governor. (No. 2822.)

(Supreme Court of Georgia. Dec. 2, 1921.)

(Syllabus by the Court.)

1. States \Leftrightarrow 117, 118, 166—Statute authorizing setting apart railroad rentals as special fund, etc., not invalid under constitutional provisions as to contracting debts, borrowing money, and applying proceeds of sale of state property to bonded debt.

On August 5, 1921 (Laws 1921, p. 230), an act of the General Assembly of Georgia was approved, entitled, "An act to authorize the Governor, from time to time, to set apart the rental of the Western & Atlantic Railroad, for limited periods, as a special fund, and to authorize the Governor to draw warrants against said special fund, to discount the same, and to place the proceeds in the treasury for the purpose of meeting the obligations of the state then created and incurred by law, and for other purposes." *Held*:

The act does not contravene any of the following declarations of the Constitution of the state, viz.: (1) That no debt shall be contracted by or on behalf of the state, except as the constitution specifies, Civ. Code 1910, § 6558. (2) That all laws authorizing the borrowing of money by or on behalf of the state shall specify the purpose for which it is to be used, and it shall not be used for any other purpose. Id. § 6559. (3) That the proceeds of the sale of any property owned by the state, whenever the General Assembly may authorize its sale, shall be applied to the payment of the bonded debt of the state, and shall not be used for any other purpose whatever, so long as the state has any existing bonded debt. Id. § 6570.

2. States \Leftrightarrow 115—Statute providing for setting apart railroad rentals as special fund, etc., not violative of fiscal policy requiring expenses for each year to be paid from the revenue for that year.

Held further, that the act is not invalid because, as claimed, it is violative of a fiscal policy of the Constitution that the expenses of the state for each year shall be paid from the revenue received by it during that year.

3. States \Leftrightarrow 138—Governor held authorized to draw warrants payable after expiration of term.

The executive warrant referred to in the petition, and presented to the comptroller general to be countersigned by him, is not void on the alleged ground that the Governor has no lawful authority to draw a warrant against funds of the state when they will not be paid into the treasury, and the warrant will not become payable during his term of office.

4. Statutes \Leftrightarrow 68—Statute held general law and not invalid because of conflict with another law.

The act is a general law within the meaning of article 1, § 4, par. 1, Const. (Civ. Code 1910, § 6391), which declares in part: "Laws of a general nature shall have uniform operation throughout the state, and no special law shall

be enacted in any case for which provision has been made by an existing general law." *Mathis v. Jones*, 84 Ga. 804, 11 S. E. 1018; *Morrison v. Cook*, 146 Ga. 570, 91 S. E. 671. Being a general law, the act is therefore not invalid because of the existence, at the time of its passage, of the act of 1919 (Laws 1919, p. 331, § 109), providing: "That fifty per cent. of all revenues received by the state from all sources of income or taxation shall be used and expended for the support and maintenance of the common schools of Georgia for the year in which said income or taxes are due and payable. This section to go into effect January 1, 1922."

5. States ~~127~~—Statute providing for setting apart railroad revenue as special fund, etc., not repealed.

Nor was the act of August 5, 1921 (Laws 1921, p. 230), repealed by the general appropriation act approved August 15, 1921 (Laws 1921, p. 7), making the following appropriation, in section 6(c): "For the support and maintenance of the common or public schools of the state, four million two hundred and fifty thousand dollars (\$4,250,000) for each of the years 1922 and 1923, and should the revenue of the state exceed the sum of eight million five hundred thousand dollars (\$8,500,000), then one-half of the excess of each year to be applied to said common or public schools. (Provided, that this appropriation shall be composed of special funds and taxes as provided by the Constitution of this state, and shall be kept and expended under the provisions governing same.)"

6. No error to grant mandamus.

It was not error to grant a mandamus absolute, requiring the comptroller general to countersign the executive warrant presented to him.

Hill, J., and Beck, P. J., dissenting.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Mandamus on petition of the Governor, T. W. Hardwick, against W. A. Wright, Comptroller General. Judgment in favor of the petitioner, and defendant brings error. Affirmed.

The General Assembly passed an act, approved by the Governor August 5, 1921 (Laws 1921, p. 230), which reads as follows:

"An act to authorize the Governor, from time to time, to set apart the rental of the Western & Atlantic Railroad, for limited periods, as a special fund, and to authorize the Governor to draw warrants against said special fund, to discount the same, and to place the proceeds in the treasury for the purpose of meeting the obligations of the state then created and incurred by law, and for other purposes.

"Section 1. Be it enacted by the General Assembly of the state of Georgia, and it is hereby enacted by the authority of the same, that the Governor of the state is hereby authorized and fully empowered to assign and set aside not exceeding five years of the rental arising

from the existing lease of the Western & Atlantic Railroad, as a special fund to be used exclusively for the purpose of paying warrants drawn against the same as hereinafter provided, provided that \$100,000 set aside as public school fund be paid out of the general fund.

"Sec. 2. Be it further enacted, that in order to enable the state to meet its obligations then already created and incurred by law, and where revenue from other sources is, in the opinion of the Governor, not sufficient, the Governor of the state is hereby duly authorized and fully empowered, from time to time, to draw his warrant or warrants against the special fund created by section 1 of this act, so held as a special fund in the treasury, for such sum or sums as may be required to meet appropriations duly made by law, and the Governor is further authorized and empowered to discount said warrants so drawn against said special fund, and to place the proceeds arising therefrom in the treasury for the purpose of meeting and discharging the obligations of the state then created and incurred, as aforesaid, for which appropriations have been made by law. Said warrants shall be duly countersigned by the comptroller general. The holders of said warrants shall further have all the rights and privileges which the original obligees of said then incurred obligations might have had against the state.

"Sec. 3. Be it further enacted, that all laws and parts of laws in conflict with this act be, and the same are, hereby repealed."

On September 9, 1921, the Governor, acting under the authority of this act, issued an order assigning and setting aside, as a special fund to be used exclusively for the purposes mentioned in the act, all the rentals arising from the existing lease of the Western & Atlantic Railroad accruing between the date of the order and August 4, 1926, and further ordering that such fund—

"shall, as it shall from time to time be paid into the treasury of this state by the lessees of the Western & Atlantic Railroad in pursuance of the existing lease thereof, be held as a specific fund in the treasury of the state of Georgia for the purpose of paying warrants drawn against the same by the Governor, duly countersigned by the comptroller general, as provided in said act."

On the same date the executive order was issued the Governor, in pursuance of it and of the provisions of the act of the General Assembly, drew his warrant upon the state treasurer, reciting that as Governor he had sold and assigned to the Bank of Tifton of the rentals arising from the lease of the Western & Atlantic Railroad, and to be due and payable to the state of Georgia, under said lease, for the month of August, 1923, the sum of \$10,000, and that the Bank of Tifton had paid to the state of Georgia the full purchase price thereof, and therefore ordered and directed the treasurer of the state to pay to the Bank of Tifton, or order, the sum of \$10,000 out of the special fund set

aside in the treasury of the state by the executive order, in pursuance of the act, the same to be payable out of the rentals to be derived from said lease of the Western & Atlantic Railroad for the month of August, 1923, this warrant to be due and payable on August 1, 1923.

When the warrant, as the law requires, was presented to the comptroller general to be countersigned by him, he declined to countersign it, on the ground that he was advised that the warrant was illegal and void because issued under the authority of an act of the General Assembly which is unconstitutional.

The Governor thereupon filed in the superior court of Fulton county a petition for mandamus against the comptroller general, upon which a rule was issued requiring the comptroller general to countersign such warrant, unless he showed good cause to the contrary. The petition set forth the facts as above stated, and further that—

"Under the existing lease of the Western & Atlantic Railroad the rentals are \$540,000 per annum, payable monthly in advance into the treasury of the state by the lessees on the 1st day of each month; and no other assignment of the rental for the month of August, 1923, had been made, except the one stated above as being made to the Bank of Tifton."

To this petition the comptroller general filed a response admitting all the allegations of fact which the petition contained, but setting up various grounds why the warrant is illegal and void and should not be countersigned.

On the hearing of the rule the judge of the superior court overruled the grounds set up in the response of the comptroller general, and entered a judgment making the rule absolute. To this judgment the comptroller general excepted.

Anderson, Rountree & Crenshaw and Clifford L. Anderson, all of Atlanta, for plaintiff in error.

Geo. M. Napier, Atty. Gen., A. G. Powell and Little, Powell, Smith & Goldstein, all of Atlanta, and Seward M. Smith, Asst. Atty. Gen., for defendant in error.

FISH, C. J. (after stating the facts as above). [1] 1. One ground set up in response to the mandamus nisi, and urged as cause why it should not be made absolute, is that the act of the General Assembly under which the petitioner, the Governor of the state of Georgia, claims the right to draw said warrant, is unconstitutional and therefore void, in that such warrant when drawn and countersigned becomes a debt contracted by and on behalf of the state, contrary to the provisions of article 7, § 3, par. 1 (Code § 6558), of the Constitution of the state of Georgia, reading as follows:

"No debt shall be contracted by or on behalf of the state, except to supply casual deficiencies of revenue, to repel invasion, suppress insurrection, and defend the state in time of war, or to pay the existing public debt; but the debt created to supply deficiencies in revenue shall not exceed, in the aggregate, two hundred thousand dollars."

The brief filed here for the plaintiff in error says on this point:

"The question is not whether the warrants by themselves are binding contracts, but whether the act which authorizes their issuance undertakes by its own terms to authorize the making of a debt. The contractual relation which creates the debt grows, not out of the warrants alone, but out of the legislative enactment setting aside a certain specified fund to pay the warrants and undertaking to subrogate the holders of the warrants to the rights of other persons in the event that particular fund should fail. It is the act which undertakes to create the debt, not the warrant."

And counsel argue that—

"Upon failure of the rentals to materialize, the state will be under the same obligation to the holders of these warrants as it was to the persons whose obligations were paid with the money derived from their discount."

An executive warrant drawn in accordance with the plan of the legislative act here under review is quite different in character from the ordinary warrant drawn by the Governor on the Treasurer. This act authorizes the Governor to assign and set aside not exceeding five years of the rental arising from the existing lease of the Western & Atlantic Railroad, as a special fund to be used exclusively for the purpose of paying warrants drawn by the Governor against it in discharging obligations of the state already created and incurred by law. The Governor is authorized to discount these warrants, and he is directed to place the proceeds arising therefrom in the treasury of the state for the purpose of meeting and discharging the obligations of the state already created and incurred, and for which appropriations have been made by law, the warrants to be duly countersigned by the comptroller general. It is plain that thus far the act does not undertake to provide for the contracting of a debt by or on behalf of the state; for the scheme manifestly is to provide an undertaking for the payment of debts of the state by discounting, without recourse as it were, its warrants payable exclusively out of a special and specified fund. The act, however, further provides that—

"The holders of said warrants shall further have all the rights and privileges which the original obligees of said then incurred obligations might have had against the state." Section 2.

From this last provision, when considered in connection with the plan of the act, does there arise a contractual relation between

the state and a purchaser who discounts a warrant that creates or results in a debt against the state?

(1) After due consideration of this important question we have arrived at the conclusion that no debt by or in behalf of the state is so created. The warrants in pursuance of the act are drawn against a certain specified fund which it is anticipated will be in the treasury to meet them at the time fixed therein for their payment, and they are to be paid exclusively out of that fund; and should it fail to materialize—that is, not be in the treasury to meet the warrants at their maturity—then the holders of the purchased and discounted warrants would have no recourse against the state on the warrants themselves; but if the money obtained by having the warrants discounted and placed in the treasury by the Governor should be used by the state in the payment of its lawful obligations as referred to in the act, then “the holders of said warrants shall further have all the rights and privileges which the original obligees of said then incurred obligations might have had against the state.” In other words, if any of the money obtained by discounting the warrants shall be used to pay off any part of the obligations of the state as designated in the act, then the holders of the corresponding warrants shall have all the rights and privileges which the original obligees might have had against the state, if they had not been so satisfied. In such circumstances the original obligees would, of course, have no further rights and privileges against the state, but the act in effect provides that whatever rights and privileges they may have had, had not their obligations against the state been so met, are not absolutely extinguished in all respects, but shall continue to exist or remain in abeyance for the benefit of the holders of such corresponding warrants should the specific fund for their payment fail to materialize. No debt is thus created by or on behalf of the state, but as part of the consideration for the sale and discount of the warrants the holders thereof in a given contingency are allowed certain rights which other obligees formerly had against the state which had never been entirely extinguished, but had been preserved for such holders upon a contingency.

(2) Nor is the act under consideration void, as claimed in the response, because, as is therein alleged, it contravenes article 7, § 4, par. 1 (Civil Code, § 8559), of the Constitution of the state, which is as follows:

“All laws authorizing the borrowing of money by or on behalf of the state shall specify the purposes for which the money is to be used, and the money so obtained shall be used for the purposes specified, and for no other.”

The transaction designed by the act is not an undertaking to borrow money on be-

half of the state and to pledge the rentals in question for the payment of warrants to be drawn against them. Much of what is said in the preceding division of the opinion is applicable here.

(3) Another ground urged why an absolute mandate should not be granted is:

“Because the act aforesaid is illegal and void, in that it is contrary to and contravenes article 7, § 13, par. 1 (Civil Code, § 8570), of the Constitution of the state of Georgia which reads as follows: ‘The proceeds of the sale of the Western & Atlantic, Macon & Brunswick, or other railroads held by the state, and any other property owned by the state, whenever the General Assembly may authorize the sale of the whole or any part thereof, shall be applied to the payment of the bonded debt of the state, and shall not be used for any other purpose whatever, so long as the state has any existing bonded debt: Provided, that the proceeds of the sale of the Western & Atlantic Railroad shall be applied to the payment of the bonds for which said railroad has been mortgaged, in preference to all other bonds.’”

The monthly rentals under the existing lease of the Western & Atlantic Railroad, which its lessee has promised to pay the state, are choses in action, and the right of the state to receive them is, of course, a property right owned by the state. The act under review in effect authorizes the sale of not exceeding five years of such rentals, for the purpose designated in the act. The question is therefore presented whether the phrase “any other property owned by the state,” here used in the connection as it appears in the Constitution, includes the property right of the state in the rentals which the lessee of the railroad has contracted to pay the state. In solving this question it is legitimate to look to the conditions—financial, economical and otherwise—existing at the time the makers of the Constitution were in convention. At that time the Western & Atlantic Railroad was under lease for a term of 20 years from December 27, 1870, at a yearly rental of \$300,000, payable \$25,000 at the end of each month. At the time the members of that convention were considering and debating the proposed provision of the Constitution declaring that “The proceeds of the sale of the Western & Atlantic Railroad” and “other property owned by the state whenever the General Assembly may authorize the sale of the whole or any part thereof, shall be applied to the payment of the bonded debt of the state,” the term of the lease of that railroad had more than 13 years to run before its expiration, and the rentals to be paid during that time amounted to something like \$4,000,000. A resolution adopted by the convention July 18, 1877, authorizing the appointment of a committee to inquire into the propriety of selling the Western & Atlantic, Macon & Birmingham, and North & South Railroads, in order to pay

the (state's) indebtedness, and to reduce taxation, recited that—

"The public debt of the state is now over eleven millions, with only about one third of the property owned before the war; and * * * the rate of taxation is about eight times as great as before the war; and * * * this heavy tax is not more than enough to pay the current expenses of the state, and the annual accruing interest of the public debt; and * * * it is deemed impolitic and impracticable to increase the present burdensome rate of taxation," etc. Jour. Const. Conv. 1877, p. 68; Small's Debates, 47.

There were other resolutions clearly indicating that the makers of the Constitution were keenly alive to the critical financial condition of the state and the extreme necessity existing for providing and adopting the earliest possible relief; yet we have been unable to find in any of the resolutions or debates of the convention the words "rentals," or "rentals of the Western & Atlantic Railroad," or "rentals" of any other property owned by the state. In view of the earnest efforts of the members of the constitutional convention to adopt measures to relieve the state of its then great financial embarrassment, and their diligent and exhaustive search for revenues of the state with which to accomplish that much-desired end, does it admit of a reasonable doubt that, if the members intended that the rentals of the Western & Atlantic Railroad—which then, as we have shown, amounted to a very large annual sum—should be applied exclusively towards the payment of the bonded debt of the state, they would not have said so in express and unequivocal terms? All that appears in the resolutions, reports, or debates of the constitutional convention on the subject of the public debt of the state, and as to how it should be paid, is set forth in the dissenting opinion written by Mr. Justice Cobb in *Park v. Candler*, 114 Ga. 466, 490, 40 S. E. 523, 530.

Moreover, "a long-continued and unquestioned interpretation of a paragraph of the Constitution by the General Assembly, or the executive, or the officers whose duty it is to obey and carry into effect the provisions of the paragraph, is a weighty argument in favor of such interpretation." *Epping v. Columbus*, 117 Ga. 263 (7), 43 S. E. 803. For more than half a century the Western & Atlantic Railroad has been operated under leases from the state, and no act of the General Assembly, so far as we are aware, has ever referred to or dealt with the rentals of the road as a part of the "property fund" devoted exclusively towards the payment of the bonded debt of the state; and it is a part of the financial history of the state that not a dollar of such rentals has ever been applied to such indebtedness.

Again, in *Park v. Candler*, 113 Ga. 647, 39 S. E. 89, a petition for mandamus was

brought by the Governor against the Treasurer to compel him to pay certain executive warrants drawn (in accordance with the act of the General Assembly of December 8, 1897 [Laws 1897, p. 108]) upon the school fund for the payment of salaries of teachers of the common schools of the state. The treasurer had declined to pay more than \$77,294.83 on the ground that there was in the treasury no other fund available for the payment of the warrants. The petition alleged, and the answer admitted, that \$77,294.83 was the "amount of general funds arising from taxes, rental of the state's property, and other sources" in the treasury. It appears that the Governor, the Treasurer, the Attorney General who represented the Governor, and the learned counsel for the Treasurer all treated the "rental of the state's property" as part of the general fund, and not part of the "public property" fund to be applied solely to the payment of the bonded debt of the state. Nor is there anything in either the majority or the dissenting opinion of this court in that case intimating that the rentals of the state's property do not constitute a part of the general fund in the treasury. It is true there was no ruling made directly on this point; but it was held that—

"As the Treasurer admitted in his answer that there was in the treasury the sum of \$77,294.83, which he had offered to appropriate to the payment of such of the warrants as the Governor should indicate, the court erred in making the mandamus absolute as to this amount."

Considering the ground upon which this ruling was based, the strong implication is that this court was in accord with the opinion of every one else connected with the case that the rental of the state's property did not constitute a part of the "public property fund." The record does not disclose from what property of the state the rental, constituting a part of the general fund, was received. The warrants, however, were presented for payment at the treasury on April 18, 1901, and the only rental of any part of the property of the state included in the Treasurer's next preceding report published in Georgia Laws 1900, p. 514, was amount received "from rental Western & Atlantic Railroad, \$420,012.00." It would therefore seem certain that a part of the public fund dealt with in that case was a portion of the rentals of the Western & Atlantic Railroad.

For the reasons stated, namely, the entire failure of the framers of the present Constitution (1877) to refer in any way, either in resolutions or debates or otherwise, to the property right of the state to receive a large sum of money which the lessees of the Western & Atlantic Railroad had agreed to pay the state monthly for the use of the railroad property during the then existing lease, al-

though the financial condition of the state was desperate; the continued and unchallenged construction given to the constitutional provision for more than 50 years by the legislative and executive departments of the state; and the physical precedent at least in *Park v. Candler*, 113 Ga. 647, 39 S. E. 89, of recognizing that the rentals of the Western & Atlantic Railroad, when received by the State Treasurer, properly constituted a part of the general fund in the treasury, and not a part of the "public property fund" to be applied exclusively to the payment of the state's bonded debt—for these reasons we say, and further because of the very nature of the subject being dealt with in the constitutional provision we are now considering, the end in view, the means sought for its accomplishment, and the language employed, it is abundantly clear to us that the framers of the Constitution never intended that the intangible property right of the state to receive money under contract for the use of its railroad property should be included in the expression "any other property owned by the state," so that, when the time to receive such money should, by legislative authority, be accelerated by discount, the proceeds thereof should become a part of the "public property fund" to be applied exclusively to the payment of the state's bonded debt.

It is, however, said, in effect, that the matters to which we have referred in this division of the opinion do not authorize our conclusion, because the General Assembly has never, prior to the act of August 5, 1921, which we are considering, authorized the sale of any of the rentals of the Western & Atlantic Railroad, and that it is only where property belonging to the state is authorized by the Legislature to be sold that the Constitution expressly declares that the proceeds of the sale shall be applied exclusively to the payment of the bonded debt of the state. The question is whether the right of the state to receive the money—the rental, under contract, for the use of the Western & Atlantic Railroad—is included in the phrase of the Constitution "any other property owned by the state." No contention is made that when the state receives the rental at its maturity it becomes a part of the "public property fund," to be applied exclusively to the payment of the state's bonded debt; but it is urged that, when the General Assembly authorizes a sale of any portion of the rentals of the railroad, then the proceeds of the sale must be applied exclusively to the payment of the bonded debt. Such a differentiation, we think, is illogical. It seems wholly unreasonable to say that the state may lease the Western & Atlantic Railroad and use the rentals for whatever purpose the General Assembly may in its discretion direct, and yet that, if the General Assembly undertakes to anticipate these revenues—which it could

have caused to be paid in a lump sum in advance, if it had so provided in the lease—by discounting them, the funds then must take a different course. The inherent nature or character of the state's right to receive the money from the lessees for the use of its railroad is certainly not so radically changed by the mere authorization by the General Assembly to hasten its receipt of such revenue by discounting it; and such a construction, we think, is entirely too literal and strict to be fairly given to the constitutional phrase under consideration.

The General Assembly in 1897 (Georgia Laws 1897, pp. 70, 71) authorized the Prison Commission to establish a prison farm (Pen. Code 1910, § 1203), and declared (section 1206) that—

"The Commission shall sell, to the best advantage, all surplus products of the penitentiary, and shall apply the proceeds thereof to the maintenance of the institution as far as necessary. Should any surplus funds arise from this source, they shall be paid into the state treasury annually; and the Commission shall, at the end of each quarter, make to the Governor a detailed report of all such transactions: Provided, the Commission shall have authority to furnish such surplus products, or any part thereof, to the Georgia State Sanitarium, the Academy for the Blind, at Macon, and to the School for the Deaf, at Cave Spring, should this be found practicable."

In 1905 (Georgia Laws 1905, p. 127; Pen. Code, § 1237 et seq.) the General Assembly established the Georgia State Reformatory, and declared (Pen. Code, § 1255) that—

"The Commission shall sell to the best advantage all agricultural products not used in the reformatory, and shall apply the proceeds thereof to the maintenance of the institution as far as necessary. Should any surplus funds arise from this source, they shall be paid into the state treasury annually; and the Commission shall at the end of each quarter make to the Governor a detailed report of all such transactions."

So these constitute two instances (and others might be cited) where the property of the state in the form of surplus funds derived from the sale, by legislative authority, of agricultural products received from the state's farms, were paid into the treasury of the state as a part of the general fund, and not as a part of the public property fund, to be exclusively applied to the payment of the state's bonded debt. Although these statutes providing for the disposition of the surplus fund derived from the sale of the state's agricultural products were enacted nearly a quarter of a century ago, no contention has ever been made, so far as we are aware, that such statutes are unconstitutional, and that the funds we have referred to constitute a part of the "public property fund."

It is argued for the plaintiff in error that, if the state can sell the rentals of the Western & Atlantic Railroad for 5 years, it can sell them for 20 years, or for 50 years. At least within reasonable limits, that may be true. It is further claimed that it would impair the sale value of the railroad property for the state to grant a long lease, and then sell the rentals. This may also be true. But is there any constitutional limitation against the General Assembly exercising its discretion in this respect? The constitutional provision in question constitutes no lien or mortgage on the Western & Atlantic Railroad. It is merely a direction, a binding direction, of course, to the General Assembly, that, "whenever it may authorize the sale," if it ever does so authorize, the proceeds shall be used to pay the bonded debt of the state. The Legislature is not required to sell the railroad, and it is not bound to maintain it or to protect its sale value in any other way, so far as any constitutional requirement is concerned. The Legislature, if it saw fit to do so, could lease the railroad for so small a rental that no one would care to buy it. This would reduce its sale value, but it would not be an act contrary to the Constitution. In substance we are dealing with the power of that body supreme in its discretion (except as limited by direct constitutional language), the Legislature, of earning and using revenue from this valuable piece of property, which it has the discretion to sell, but which it may use as it sees fit until it does decide to sell. If and when the Legislature authorizes the sale, the constitutional direction will come into play. Until a sale is authorized the legislative discretion is supreme and untrammelled. It may be unwise to depreciate the future value of this property to the state by converting unearned rentals into their present cash value. That is a debatable question, a question that has already been debated and decided by that body which, under our Constitution, must decide it; but it is not contrary to anything written into our Constitution for the General Assembly to do.

[2] 2. It is further said in the response that an absolute mandate should not be issued:

"Because the constitutional scheme for the administration of the finances of the state of Georgia limits all expenditures in one year to the revenues derived from all sources during that year; and it is unlawful, illegal, and contrary to the Constitution of the state to anticipate revenues to be received by the state in future years for the purpose of meeting obligations in preceding years."

No scheme or fiscal policy for the state appears in any direct or express language of the Constitution limiting all expenditures for the state in any one year to the revenues of the state derived from all sources during that year, and declaring that the revenues shall not be anticipated. Nor does any such

fiscal policy arise by necessary implication from the constitutional declarations cited in this ground of the response, namely, those conferring the power of taxation on the General Assembly, limiting the rate of taxation to five mills for any one year, providing that all revenue and appropriation bills shall originate in the House, and that the state shall contract no debt except to supply such temporary deficiency as may exist in the treasury in any year from necessary delay in collecting the taxes for that year, limiting the amount to be so borrowed, and declaring that it shall be repaid out of the taxes levied for the year in which the loan is made.

As already held, this legislative act does not seek to authorize the creation of a debt, but is evidently designed to provide for the payment of debts owing by the state, and to accomplish this end it authorizes the sale of the state's right to receive the rentals of the Western & Atlantic Railroad for a limited period in the future. There is nothing in the Constitution prohibiting the General Assembly from anticipating revenues of this character, nor requiring it, in leasing that road, from time to time to allot each year's rental of the property to that particular year's income or revenue to be used in discharging the appropriations for that year.

As quite applicable to the present case we quote from *Gray v. McLendon*, 134 Ga. 224, 259, 67 S. E. 859, 875, as follows:

"In *Cooley's Const. Lim.* * * * it is said: * * * The courts are not the guardians of the rights of the people of the state except as those rights are secured by some constitutional provision which comes within their judicial cognizance. The protection against unwise or oppressive legislation within constitutional bounds is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil; but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the Constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the lawmaking power.' In 6 Am. & Eng. Enc. Law, 1087, it is said: 'A statute should not be annulled on the vague ground of its conflict with the general latent spirit supposed to pervade or underlie the Constitution, but which neither its terms nor its implications clearly disclose.' See, in this connection, *Flint v. Foster*, 5 Ga. 194 (48 Am. Dec. 248); *Plumb v. Christie*, 103 Ga. 686, 692 (30 S. E. 759, 42 L. R. A. 181). * * * The Constitution of this state (Civil Code, § 5784) provides: 'The General Assembly shall have power to make all laws and ordinances consistent with this Constitution, and not repugnant to the Constitution of the United States, which they shall deem necessary and proper for the welfare of the state.' A law is void, or not void, as measured by this clause of the Constitution."

[3] 3. The respondent further says that he was legally bound to refuse to countersign the warrant referred to in the petition, for

the reason that the warrant is illegal and void:

"Because the Governor of the state of Georgia has no lawful power or authority to draw a warrant against funds belonging to the state, when said funds will be paid into the state treasury, and said warrant becoming payable, after the expiration of the term of office for which the Governor signing said warrant was elected, His Excellency, Gov. Thomas W. Hardwick, the petitioner in the above-stated case, having been elected for a term of office which will expire prior to the time said funds will be paid into the treasury and such warrant payable, to wit, prior to August 1, 1923."

This ground of the response is not meritorious. It is true that in *Fletcher v. Renfro*, 56 Ga. 674, some doubt was expressed as to whether a Governor could legally draw a warrant which would be effective beyond his term of office. No ruling, however, was made on the point; and, moreover, the warrant there referred to, and held not to create a debt, but to be only a license or power authorizing the treasurer to pay, was the usual and ordinary executive warrant, and not one, as in this case, where a legislative act expressly empowered the Governor to draw warrants against a special, specified fund, to sell and discount the warrants to the purchaser, receive the purchase price, and deposit that in the treasury for the purpose of creating a fund for the payment of the already existing obligations of the state as designated in the legislative act. We are not aware of any legal reason why the General Assembly cannot authorize the Governor to exercise the power to issue and dispose of warrants as the act provides.

[4, 5] 4, 5. The holdings announced in the fourth and fifth headnotes need no elaboration.

[6] 6. In view of the rulings hereinbefore made, it was not error to grant the mandamus absolute requiring the comptroller general to countersign the executive warrant presented to him.

Judgment affirmed.

All the Justices concur, except BECK, P. J. and HILL, J., who dissent.

HILL, J. Article 7, § 13, par. 1, of the Constitution of the state (Civil Code of 1910, § 6570) provides as follows:

"The proceeds of the sale of the Western & Atlantic, Macon & Brunswick, or other railroads held by the state, and any other property owned by the state, whenever the General Assembly may authorize the sale of the whole or any part thereof, shall be applied to the payment of the bonded debt of the state, and shall not be used for any other purpose whatever, so long as the state has any existing bonded debt: Provided, that the proceeds of the sale of the Western & Atlantic Railroad shall be applied to the payment of the bonds for which said railroad has been mortgaged, in preference to all other bonds."

In construing the words of a Constitution the ordinary meaning is to be given them. Even where a word having an acquired and fixed technical, as well as a popular meaning, is used in the Constitution, the courts will generally accord to it its ordinary significance, unless the very nature of the subject indicates, or the text suggests, that it is used in its technical sense. 6 Am. & Eng. Encl. of Law, 924, 925. Applying the above rule, the language of the Constitution, as quoted above, is clear. Besides, no technical language is used. After mentioning certain specific railroad property, including the Western & Atlantic Railroad, which, if sold, must be applied to the payment of the bonded debt of the state, the Constitution declares, "and any other property owned by the state." whenever the General Assembly may authorize the sale of the whole or any part thereof, shall be applied to the payment of the bonded debt of the state, "and shall not be used for any other purpose whatever," etc. Can language be clearer? "Ita lex scripta est." The fundamental law of the state is so written. The rent of the Western & Atlantic Railroad is admittedly "property," and when this "property" is sold by authority of the Legislature the proceeds thereof must be applied, under the mandate of the Constitution, to the payment of the bonded indebtedness of the state. The Legislature, by the act of 1921 quoted in the majority opinion, seeks to authorize the sale of the rental of the Western & Atlantic Railroad for 5 years, and to turn the proceeds thereof into the general fund of the state for general purposes. This, in my opinion, cannot be done under the provision of the Constitution quoted above. The act is repugnant to the above constitutional provision. If the rent for five years can be sold, the rent for 45 years—the life of the lease—can be sold, and to do that would be to impair the value of, and virtually to sell, the road itself; for no one would buy the road if it was put up for sale with its entire rental for 45 years sold in advance. In interpreting the Constitution words are not only presumed to have been employed in their natural and ordinary meaning, but the instrument itself must be interpreted in the light of the circumstances attending its creation. 6 Am. & Eng. Enc. of Law, pp. 624, 625. One cannot read the proceedings of the constitutional convention of 1877 (See Jour. Const. 1877, 68; Small's Debates, 47 et seq.; Park v. Candler, 114 Ga. 466, 481, 40 S. E. 523 et seq.) and not be impressed with the idea that the framers of the Constitution intended that, when the Western & Atlantic Railroad "and any other property of the State" (italics mine) should be sold by authority of the Legislature, the proceeds thereof should be applied to the payment of the bonded debt of the state. See Park v. Candler, 113 Ga. 647, 656, 39 S. E. 89.

It is argued by counsel for defendant in error that to the language "any other property owned by the state" is to be applied the doctrine, "noscitur a sociis;" and in certain cases this rule is to be applied in construing statutes. But it will be observed in this case that the provision as to the proceeds of the sale of the two railroads, the Western & Atlantic and the Macon & Brunswick, is followed by the words "or other railroads held by the state." This language "or other railroads held by the state," it would seem, exhausts the subject of the sale of the railroad property, and leaves no room for the application of the maxim, "Noscitur a sociis;" and, when the general term of "any other property owned by the state" is employed, it becomes comprehensive and actually includes what the words import, all property of any kind, and is not limited in its application by the maxim just quoted. From the last clause of the Constitution itself quoted above it is provided that in case of the sale of the Western & Atlantic Railroad the proceeds shall be applied to "the payment of the bonds for which said railroad has been mortgaged, in preference to all other bonds." And it is a part of the financial history of the state that, in borrowing money, the state has always held out the ownership of the Western & Atlantic Railroad, worth millions of dollars, as an asset with which the state could pay the debt, should it desire to sell the property without taxing her citizens for that purpose. The courts will take judicial cognizance of the fact that the state owes a large bonded debt.

It is true that neither in the debates in the constitutional convention nor in the Constitution itself are the words "rentals" or "rentals of the Western & Atlantic Railroad," or rentals of any other property owned by the state, expressly used. And why should they be? For a much broader term is used, viz. "any other property owned by the state," which includes "rentals," for it is admitted that the rentals are "property." But it is contended that this means "tangible property," "corpus, and not income." No such restriction is in the written Constitution itself. These words must be construed into the Constitution if such a meaning is given

the word "property." It is also true that not a dollar of the rentals of the Western & Atlantic Railroad has ever been applied to the bonded debt of the state, but it is likewise true that the Legislature has never before authorized the sale of the rentals for even one year; and the mandatory provision of the Constitution is, "Whenever the General Assembly may authorize the sale of the whole or any part thereof, the proceeds shall be applied," etc. The income for one year may go without sale into the general fund to help defray the expenses of that year; for it has not been sold by authority. But that is quite a different proposition from the Legislature authorizing the sale of 5 years' rental of the Western & Atlantic Railroad, and turning the proceeds into the general fund. Whenever an authorized sale is made, the Constitution is mandatory and declares that the proceeds shall be applied to the payment of the bonded debt of the state. One year's income within the year would not impair the sale of the corpus of the property, but 5 years' sale would to that extent, and the sale of 45 years' rental would well-nigh destroy the sale of the property itself. This was never dreamed of by the framers of the Constitution, as gathered from the debates in the convention. On the contrary, the debates tend to show that all of this, and other magnificent and valuable property, was intended to be in the nature of a security for the public bonded debt, and to lessen taxation, etc. But to give the act under review the construction asked would in its last analysis be to virtually destroy this property, if the entire rentals are to be sold by authority of the Legislature, and the proceeds devoted to other purposes than the one contemplated by the Constitution itself. The judiciary can only declare an act void when it conflicts with some provision of the Constitution; but in the view we take of the act of 1921 under consideration it is in violation of article 7, § 13, par. 1, of the Constitution of 1877 (Civil Code of 1910, § 6570); and I am constrained, therefore, to dissent from the decision of the majority of the court in this case.

I am authorized by Mr. Presiding Justice BECK to say that he concurs in the foregoing dissent.

(27 Ga. App. 798)

SMITH v. STATE. (No. 12902.)(Court of Appeals of Georgia, Division No. 1.
Dec. 14, 1921.)*(Syllabus by the Court.)*

Appeal and error \S 1005(2)—Denial of new trial not disturbed, where verdict supported by some evidence.

There being some evidence to support the verdict, which has the approval of the trial judge, and error being assigned upon the general grounds only, this court is powerless to interfere with the overruling of the motion for a new trial.

Error from Superior Court, Lincoln County; W. L. Hodges, Judge.

Proceeding between Wyatt Smith and the State. Judgment for the latter, and the former brings error. Affirmed.

O. J. Perryman, of Lincolnton, for plaintiff in error.

M. L. Felts, Sol. Gen., of Warrenton, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 793)

CHASTAIN v. HIGGINS. (No. 12754.)(Court of Appeals of Georgia, Division No. 1.
Dec. 14, 1921.)*(Syllabus by the Court.)*

Bills and notes \S 489(6)—In absence of plea of non est factum, note properly introduced in evidence, although execution not proved.

Higgins sued Chastain upon a promissory note. Chastain defended upon the ground that on a certain day in a named city he had paid to the payee of the note a certain sum in full payment and satisfaction of the principal and interest on the note sued on. When the case came on for trial, the note sued on was tendered in evidence. The defendant objected to the introduction of the note upon the ground that its execution had not been proved, and upon the ground that his plea made it necessary for the plaintiff to prove the execution of the note. These objections were overruled, and the note admitted in evidence. The defendant offered no testimony in support of his plea of payment. It not having been error for the court to overrule the objections to the introduction of the note in evidence, there having been no plea of non est factum filed, and the only issue being upon the plea of payment, it was proper for the judge, who by agreement was trying the case without a jury, to render judgment in favor of the plaintiff for the full principal and interest due upon said promissory note.

Error from City Court of Thomasville; W. M. Hammond, Judge.

Action by M. M. Higgins against Heywood Chastain. Judgment for plaintiff, and defendant brings error. Affirmed.

Jas. B. Burch, of Thomasville, for plaintiff in error.

Titus & Dekle, of Thomasville, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(27 Ga. App. 764)

HARDEN v. STATE. (No. 12890.)(Court of Appeals of Georgia, Division No. 1.
Dec. 18, 1921.)*(Syllabus by the Court.)*

Sufficiency of evidence.

The special grounds of the motion for a new trial are merely amplifications of the general grounds, and the verdict was authorized by the evidence, and has been approved by the trial court.

Error from Superior Court, Randolph County; R. C. Bell, Judge.

Lucius Harden was convicted of an offense, and brings error. Affirmed.

Chas. W. Worrlil, of Outhbert, for plaintiff in error.

B. T. Castellow, Sol. Gen., of Outhbert, and R. R. Arnold and E. C. Hill, both of Atlanta, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 821)

RENDER v. DIXON. (No. 12554.)(Court of Appeals of Georgia, Division No. 2.
Dec. 14, 1921.)*(Syllabus by the Court.)*

Appeal and error \S 1005(2)—Approved verdict supported by evidence not disturbed.

The motion for a new trial in this case does not complain of any error of law, but is based upon the general grounds only. Under one view of the testimony, the verdict rendered for the plaintiff can be sustained, and the judgment overruling the motion for new trial must therefore be affirmed.

Error from City Court of La Grange; Duke Davis, Judge.

Action by Brewer Dixon against R. L. Render. Judgment for plaintiff, a new trial was denied, and defendant brings error. Affirmed.

E. T. Moon, of La Grange, for plaintiff in error.

L. B. Wyatt, of La Grange, for defendant in error.

JENKINS, P. J. Affirmed.

STEPHENS and HILL, JJ., concur.

(27 Ga. App. 776)

JONES v. STATE. (No. 12950.)

(Court of Appeals of Georgia, Division No. 1.
Dec. 18, 1921.)

(Syllabus by the Court.)

Sufficiency of evidence.

The grounds of the amendment to the motion for a new trial are without substantial merit; the verdict was authorized by the evidence and has been approved by the trial judge.

Error from City Court of Polk County; Jno. L. Tison, Judge.

Linton Jones was convicted of an offense, and he brings error. Affirmed.

Mundy & Watkins, of Cedartown, and Porter & Mebane, of Rome, for plaintiff in error.

J. A. Wright, Sol., and E. S. Ault, both of Cedartown, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 801)

HOLLOWAY v. STATE. (No. 12959.)

(Court of Appeals of Georgia, Division No. 1.
Dec. 14, 1921.)

(Syllabus by the Court.)

Appeal and error \S 1005(2)—Approved verdict supported by evidence not disturbed.

The motion for a new trial being based upon the general grounds only, and there being some evidence to support the verdict, which is approved by the trial judge, this court will not interfere.

Error from Superior Court, Taliaferro County; E. T. Shurley, Judge.

Proceeding between Walter Holloway and the State. Judgment for the latter, and the former brings error. Affirmed.

H. E. Combs and F. H. Colley, both of Washington, Ga., for plaintiff in error.

M. L. Felts, Sol. Gen., of Warrenton, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 792)

CENTRAL OF GEORGIA RY. CO. v. ROWLAND. (No. 12742.)

(Court of Appeals of Georgia, Division No. 1.
Dec. 14, 1921.)

(Syllabus by the Court.)

Sufficiency of evidence.

The verdict was authorized by the evidence, and the excerpts from the charge of the court, as complained of by the plaintiff in error, do not require a new trial.

Error from Superior Court, Haralson County; F. A. Irwin, Judge.

Action by J. W. A. Rowland against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. Branham and Maddox & Doyal, all of Rome, and Griffith & Matthews, of Buchanan, for plaintiff in error.

BROYLES, C. J. The facts of this case were reviewed by this court in the case of Central of Georgia Railway Co. v. Reid, 23 Ga. App. 694, 99 S. E. 235. Reid, the defendant in error in that case, and Rowland, the defendant in error in the instant case, were riding together in the same buggy when the mule drawing it ran away and threw them out, causing the alleged injuries sued for in each case. Each plaintiff alleged the same acts of negligence against the same defendant.

This court in its decision of the Reid Case laid down the principles of law that controlled that case, and that control the present case. Under that decision and the facts of this case, the verdict rendered upon the trial now under review was authorized by the evidence. It is true that the two excerpts from the charge which are complained of in the motion for a new trial are somewhat confused and misleading, and perhaps subject to other exceptions, but when these excerpts are considered in the light of the entire charge and the facts of the case—including the small verdict (\$250) in favor of the plaintiff—we do not think they require another trial of the case.

Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 24)

EARLY v. HOUSER & HOUSER.
(No. 12768.)(Court of Appeals of Georgia, Division No. 2.
Dec. 14, 1921.)*(Syllabus by the Court.)***1. Negligence Ⓒ2—Legal duty essential.**

Legal liability results only from a breach of legal duty, which implies the existence of some legal relation.

2. Master and servant Ⓒ88(5) — Volunteer defined.

One who, without any employment whatever, but at the request of a servant who has no authority to employ other servants, voluntarily undertakes to perform service for a master, is a mere volunteer, and the master does not owe him any duty, except not to injure him willfully and wantonly after his peril is discovered.

3. Master and servant Ⓒ257 — Allegations held not to show breach of duty to volunteer.

The allegations of the petition failed to show a breach of any duty of the defendants to the plaintiff in connection with the act in which he is alleged to have been injured, and showed that this act was simply a voluntary one on his part, in which he assumed all the risk.

Error from Superior Court, Dawson County; J. B. Jones, Judge.

Action by R. M. Early against Houser & Houser. Judgment for defendants, and plaintiff brings error. Affirmed.

Early sued for damages on account of personal injuries, making substantially the following allegations: The defendants were the owners of and operated a public ginnery, to which the public was invited to bring cotton to be ginned, and for the ginning of which they charged a stipulated sum as compensation. The gin was generally operated by the defendants, "with the assistance of Jack Williams (sometimes called Jack Bruce), who was an employee of said" defendants. On the day of the alleged injury the defendants had gone away from the gin and left the entire management and control and operation of the ginnery under the control and management of Williams alone, and at the time of the injury he was the agent of the defendants, and, as such, had entire control and management of and was operating the ginnery. On the day of the injury the plaintiff was a customer at the gin, having on that day carried a bale of seed cotton to the gin, and was then and there invited to place the cotton at the proper place to have it ginned, and was waiting to have it ginned. It is alleged that while he was unloading his cotton a belt running from a counter shaft to a pulley on the gin slipped and ran off of the pulley on the counter shaft, causing the gin to stop, and the counter shaft continued to

revolve at a very rapid and increased speed; that when the belt ran off, the said Williams, who was then operating the gin alone, and had entire charge of it, having no assistance or help near or within call of him, called upon and requested and directed the plaintiff to assist him in putting the belt back on the pulley of the counter shaft; that this was an emergency in which it was necessary that the belt should be put back on the pulley, not only to avoid injury to the machinery, but in order that the ginning should continue and not be delayed, and in order that the plaintiff's cotton should be ginned and not delayed; that in order to lend a helping hand and in order that the gin might continue to run the plaintiff immediately complied with the request, and in so doing he came very close to the counter shaft, and his clothing was caught upon an unguarded and projecting set screw on the shaft, and he thereby received the injury for which he sued. The court sustained a demurrer to the petition, and the plaintiff excepted.

W. B. Sloan and H. H. Petry, both of Gainesville, for plaintiff in error.

E. C. Brannon, B. R. Taylor, and A. W. Vandiviere, all of Dawsonville, and O. J. Lilly, of Gainesville, for defendants in error.

HILL, J. [2] The allegations of the petition show that the plaintiff was a volunteer, and, in undertaking to render a voluntary service to the employee of the defendants who was operating the gin, he did so at his own risk. These allegations, most favorably considered, show that Williams, who was in charge of the gin, was operating it simply as an employee of the defendants, and as such employee had no authority to employ assistance. It was insisted that the plaintiff was not merely a volunteer, that he was at the gin in compliance with an invitation of the owners thereof, the defendants, and that he was therefore a licensee with an interest; that in addition an agent of the defendants, who at the time was in charge of the gin, requested him to assist; and that Williams, the employee, being in sole charge of the gin, was the alter ego of the defendants, and the defendants were liable for the acts of Williams. There are some authorities which sustain the view here presented, but we think the question is controlled by decisions of this court and of the Supreme Court adverse to the position of learned counsel for the plaintiff in error. While there are some general statements in the petition which would indicate that Williams was acting as vice principal of the defendants, there are no facts alleged which would justify that conclusion; the only facts alleged being that he was operating the gin in the absence of the defendants, as their employee. It is alleged that the plaintiff

was invited to take his cotton to the gin for the purpose of having it ginned, but this invitation was not broad enough to authorize him to intermeddle with the operation of the gin at the request of Williams, and when he did so he was acting voluntarily and at his own risk.

"To create the relation of master and servant there must be some contract or some act on the part of one person which expressly or impliedly recognizes another as his servant." *Atlanta & West Point R. Co. v. West*, 121 Ga. 641(1), 49 S. E. 711, 67 L. R. A. 704, 104 Am. St. Rep. 179.

[1] So far as appears from the petition, the owners of this gin were guilty of no breach of any duty to the plaintiff, and there cannot be a legal liability except upon a breach of some legal duty.

"Where a volunteer engages in work undertaken in compliance with an unauthorized request of an employee of the defendant, the latter owes him none of the obligations of a master toward a servant, but is only bound to use care not to injure him after notice of his peril." *Atlanta & West Point R. Co. v. West*, supra; *Cooper v. Lowery*, 4 Ga. App. 120, 60 S. E. 1015; *Central of Georgia Ry. Co. v. Mullins*, 7 Ga. App. 381, 66 S. E. 1028; *Southern Ry. Co. v. Duke*, 16 Ga. App. 673, 85 S. E. 974; *Rhodes v. Georgia R. & Banking Co.*, 84 Ga. 320, 10 S. E. 922, 20 Am. St. Rep. 382.

[3] The allegations of the petition are not sufficient to show such an emergency as would authorize the plaintiff voluntarily to interfere and undertake the risk of working with the dangerous revolving machinery. The fact that an employee in charge of the gin requested him to do so did not warrant him in doing so. Certainly his act was not one the responsibility for which he could legally impose upon the owners of the gin, who were under no obligations whatever to him in so far as his meddling with the machinery was concerned. The relation of master and servant was not created by this unauthorized request of the employee in charge of the gin. The invitation extended to the plaintiff by the owners of the gin was to bring his cotton there for the purpose of having it ginned, and certainly such invitation was not sufficient to justify him in undertaking to help in the operation of the gin. Under the decisions in *Atlanta & West Point R. Co. v. West*, and *Central of Georgia Ry. Co. v. Mullins*, supra, we think the judgment of the lower court sustaining the demurrer and dismissing the petition should be affirmed.

Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

BOWDEN v. STATE. (No. 12919.)

(Court of Appeals of Georgia, Division No. 1.
Dec. 13, 1921.)

(Syllabus by the Court.)

Assault and battery \S 51, 91—Mere preparation not assault; evidence insufficient to sustain conviction.

Mere preparation to commit an injury, unaccompanied by a physical effort to do so, is not an assault.

Error from Superior Court, Monroe County; W. E. H. Searcy, Jr., Judge.

Gene Bowden was convicted of an assault, and he brings error. Reversed.

W. M. Clark, of Forsyth, for plaintiff in error.

E. M. Owen, Sol. Gen., of Zebulon, for the State.

BROYLES, C. J. The defendant was convicted of an assault, and the evidence discloses that the only act relied on to sustain the conviction was as follows:

"He called me 'a damn rascal,' and picked up two rocks. He held one in each hand. (Here witness illustrated by holding the right hand backward and higher, holding the left hand down in a natural position.) He drew the right hand and arm back as if to throw. I said: 'You have the advantage. Why don't you kill me with the rocks?' He was on one side of a wire fence, and I was on the other side. We were about as far apart as defendant's counsel and I now are—about 12 or 14 feet. He did not throw the rocks nor try to throw them. I turned my back to him and walked away."

In *Brown v. State*, 95 Ga. 481, 20 S. E. 495, the holding is as follows:

"Mere preparation to commit a violent injury upon the person of another, unaccompanied by a physical effort to do so, will not justify a conviction for an assault; and therefore where the evidence showed that during an altercation between the person alleged to have been assaulted, and two other persons acting in concert, one of the latter picked up a stone but made no attempt to cast it at the former, who was about 20 steps distant, neither of the two persons so acting in concert could be lawfully convicted of an assault."

The evidence in the instant case did not authorize a conviction, and the court erred in overruling the motion for a new trial.

Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 813)

**MAYOR AND ALDERMEN OF SAVANNAH
v. WATERS. (No. 12510.)**(Court of Appeals of Georgia, Division No. 2.
Dec. 14, 1921.)*(Syllabus by the Court.)***1. Negligence \S 93(1)—Driver's negligence
not imputable to invitee.**

Negligence by the driver of a private vehicle, contributing to the injury of a person riding therein by invitation, is not imputable to the injured person, unless it is made to appear that the injured person owned the vehicle, or had some agency or concern in its operation such as that the driver was his servant or agent, or that the two were engaged at the time in a joint enterprise for their common benefit, or unless he otherwise had some right, or was under some duty, to control or influence the driver's conduct, such as might arise from the obvious or known incompetency of the driver, resulting from drunkenness or other cause. Civ. Code 1910, § 3475; Roach v. Western & Atlantic R. Co., 98 Ga. 785, 786(4), 21 S. E. 67; Metropolitan R. Co. v. Powell, 89 Ga. 601, 602(7), 16 S. E. 118; Adamson v. McEwen, 12 Ga. App. 510, 77 S. E. 591; Wilkinson v. Bray, 27 Ga. App. —, 108 S. E. 133, 134; Christopherson v. Minn. Ry., 28 N. D. 128, 147 N. W. 791, L. R. A. 1915A, 761, Ann. Cas. 1916E, 683.

**2. Negligence \S 113(6)—Invitee injured need
not allege his own freedom from negligence
nor that of the driver with whom he was riding.**

It not being incumbent upon the plaintiff in such a case to allege his own freedom from fault or negligence (Lamb v. Hall, 145 Ga. 331, 89 S. E. 193; Central Ry. Co. v. Brandenburg, 129 Ga. 115, 118, 58 S. E. 658; Ga. Midland & Gulf R. Co. v. Evans, 87 Ga. 673[1], 13 S. E. 580; Fisher Motor Car Co. v. Seymour, 9 Ga. App. 465[1], 71 S. E. 764), a fortiori it was unnecessary for the plaintiff in the present case to negative any such negligence by the driver of the car in which the plaintiff was riding at the time of the alleged injury, or that any relationship existed between them under which negligence of the driver, had it existed, would have been imputable to the plaintiff. Since the petition does not affirmatively show any contributory negligence on the part of the plaintiff, or any negligence on the part of the driver together with any fact or circumstance which would render the plaintiff liable for any such negligence, the judge did not err in overruling the demurrers.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Action by M. E. Waters against the Mayor and Aldermen of Savannah. Judgment for plaintiff, and defendant brings error. Affirmed.

Shelby Myrick and Edwin A. Cohen, both of Savannah, for plaintiff in error.

Oliver & Oliver and John Z. Ryan, all of Savannah, for defendant in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(27 Ga. App. 730)

FREEMAN et al. v. STATE. (No. 12978.)(Court of Appeals of Georgia, Division No. 1.
Dec. 13, 1921.)*(Syllabus by the Court.)***1. Criminal law \S 867—Statement by witness
reflecting on character of defendant held not
ground for mistrial.**

Upon the trial of the defendants, a witness for the state, while being questioned by the solicitor general, made a statement which reflected upon the character of one of the defendants, and which was not responsive to the question propounded. No objection was made to the admission of this statement, nor was any motion subsequently made to rule it out; but counsel for the accused moved for a mistrial of the case because of such statement. The court declined to grant a mistrial, saying, "If you could get a mistrial every time a witness says something he oughtn't to say, you would never get a trial." The judge did, however, on his own motion, rule out the statement of the witness, and specifically instructed the jury not to consider it in any way in passing upon the case. In view of the above-recited facts, this court cannot hold as a matter of law that the trial judge abused his discretion in denying the motion for a mistrial. None of the cases cited by counsel for the movants is similar to this case.

2. Sufficiency of instructions.

In view of the particular facts of the case and the charge of the court as a whole, the excerpts complained of are not error for any reason assigned.

**3. Motion for new trial held not to show
reversible error.**

None of the other special grounds of the motion for a new trial shows reversible error.

4. Sufficiency of evidence.

The verdict was authorized by the evidence, and the overruling of the motion for a new trial was not error.

Error from Superior Court, Fulton County; Jno. D. Humphries, Judge.

Griff Freeman and others were convicted of an offense, and they bring error. Affirmed.

W. Carroll Latimer, Saml. D. Hewlett, Wm. Schley Howard, and Harvey Hill, all of Atlanta, for plaintiffs in error.

Jno. A. Boykin, Sol. Gen., and E. A. Stephens, both of Atlanta, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 810)

CHANDLER v. AMERICAN CENT. LIFE INS. CO. (No. 12506.)(Court of Appeals of Georgia, Division No. 2.
Dec. 14, 1921.)*(Syllabus by the Court.)***Insurance — 360(4)—Retention of worthless premium check held not to make insurer liable on policy.**

The conditional receipt, given by the life insurance company for the premium check tendered on the last day for payment, was not in terms or in legal effect a receipt for the premium, but only for the check, coupled with what amounted to an extension agreement conditioned, however, upon payment of the check on its presentation. Here, contrary to the facts in *Veal v. Security Mutual Life Insurance Co.*, 6 Ga. App. 721, 85 S. E. 714, the company did not accept the check as in payment of the premium, nor did it even, after notice of dishonor of the check, continue to claim liability and demand payment thereon, but, on the contrary, it expressly limited its acceptance of the check to its actual payment, and, after the check had been dishonored, promptly notified the insured of the policy's lapse, coupling the notice with an unaccepted offer of reinstatement, based, not upon the payment of the check, but upon the payment of the premium, together with interest thereon from the date on which the premium became due. The dishonored check should have been voluntarily returned; but, since the action taken by the defendant company had placed it beyond its power to enforce payment thereon, its mere physical retention would not render the company liable on the policy, which had been declared lapsed, and which the insured on invitation had failed to reinstate. Under the agreed statement of facts under which this case was tried, the judge did not err in directing a verdict in favor of the defendant. See *State Life Ins. Co. v. Tyler*, 147 Ga. 287, 93 S. E. 415; *Belmont Farm v. Dobbs Hardware Co.*, 124 Ga. 827, 828, 53 S. E. 312. See, also, *French v. Columbia Life & Trust Co.*, 80 Or. 412, 156 Pac. 1042, Ann. Cas. 1918D, 484; *N. Y. Life Ins. Co. v. Evans*, 136 Ky. 391, 124 S. W. 376; *Moreland v. Union Central Life Ins. Co.*, 104 Ky. 129, 46 S. W. 516.

Error from Superior Court, Haralson County; F. A. Irwin, Judge.

Action by H. M. Chandler against the American Central Life Insurance Company. Judgment for defendant on a directed verdict, and plaintiff brings error. Affirmed.

Helen M. Chandler sued the American Central Life Insurance Company upon an insurance policy for \$1,000, of which she was beneficiary, which the defendant had issued upon the life of Luna E. Chandler. The pleadings and the agreed statement of facts upon which the case was tried show that the policy was issued and delivered on July 28, 1915, that the first annual premium of \$30.83, due July 28, 1915, was paid, that the

second annual premium, due July 28, 1916, was paid, and that the third annual premium, due July 28, 1917, was not paid, but that on August 27, 1917, within the 31 days of grace allowed for the payment of premiums, the insurance company received at its home office a check drawn by Luna E. Chandler, and payable to it, for the amount of the premium, which check was dated at Tallapoosa, Ga., August 24, 1917, and was drawn on the Bank of Tallapoosa, Ga. Upon receipt of the check the company issued a premium receipt, dated August 27, 1917, and mailed it to the insured. The receipt is set out in full in the plaintiff's petition, and contains the following stipulation:

"Any tender is accepted subject to the terms and conditions of the policy, and to ultimate cash payment."

On the face of the receipt are the number of the policy, the amount of the premium, and the name of the assured, and at the bottom the word "Over," and on the reverse side appear the several stipulations and the signatures of two officers of the company. The check was duly presented for payment, and payment was refused because the assured did not have sufficient funds on deposit with the drawee bank to cover the check. On September 15, 1917, the company sent to the assured a letter, stating, among other things, the following:

"This check comes back to us to-day, however, unpaid, and the policy therefore is in the same position as though your check had not been received. We are inclosing reinstatement application for your completion, which we ask that you return to us at once with your remittance, \$30.83, plus interest at the rate of 6 per cent. per annum from July 28, 1917, to the date of such remittance, when the reinstatement application will have our prompt attention."

The company received no reply to this letter, and on September 28, 1917, sent to the assured a letter calling attention to the fact that the premium had not been paid, and requesting him to forward \$30.83, plus interest from July 28, 1917, and also to sign the reinstatement application which was inclosed. The assured did not reply to either of the letters, and took no action in regard to the premium or check. On August 27, 1917, the date on which the check was received by the company in Indianapolis, the assured had on deposit in the Bank of Tallapoosa, subject to check, \$5.29; and from August 27, 1917, to November 28, 1917, the assured's account with the bank was either overdrawn or amounted to less than \$30.83.

The assured died on March 16, 1918, and proofs of death were furnished to the company by the beneficiary, and payment of the policy was refused by the company. Under

the terms of the policy, it would not have had any extension insurance value until after the payment of the third annual premium. On motion of the defendant's attorneys the court directed a verdict for the defendant.

H. J. McBride, of Tallapoosa, for plaintiff in error.

Bryan & Middlebrooks, of Atlanta, and Woolen, Cox & Welliver, of Indianapolis, Ind., for defendant in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(27 Ga. App. 788)

WALLIN v. MAYOR AND ALDERMEN OF CITY OF SAVANNAH. (No. 12738.)

(Court of Appeals of Georgia, Division No. 1.
Dec. 14, 1921.)

(Syllabus by the Court.)

1. Recovery under contract properly limited.

On consideration of the demurrer to the petition, the court did not err in passing an order limiting the plaintiff's right of recovery to \$1,186.37, nor thereafter in refusing to allow him to introduce evidence for the purpose of showing that he was entitled to recover an additional sum. Nor was it error to direct a verdict in favor of the plaintiff for \$1,000.

(Additional Syllabus by Editorial Staff.)

2. Municipal corporations §250—Architect held not entitled to extra compensation, where changes in specifications were necessitated by increased costs.

In an action by a architect to recover for services in making plans for a building to be erected by defendant city under a contract providing for additional compensation for material changes in the plans and specifications after approval, where it appeared that changes were made necessary by the increase in costs, *held*, that plaintiff was not entitled to extra compensation; the intent of the contract not including changes necessary to bring the costs within the appropriation made by the city.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Action by Henrik Wallin against the Mayor and Aldermen of the City of Savannah. Judgment for defendant and plaintiff brings error. Affirmed.

Henrik Wallin sued the mayor and aldermen of the city of Savannah for breach of contract. The contract, as set forth in the petition, shows that Wallin was engaged by the city as architect for a certain building to be erected by the city. The material parts of the contract, so far as this suit is concerned, are as follows:

"Art. 2. The said Wallin shall render complete professional services as architect for said building, consisting of preparing preliminary studies, plans, and sketches, which are to be restudied and revised by the said city or its agents until the same are satisfactory to and approved by the said city, after which said Wallin shall perform all services required or necessary in the matter of plans, working drawings, and specifications, detailed drawings, forms of building contracts, general direction and supervision of the construction of said building, certificates of payments due contractors and others performing labor or furnishing material in connection with said building, and all other services in connection with the construction of said auditorium building properly chargeable to an architect, all of which services to be the customary services of an architect as defined by the American Institute of Architects, except that in case of conflict the express terms of this agreement shall be binding."

"Art. 6. The said city is to compensate the said Wallin for his services as architect, and is to pay as such compensation a sum equal to six per cent. (6%) of the total cost of the completed building, provided such sum does not exceed the maximum amount of commissions hereinafter named. Payments to the said Wallin are to be made as the work progresses, in the following order: Upon the acceptance of the preliminary studies, one fifth of the estimated fee; upon the completion of specifications and general working drawings one fifth additional, and an additional one-fifth when the general contract is let by the city, the remainder being due from time to time in proportion to the amount of service rendered. Until an actual estimate is received, charges are based upon the proposed cost of the work and payments received are on account of the entire fee, but in no event is the said Wallin to receive commissions of more than a total [of] eight thousand one hundred (\$8,100.00) dollars, unless the plans, after acceptance by the city, are, through no fault of the said Wallin, materially changed by the city.

"Art. 7. If, after the plans, specifications, and scheme of work have been accepted and approved by the city, through no fault of the said Wallin, material changes are made by the city in the same, or if the architect be put to extra labor or expense by the delinquency or insolvency of a contractor, the architect shall be paid for such additional services and expense in a sum to be agreed upon between the city and said Wallin.

"Art. 8. Should it be found, after the completion by the said Wallin of the preliminary studies and the plans and specifications and general working drawings for the construction of the auditorium, that a contractor acceptable to the city has not submitted a bid on the same in the amount within the sum set apart by the city for the construction of said auditorium by the city, then the said Wallin is obligated to make all necessary revisions and changes in the plans and specifications, working drawings, or other documents, as will enable the cost of the auditorium building to be reduced to a sum within the amount set apart by the city for the construction of said auditorium; all without extra payment or compensation to the said

Wallin; all revisions and changes in the plans, specifications, and working drawings made shall be submitted to and approved by the city."

The petition admitted that the plaintiff had been paid by the city on this contract \$7,526.63, and showed that under the contract he had performed other services, which entitled him to recover the sum of \$1,186.37. The petition alleged also that by reason of certain facts set forth therein the plaintiff was entitled to recover the additional sum of \$3,240. The defendant demurred to the petition generally and specially. The court overruled the general demurrer, but sustained the ground of the special demurrer attacking the plaintiff's claim as to the \$3,240 item. After striking this item the court passed an order limiting the plaintiff's right of recovery to \$1,186.37. To this order the plaintiff excepted pendente lite, and the case proceeded to trial. Upon the trial the plaintiff admitted that he was entitled to recover only \$1,000 on account of the extra services for which the petition claimed \$1,186.37. The court refused to allow the plaintiff to testify as to the \$3,240 item, and, upon motion of the defendant's counsel, directed a verdict in favor of the plaintiff for \$1,000. To the action of the court in rejecting the plaintiff's proffered testimony and in directing a verdict for only \$1,000, the plaintiff excepted.

Oliver & Oliver, of Savannah, for plaintiff in error.

Shelby Myrick and Edwin A. Cohen, both of Savannah, for defendant in error.

BROYLES, C. J. (after stating the facts as above). [1, 2] In our view of this case the court did not err in sustaining that ground of the special demurrer which challenged the plaintiff's right to recover the \$3,240 alleged to be due him by the defendant. The salient facts upon this phase of the case, as shown by the amended petition and the contract, are that the plaintiff agreed to draw the plans for the building and supervise its construction, all for the sum of \$8,100, unless the plans were materially changed by the city through no fault of his; that he drew certain plans and specifications, which were accepted by the city, but, because of the unprecedented advances in the price of labor and material, none of the bids received from contractors was within the price fixed for the construction of the building, and subsequently all bids were rejected, and he was compelled by the city, through no fault of his, to alter his original plans and specifications, in order to bring the construction of the building within the amount appropriated by the city. It is for these alterations in the original plans that he claims the additional

sum of \$3,240, and he bases his claim thereto on article 7 of the contract.

We do not think this article, construed singly or in connection with the entire contract, supports this contention. The changes in the original plans and specifications became necessary, because there were no bids submitted within the amount appropriated by the city for the construction of the building as planned and outlined by the plaintiff in his original drawings, and this very contingency was expressly provided for in article 8 of the contract. The learned counsel for the plaintiff contend that, when article 8 of the contract is construed in the light of articles 2, 6, and 7 thereof, it means that, if the revisions and changes provided for in article 8 are occasioned through no fault of the architect, then he shall receive compensation therefor. We do not think such a construction of the contract is a reasonable one. It seems clear to us that, under a proper construction of the contract as a whole, and the plain and unambiguous terms of article 8 thereof the plaintiff was not entitled to any compensation for the alterations of the original plans and drawings which were made necessary to bring the cost of the building within the appropriation made by the city for its erection.

It follows, from what has been said, that the court did not err in sustaining the special demurrer to the petition, and in passing an order limiting the plaintiff's right of recovery to \$1,186.37, nor in excluding the testimony offered in support of the \$3,240 item, nor in directing a verdict in favor of the plaintiff for the sum of \$1,000.

Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 24)

WARD v. J. B. COLT CO. (No. 12765.)

(Court of Appeals of Georgia, Division No. 2.
Dec. 14, 1921.)

(Syllabus by the Court.)

1. Contracts \S 93(2)—Ignorance of contract no defense where signed without reading; absence of spectacles no excuse for failure to read contract.

It is well settled that one who executes a written contract without reading it cannot avoid liability thereon because he was ignorant of the contents of the contract, when he was not induced to sign the contract by any false representation amounting to fraud on the part of the person with whom he was dealing. *Barnes v. Slaton Drug Co.*, 21 Ga. App. 580, 94 S. E. 896; *Tinsley v. Gullett Gin Co.*, 21 Ga. App. 512 (2), 94 S. E. 892. The fact that a party who signs a contract did not read it because he did not have his spectacles with

him furnishes no excuse for his failure to read the contract or to have some one read it to him. *Hanes v. Farmers' & Merchants' Bank*, 20 Ga. App. 129, 92 S. E. 896.

2. Reading contract not prevented by fraud or emergency.

There was no evidence tending to show that the defendant was prevented from reading the contract by any emergency, or by artifice or fraud perpetrated by the opposite party or by any one else, such as would reasonably prevent him from reading it.

3. Defendant held not induced to sign contract by fraud.

The contract signed by the defendant, on which he was sued, was a plain, unambiguous contract in writing, and there is no evidence that the defendant was induced to make the contract by any representation amounting to fraud, and no reason appears why he should not have complied with the terms of his contract. The verdict directed by the trial judge was the only one that could have been legally rendered under the evidence, and the plea contained no merit.

Error from Superior Court, Lincoln County; E. T. Shurley, Judge.

Action by the J. B. Colt Company against M. I. Ward. Judgment for plaintiff, and defendant brings error. Affirmed.

Burnside & McWhorter, of Lincolnton, for plaintiff in error.

I. T. Irvin, Jr., and Hugh E. Combs, both of Washington, Ga., for defendant in error.

HILL, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(27 Ga. App. 770)

ROBINSON v. STATE. (No. 12940.)

(Court of Appeals of Georgia, Division No. 1. Dec. 13, 1921.)

(Syllabus by the Court.)

1. Receiving stolen goods — 7(6) — Indictment held sufficiently supported by proof as to ownership.

An indictment for receiving stolen goods, which alleged the owners of the goods to be "Audley Hill & Co., a corporation" is sufficiently supported by proof that the goods belonged to Audley Hill Company, the evidence showing that both these names were applied to the same concern.

2. Indictment and information — 176 — Allegations and proof as to date held not to show commission of two separate offenses.

Although the indictment against the principal alleged that the larceny was committed on December 2, and the indictment against the accessory alleged that the stolen goods were received by him on December 4, and the proof showed that the larceny was really committed

on the latter date, this does not show that the principal "committed two acts of larceny," and that the accessory had been convicted of the one with which the principal had no connection. The time alleged in an indictment is immaterial, provided it is within the statute of limitations for the particular offense for which the accused is being tried.

Error from City Court of Richmond County; J. O. O. Black, Jr., Judge.

A. P. Robinson was convicted of receiving stolen goods, and he brings error. Affirmed.

Wm. H. Fleming, of Augusta, for plaintiff in error.

W. Inman Curry, Sol., of Augusta, for the State.

BLOODWORTH, J. Plaintiff in error was convicted of receiving stolen goods. The evidence authorized the verdict. The grounds of the amendment to the motion for a new trial are all amplifications of the general grounds. There is no merit in any of the contentions embraced in these grounds of the motion, and we will discuss only two of them.

[1] It is insisted that the verdict is without evidence to support it because: (1) "The ownership of the goods alleged to have been received by defendant, knowing them to be stolen, is described in the indictment as follows: 'The property of Audley Hill & Company, a corporation,' whereas the evidence shows there was no such corporation in existence as Audley Hill & Co.," but the corporate name is Audley Hill Company. A witness testified that the goods belonged to Audley Hill & Co.; that at the time the goods were stolen he was driving "one of the wagons of Audley Hill & Co.," and that he "went back to Audley Hill & Co.'s warehouse." Under the evidence in this case no other conclusion can be reached than that the two names were applied to the same corporation. The contention of plaintiff in error that the difference in name between Audley Hill & Co. and Audley Hill Company is a fatal variance is settled against him by a number of decisions of the appellate courts of this state.

"An indictment for larceny after trust, charging that the accused, after having been intrusted with money for the purpose of paying it to 'Dudley-Butts Lumber Company,' fraudulently converted the same to his own use, is sufficiently supported by evidence showing that the money which the accused converted was intended for payment to 'Dudley-Butts Sash, Door & Lumber Company,' it appearing that the two names were applied to the same corporation, and that it was as well known by one name as the other. 'The question is one of the identity of the party, * * * and not merely one of the identity of a name.' *Jackson v. State*, 76 Ga. 568; *Rogers v. State*, 90 Ga. 463." *Smith v. State*, 121 Ga. 613, 49 S. E. 677.

See, also, *Edwards v. State*, 121 Ga. 590 (3), 49 S. E. 674; *Edwards v. State*, 24 Ga. App. 653 (1), 101 S. E. 766, and citations.

[2] 2. The fact that the indictment in this case alleged the commission of the crime of receiving stolen goods as having been committed on December 4, and the indictment against the principal alleged that the goods were stolen on December 2, is no proof that the principal "committed two acts of larceny," nor that the goods received by the accused in this case were not the same goods stolen by the principal. The proof that the allegations in the two indictments referred to the same goods came from the principal, who swore:

"I admit I stole the goods [the goods described in the indictment against the accused in this case]. I was tried for stealing these goods, and am now serving a sentence on the chain gang."

It is a fundamental principal of our penal law that the state, in making out its case, is not confined to the day named in the indictment, but may prove the commission of the offense at any time prior to the return of the indictment, provided the time proven is within the statute of limitations for the particular offense for which the accused is being tried. *Cole v. State*, 120 Ga. 485, (2), 48 S. E. 156.

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(28 Ga. App. 18)

WASHINGTON v. JORDAN. (No. 12693.)

(Court of Appeals of Georgia, Division No. 2.
Dec. 14, 1921.)

(Syllabus by the Court.)

1. Recovery on quantum meruit sustained.

A recovery on a quantum meruit for commissions on the sale of real estate was authorized by the evidence.

2. Work and labor §4(2)—Promise to pay for reasonable value of services implied.

Ordinarily when one renders services valuable to another, which the latter accepts, a promise is implied to pay the reasonable value thereof, and it is not necessary in such case to prove an express promise to pay for such services. Civil Code 1910, § 5513; *Williamson v. Martin*, 19 Ga. App. 425, 91 S. E. 510.

3. Brokers §56(1)—Owner may not himself sell to agent's customer so as to deprive him of his commission.

While the owner of real estate, by employing an agent to perfect the sale thereof, does not preclude himself from selling it, yet the owner must act in the utmost good faith with his agent, without any purpose of depriving him of his right to commissions for his services.

Moore v. May, 10 Ga. App. 198, 73 S. E. 29. And the owner cannot sell to his agent's customer and thus prevent the agent from receiving his commission. *Gresham v. Connally*, 114 Ga. 906, 41 S. E. 42.

4. Brokers §56(3)—Consummation of actual sale by owner does not deprive broker of commissions for services rendered.

Where a broker has been instrumental in procuring a purchaser, he is entitled to his commission notwithstanding the fact that the owner consummated the actual sale to the purchaser procured by the broker. Civ. Code 1910, § 3587; *Graves v. Hunnicutt*, 8 Ga. App. 99, 68 S. E. 558.

5. Appeal and error §1058(1)—Witnesses §268(1)—Exclusion of evidence as to whether plaintiff had registered as real estate agent not error, but if error, held cured by introduction of other evidence.

There was no error in the exclusion of the question propounded on cross-examination as to whether the plaintiff had registered as a real estate agent, under section 971 of the Civil Code of 1910. Even if there had been error in such ruling, it was cured by the fact that a broker's license, duly issued, was subsequently introduced in evidence.

6. Evidence §471(24)—Whether purchaser from principal was influenced by broker properly excluded.

Under the facts of this case there was no error in excluding from the evidence the answer to the question propounded to the purchaser of the property by the defendant, referring to the broker who had procured the sale, "Were you influenced by Mr. Jordan in the purchase of this property?" The case of *Doonan v. Ives*, 73 Ga. 295, relied upon by the plaintiff in error, is distinguished from the present case on the facts. In that case the owner of the real estate had testified that she did not know that the plaintiff, as a real estate agent, had been employed to sell her property, and this statement was corroborated by other evidence. Here the evidence was undisputed that the plaintiff, as broker, was employed by the defendant to sell the property and had actually carried on negotiations for that purpose with the person who subsequently purchased the property from the owner. Under these facts an answer by the purchaser to the question that the broker had not influenced him in the purchase of the property would have been simply an opinion without probative value.

7. Brokers §57(2)—Sale by principal on modified terms cannot defeat broker's right to commissions.

The law of this case is well settled and is this: If under his contract with the defendant the plaintiff performed work and rendered services in compliance with the contract, whether express or implied, and procured, as a result of his services, a customer for the property in question, and the owner, having information that the broker was negotiating with his customer, did himself, as owner, sell the property to the customer so procured by the broker, although with some modification of the terms on which the authority to sell the property had

been given by the owner to the broker, the owner could not thereby defeat the payment of the broker's commission. This would be a fraudulent taking advantage of the broker's labor without paying for it. *Doonan v. Ives*, supra.

8. Denial of new trial affirmed.

No error of law appears, and the judgment overruling the motion for a new trial is affirmed. The motion to assess damages for bringing the case to this court for the purpose of delay is denied.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by R. J. Jordan against J. T. Washington. Judgment for plaintiff, and defendant brings error. Affirmed.

Brewster, Howell & Heyman, Hugh Howell, and W. P. Bloodworth, all of Atlanta, for plaintiff in error.

Westmoreland & Smith, of Atlanta, for defendant in error.

HILL, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(27 Ga. App. 814)

DAVIS, Agent, v. PHILLIPS. (No. 12513.)

(Court of Appeals of Georgia, Division No. 2. Dec. 14, 1921.)

(Syllabus by the Court.)

Commerce \S 33, 47.—Goods are in interstate commerce when delivered for continuous transportation to another state; passenger's undeclared intention to extend journey beyond state does not make transportation interstate.

Goods are in interstate commerce when they have been delivered for continuous transportation to a point of destination located in another state. *Texas, etc., R. Co. v. Sabine Tram Co.*, 227 U. S. 111, 123, 33 Sup. Ct. 229, 57 L. Ed. 442; *Southern Pacific Terminal Co. v. Interstate Commerce Com.*, 219 U. S. 498, 527, 31 Sup. Ct. 279, 55 L. Ed. 310; *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715. In order for a shipment, thus destined from the beginning for such continuous transportation, to be interstate in character, it is not required that it be originally routed by the initial carrier to a point of destination beyond the limits of the state, since the nature and essential character of the transportation is the controlling factor. *Texas, etc., R. Co. v. Sabine Tram Co.*, supra. See, also, *Gulf, etc., Ry. Co. v. Texas*, 204 U. S. 403, 414, 27 Sup. Ct. 360, 51 L. Ed. 540; *Penn. R. Co. v. Clark*, 238 U. S. 456, 35 Sup. Ct. 896, 59 L. Ed. 1406; *Ill. Cent. R. Co. v. De Fuentes*, 236 U. S. 157, 35 Sup. Ct. 275, 59 L. Ed. 517. Thus, while the rulings made by this court in *Augusta Brokerage Co. v. Central of Ga. Ry. Co.*, 5 Ga. App. 187, 62 S. E. 996, in the light of subsequent decisions by the Supreme Court of the United

States, appear too broad in their statements, still, where, as in the instant case (contrary to what were the facts in *Galveston, etc., Ry. Co. v. Woodbury*, 254 U. S. 357, 41 Sup. Ct. 114, 65 L. Ed. —), the baggage was moved under an intrastate ticket, and where the journey itself was in no sense continuous, nor had ever been so declared or intended, the mere fact that the passenger may have intended, after remaining several days at the point of destination provided by the intrastate ticket, to extend her journey to another point beyond the limits of the state, could not be taken as such a fact as to render the initial travel and transportation interstate in character. "There is no presumption that a transportation when commenced is to be continued beyond the state limits." *Gulf, etc., Ry. Co. v. Texas*, supra, 204 U. S. 414, 27 Sup. Ct. 363, 51 L. Ed. 540.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

Error from City Court of Americus; W. M. Harper, Judge.

Action by M. T. Phillips against J. C. Davis, Agent, etc. Judgment for plaintiff, and defendant brings error. Affirmed.

Plaintiff in the court below sued defendant for \$739.05, the alleged value of a wardrobe trunk and contents, which the Central of Georgia Railway Company had checked as plaintiff's baggage on a ticket over its line from Americus, Ga., to Macon, Ga., and the loss of which defendant admitted. The only defense set up was that under the Act to Regulate Commerce of February 4, 1887 (chapter 104, 24 Stat. at L. 379; U. S. Comp. Stat. § 8563; 4 Fed. Stat. Ann. [2d. Ed.] p. 337), as amended by the Carmack Amendment of June 29, 1906 (34 Stat. at L. 595, c. 3591, § 7; U. S. Comp. Stat. §§ 8604a, 8604aa; 4 Fed. Stat. Ann. [2d Ed.] p. 499), and by subsequent legislation, the carriage was interstate commerce, although the initial movement to Macon was intrastate under a local ticket because it was intended that the baggage should move from Americus to Greenville, S. C., and that the shipment was, therefore, controlled by rules 10 and 11 of the Baggage Tariff for Southern Territory, filed by the carrier with the Interstate Commerce Commission. These rules limit such liability of the carrier to \$100, unless a greater value is declared by the passenger at the time of delivery to the carrier, and additional is paid at the rate of 10 cents for each \$100 or fraction thereof above such maximum value. It is admitted that no such excess was declared, nor any payment therefor made to the carrier. While the evidence is undisputed that the passenger left Americus with the intention of returning to her home in Greenville, S. C., and that after arriving over the Central of Georgia at Macon upon a local ticket thereto she purchased (on a date not disclosed) an additional ticket to Greenville, and

obtained a new baggage check routing her trunk over such line to Atlanta and thence over the Southern Railway to destination. It is also undisputed that the continuity of her trip from Americus to Greenville was broken by a two or three days' visit to relatives in Macon, that the trunk never actually moved under the interstate ticket and baggage check obtained at Macon, but was lost during transportation under the local ticket to Macon, and that at the time such local ticket and check were obtained at Americus no declaration appears to have been made by the passenger to the carrier as to any intention by her to make an interstate journey or that her baggage should so move. It was not contended that, if the shipment were intrastate, anything in the intrastate contract or under the laws of this state would relieve the carrier of liability for less than the full value. The court left to the jury the question as to whether the carriage was intrastate or interstate, under instructions that, if they found the latter, the maximum recovery would be \$100.

The jury found for the plaintiff \$370. Exception is taken to the court's refusal to grant the motion for new trial, based upon the general grounds.

R. L. Maynard, of Americus, and Yeomans & Wilkinson, of Dawson, for plaintiff in error.

Shipp & Sheppard, of Americus, for defendant in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(28 Ga. App. 39)

BALKMAN v. STATE. (No. 13020.)

(Court of Appeals of Georgia, Division No. 1.
Dec. 15, 1921.)

(Syllabus by the Court.)

Criminal law \S 134(1)—Motion for change of venue on ground of probable violence to defendant held improperly overruled.

Upon the motion to change the venue, the evidence was sufficient to reasonably show that the accused, if brought back to Miller county, tried, and acquitted, or even if he escaped the death penalty, would be in danger of being lynched or of having other violence done to him. The court therefore erred in overruling the motion.

Error from Superior Court, Miller County; W. C. Warrill, Judge.

Lit Balkman was charged with murder, a motion for change of venue was overruled, and he brings error. Reversed.

W. I. Geer, of Colquitt, and John R. Cooper and W. O. Cooper, Jr., both of Macon, for plaintiff in error.

B. T. Castellow, Sol. Gen., of Outhbert, and R. R. Arnold and E. O. Hill, both of Atlanta, for the State.

BROYLES, C. J. The accused, a negro, was indicted in the county of Miller for the murder of a prominent white man, and was arrested and carried by the sheriff of the county to Albany, and placed in the jail there, from which a few days later he was transferred to the Bibb county jail. He made a motion for a change of venue, upon the grounds that he could not get a fair trial in the county where the homicide occurred, and that, if carried back to that county to stand trial there would be danger of his being lynched or of other violence being committed upon him. Upon the hearing of the motion the sheriff of Miller county testified that, immediately after the homicide, he arrested the accused and carried him to Albany and placed him in jail there, because he thought the excitement and passion of the people in Miller county were so great that it would not be safe for the accused to remain in that county; that a few days afterwards the accused was transferred to the Bibb county jail; that it was his opinion that, if the accused were brought back to Miller county, tried, and given a death sentence, no mob violence would be done him, but that, if he escaped a death sentence, the people of Miller county would not be satisfied, and violence might be done him. Several other prominent citizens of the county testified that it was their opinion that, if the accused were tried in Miller county and escaped a death sentence, he would be lynched. A great many other prominent citizens of the county testified to the contrary, stating that in their opinion the accused could get a fair trial in the county, and that, even if acquitted, he would be in no danger of mob violence. The court overruled the motion, and the accused excepted.

While the evidence was in sharp conflict as to whether the accused, if he escaped a death sentence upon his trial, would be lynched, we think that, under all the facts of the case, it was sufficient to reasonably show that under such circumstances he would be in danger of being lynched, or of having other violence done to him. It follows that the court erred in overruling the motion. See in this connection Ga. L. 1911, p. 74 (6 Park's Ann. Code, § 964); *Kennedy v. State*, 141 Ga. 314, 80 S. E. 1012; *Bivins v. State*, 145 Ga. 416, 89 S. E. 370; *Marshall v. State*, 20 Ga. App. 416, 93 S. E. 98; *Butler v. State*, 26 Ga. App. 435, 106 S. E. 744.

Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 29)

PAYNE, Agent, v. WELLS. (No. 12730.)(Court of Appeals of Georgia, Division No. 1.
Dec. 15, 1921.)*(Syllabus by the Court.)***1. Railroads —346(2), 351(2)—Presumption of negligence defined and applied.**

The general rule, that it is error for the trial judge to state to the jury an allegation of negligence contained in the plaintiff's petition, where the allegation is not sustained by any evidence, does not apply in an action for damages against a railroad company for a homicide, where the evidence shows that the homicide was caused by the running of the defendant's cars, for in such a case the presumption arises that the defendant was negligent in each and every particular as alleged in the plaintiff's declaration, and primarily this presumption is sufficient to prove the negligence alleged. In such a case it is not error for the court, in charging the jury, to refer to all the acts of negligence alleged, although the allegations as to some of them may not be sustained by any evidence, and may even be disproved by undisputed evidence. See, in this connection, *Georgia Railway & Electric Co. v. Bailey*, 9 Ga. App. 106(6, 7), 70 S. E. 607. Under this ruling there is no merit in grounds 1 to 9 (inclusive) of the amendment to the motion for a new trial.

2. Railroads —351(3)—Charge on presumption of negligence held correct.

Complaint is made of the following charge: "This presumption of negligence arising from this Code section (2780) which I have read to you is not a conclusive presumption. It simply puts the burden upon the defendant of showing that its agents and employees were in the exercise of all ordinary care and diligence *in and about the transaction* which the plaintiff claims brought about her husband's death." (Italics ours.) It was contended that the court erred in using the words "in and about the transaction," because the burden that the law placed upon the defendant was merely that of disproving the negligence actually charged in the plaintiff's petition. This charge was substantially correct, and it does not appear that it could have misled the jury or injured the plaintiff. See, in this connection, *Jackson v. Georgia Railroad & Banking Co.*, 7 Ga. App. 644(1), 67 S. E. 898, and *Georgia Southern, etc., Ry. Co. v. Thornton*, 144 Ga. 481(2), 87 S. E. 388. This is especially true when this portion of the charge is considered in the light of the entire charge.

3. Trial —235(5) — Charge comparing evidence of witnesses, "other things being equal," held not erroneous.

Exception is taken to the following excerpt from the charge of the court: "On that subject I charge you that the existence of a fact testified to by one positive witness is to be believed rather than that such fact did not exist, because many witnesses who had the same opportunity of observation swear that they did not know or see of its having trans-

pired, provided other things are equal, and the witnesses are of equal credibility." It is insisted by the movant that the words "provided other things are equal," as used in this excerpt from the charge, were error. There is no merit in this exception. Substantially the same charge, including the words objected to, was approved by this court in *Benton v. State*, 3 Ga. App. 453, 455, 60 S. E. 116.

4. Requested instructions properly refused.

Under the facts of the case, the court did not err in refusing the request to charge as set forth in the twelfth special ground of the motion for a new trial.

5. Ground for new trial without merit.

There is no substantial merit in either the fourteenth or the fifteenth special grounds of the motion for a new trial.

6. Negligence —93(1)—Railroads —324(3) —Violation by motorist of speed regulation held not to preclude recovery for negligence; automobile driver's negligence not imputable to guest.

The thirteenth special ground of the motion for a new trial is merely an amplification of the general grounds of the motion. The verdict was authorized by the evidence. This was a suit for damages against a railroad company for the homicide of the plaintiff's husband. The homicide occurred at a public railroad crossing when a moving train of the defendant struck an automobile in which the plaintiff's husband and three other men were riding. While the evidence showed that the automobile approached the crossing at a speed greater than six miles per hour, which was a violation of the law (Ga. Laws 1910, p. 90), this would not necessarily preclude a recovery of damages for negligence of the employees of the defendant operating the train, even by the driver of the automobile (*Central of Georgia Ry. Co. v. Larsen*, 19 Ga. App. 413, 91 S. E. 517; *Central of Georgia Ry. Co. v. Moore*, 149 Ga. 531, 101 S. E. 668), and certainly, under the facts of the case, would not prevent a recovery by the plaintiff. In the instant case any negligence of the driver of the automobile could not be imputed to the plaintiff's husband, for it was shown upon the trial that the husband was not the driver or owner of the automobile, but was riding therein as an invited guest, and the evidence did not demand a finding that he and the driver of the automobile were at the time engaged in a joint enterprise. Nor did the evidence demand a finding that the plaintiff's husband, by the exercise of ordinary care, could have avoided the homicide. Nor did the evidence demand a finding that the homicide was occasioned solely by the negligence of the driver of the automobile. On the other hand, the evidence authorized a finding that the defendant's employees operating the train were guilty of at least one of the acts of negligence charged, to wit, failing to blow the whistle, or to ring the bell, or to check the speed of the train, at the crossing where the catastrophe occurred, and that this negligence was concurrent with the negligence of the driver of the automobile, and contributed to the homicide. See, in this connection, *Seaboard Air-Line Railway v. Barrow*, 18 Ga. App. 261(5), 89 S. E. 333.

7. Denial of new trial proper.

The court did not err, for any reason assigned, in overruling the motion for a new trial.

Error from Superior Court, Decatur County; J. R. Pottle pro hac, Judge.

Action by Hannah Wells against J. B. Payne, Agent. Judgment for plaintiff, and defendant brings error. Affirmed.

Hartsfield & Conger, of Bainbridge, and Pope & Bennet, of Albany, for plaintiff in error.

W. A. Covington, of Moultrie, and W. M. Harrell, J. R. Wilson, and W. V. Custer, all of Bainbridge, for defendant in error.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 803)

CLARK v. STATE. (No. 12966.)

(Court of Appeals of Georgia, Division No. 1
Dec. 14, 1921.)

(Syllabus by the Court.)

1. Criminal law §1064(4)—Ground of new trial requiring examination of evidence to determine whether rejection of testimony proper cannot be considered.

The ground of the motion for a new trial, which complains of the repelling of certain testimony offered by the movant, cannot be considered, as it is defective, for the reason that it would require this court to examine the brief of evidence to determine whether the evidence rejected was material.

2. Criminal law §730(1)—Remarks of solicitor held not ground for new trial in view of instructions to disregard.

A ground of the motion for a new trial complains of the action of the court in permitting the prosecuting attorney to make certain alleged improper remarks in his argument to the jury. While the ground states that on account of such remarks a motion for a mistrial was made and overruled, error is not assigned upon the judgment overruling the motion, but the only error assigned in the ground is upon the action of the court "in permitting the solicitor of the city court of Greenville to make" the alleged improper remarks. Moreover, the note of the trial judge shows that he in effect rebuked the solicitor for making the improper remarks, and specifically instructed the jury not to consider them in

making up their verdict. In view of these facts there is no merit in this ground.

3. Criminal law §1172(7)—Instructions prejudicial to state, and not to defendant, not ground for reversal.

Exception is taken to the following excerpt from the charge of the court: "If it has been shown to your satisfaction beyond a reasonable doubt that Albert Clark, the defendant here on trial, sold corn whisky in this county as alleged in the indictment, then the defendant would be guilty, and the burden would then be on him to show you that he is not guilty." In the sentence quoted the last clause, to wit, "and the burden would then be on him to show you that he is not guilty," was erroneous and should have been omitted, but the error was prejudicial to the state, and not to the defendant. The excerpt was not erroneous for any reason assigned.

4. Criminal law §815(11)—Instruction as to reasonable doubt held not erroneous as excluding consideration of defendant's statement.

In defining a reasonable doubt the court charged that it was the doubt of a reasonable man, a doubt "that grows out of the evidence, or want of evidence, or circumstances of the case." This charge was not subject to the exception that it excluded from the jury any consideration of the defendant's statement, in their passing upon the question of a reasonable doubt, the court having properly instructed the jury as to the weight which might be given to the defendant's statement. *Harris v. State*, 136 Ga. 107(3), 70 S. E. 952; *Sheffield v. State*, 15 Ga. App. 514(2), 83 S. E. 871, and citations.

5. Criminal law §1160—Verdict approved by trial court will not be interfered with on appeal.

The verdict was authorized by the evidence, and, having been approved by the trial judge, this court is without authority to interfere with it.

Error from City Court of Greenville; R. A. McGraw, Judge.

Albert Clark was convicted of illegal sale of liquor, and he brings error. Affirmed.

N. F. Culpepper, of Greenville, for plaintiff in error.

J. F. Hatchett, Sol., of Greenville, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

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